IN THE MATTER OF	*	**BEFORE THE**
DONALD K. WILKERSON, M.D.,	*	**MARYLAND STATE**
Respondent.	*	**BOARD OF PHYSICIANS**
License Number: D53875	*	**Case Number: 2219-0025**

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FINAL DECISION AND ORDER

PROCEDURAL HISTORY

Donald K. Wilkerson, M.D., is a vascular surgeon, originally licensed to practice medicine in Maryland in 1998. On October 30, 2019, Disciplinary Panel A of the Maryland State Board of Physicians (the "Board") charged Dr. Wilkerson with immoral and unprofessional conduct in the practice of medicine. *See* Md. Code Ann., Health Occ. § 14-404(a)(3)(i) and (ii). The charges alleged that Dr. Wilkerson engaged in verbally abusive, inappropriate, and disruptive behavior towards nurses and other associates, including making sexual comments. The charges also alleged that Dr. Wilkerson pressed his body into a nurse in a hallway.

On August 18, 19, 20, and 27, 2020, an Administrative Law Judge ("ALJ") held an evidentiary hearing at the Office of Administrative Hearings. On November 16, 2020, the ALJ issued a proposed decision concluding that Dr. Wilkerson was guilty of immoral and unprofessional conduct in the practice of medicine. As a sanction, the ALJ recommended that Dr. Wilkerson be reprimanded and that the Panel impose a one year stayed suspension and that he complete courses on professionalism and workplace boundaries.

Dr. Wilkerson filed exceptions to the factual finding that he pressed his body into a nurse, to the legal conclusion that he acted immorally in the practice of medicine, and to the sanction, which he argued should not include a suspension, stayed or otherwise. The Administrative

Prosecutor also filed exceptions on behalf of the State, arguing that the sanction should be more severe than what was recommended by the ALJ, specifically that Dr. Wilkerson's license should be suspended and that he should enroll in the Maryland Professional Rehabilitation Program until he is deemed safe to practice, followed by a period of probation for three years. On January 27, 2021, both parties appeared before Disciplinary Panel B of the Board for an exceptions hearing.

FINDINGS OF FACT

The State did not file any exceptions to the facts found by the ALJ, and Dr. Wilkerson did not file any exceptions to the facts, except for those pertaining to the physical encounter with a nurse in the hallway described in the ALJ's Finding of Fact ¶ 22. Because the facts are otherwise undisputed, the ALJ's Proposed Findings of Fact ¶¶ 1-21, 23-26 (pages 4-8) are adopted and incorporated by reference into the body of this document as if set forth in full. *See* attached ALJ Proposed Decision, Exhibit 1.[1] The findings of fact were proven by the preponderance of the evidence and are summarized below.

Dr. Wilkerson had a long history of making verbally abusive and sexually inappropriate comments to coworkers between 2005 and 2018. Dr. Wilkerson yelled at, cursed at, and berated staff, including residents, nurses, radiology technologists, and clerical staff. One time he chased a radiology technician down the hallway because he was given the wrong stent during a procedure. He cursed at a travelling nurse, who was also a nun, when he was told that the Advanced Intensive Care Unit did not have a bed available for one of his patients. He berated a resident who called him when he was dictating his notes. He repeatedly yelled at staff if they handed him the wrong instrument during a procedure, and sometimes, even when they had

[1] Names have been redacted in the ALJ decision for purposes of confidentiality.

provided what he had asked for. Dr. Wilkerson screamed at a clerical coordinator who mistakenly called him. He also made insensitive remarks to patients.

Dr. Wilkerson's comments also veered into sexual content. He made joking comments about a resident's penis. He told a nurse practitioner that he and the other surgeons would give her "sloppy kisses" if she could assist them with a billing matter. One nurse ("Nurse 1") was a particular target for his sexual comments. His comments started as flirtatious and gradually escalated until they became outrageous. Often he would whisper the sexual comments into Nurse 1's ear. They included comments about his penis size, comments about her breasts, comments about sexual acts that he wanted to do to her, comments about her body including her attractiveness, and comments about wanting to see her naked.

Dr. Wilkerson did not deny making inappropriate sexual comments, but claimed that they were made in a joking manner and that he was merely reacting to others in the context of a workplace where sexual banter was common. The ALJ acknowledged that Dr. Wilkerson was not alone in engaging in sexually inappropriate conversations and that the behavior did not occur in a vacuum. It appears that the hospital tolerated Dr. Wilkerson's behavior for many years. Eventually the hospital implemented a Performance Improvement Plan for Dr. Wilkerson on March 14, 2018. Following his violation of the Performance Improvement Plan, in August 2018, the hospital suspended Dr. Wilkerson and then terminated his employment. Dr. Wilkerson now admits that his sexual comments were not professional and were entirely unacceptable.

ANALYSIS

Unprofessional Conduct in the Practice of Medicine, Health Occ. § 14-404(a)(3)(ii)

Dr. Wilkerson does not dispute that his actions were unprofessional. He did not file exceptions to the violation of unprofessional conduct in the practice of medicine. Dr.

Wilkerson's verbal abuse of coworkers and staff was inappropriate and unprofessional. Dr. Wilkerson yelled and cursed at co-workers, particularly nurses and residents. He made comments about co-workers' appearances, including sexual comments about co-workers bodies. Dr. Wilkerson has a long history and pattern of such behavior. Likewise, he made comments of a sexual nature to several individuals, in particular singling out Nurse 1 for abuse. He would discuss sexual acts that he would like to perform on her and repeatedly commented on her body. While Dr. Wilkerson claims that he believed the comments to be mutual or "banter," these comments are exceedingly unprofessional, inappropriate, and should not take place in a medical workplace setting.

This behavior is not only unprofessional, but has the potential to affect patient care. Unprofessional conduct is in the practice of medicine when it becomes a threat to the teamwork approach of healthcare, and in particular when it causes co-workers to avoid interacting with the physician at issue. *Board of Physician Quality Assur. v. Banks*, 354 Md. 59, 75 (1999). Working in a toxic environment where there is intimidation and disruptive behavior can inhibit open communication. One witness noted that nurses did not feel comfortable raising clinical concerns with Dr. Wilkerson because of his behavior. Another stated that she was uncomfortable in his presence and would avoid him. Staff were hesitant when needing to call Dr. Wilkerson about any issues with his patients because Dr. Wilkerson would respond inappropriately or unprofessionally. Nurse 1 tried to avoid shifts with Dr. Wilkerson, and tried to avoid being alone with him. The Panel upholds the ALJ's finding of unprofessional conduct in the practice of medicine. Health Occ. § 14-404(a)(3)(ii).

CONSIDERATION OF EXCEPTIONS

Dr. Wilkerson filed three exceptions. First, he excepted to the findings of fact that concerned Nurse 1's allegation that Dr. Wilkerson pressed his body against Nurse 1, located in paragraph 22 of the ALJ's proposed findings of fact. Second, Dr. Wilkerson excepted to the ALJ's recommended conclusion of law that he engaged in immoral conduct in the practice of medicine. Last, he excepted to the sanction, claiming it was excessive. The State also excepted to the sanction, claiming it was insufficient.

Allegations that Dr. Wilkerson pressed his body against Nurse 1

Dr. Wilkerson filed an exception to the finding of fact about whether Dr. Wilkerson pressed his body into Nurse 1 from behind pushing her against a wall in a hallway. The State argues that the Panel should give substantial deference to the ALJ's credibility determinations based on *Department of Health and Mental Hygiene v. Shrieves*, 100 Md. App. 283, 299 (1994). However, the *Shrieves* case only requires substantial deference to the ALJ's findings when the credibility determination is based on demeanor based findings. *Id.* at 302 ("where credibility is pivotal to the agency's final order, ALJ's findings *based on the demeanor of witnesses* are entitled to substantial deference and can be rejected by the agency only if it gives strong reasons for doing so.") (emphasis added). A witness's demeanor is outward behavior and appearance, such as facial expressions, tone of voice, gestures, posture, eye-contact with questioner, and readiness or hesitancy to answer questions, but does not include conclusory statements that a witness was "persuasive" and "credible." *State Bd. of Physicians v. Bernstein*, 167 Md. App. 714, 759-60 (2006). The ALJ described Nurse 1's testimony as consistent and credible because it was consistent with her prior testimony and consistent with Dr. Wilkerson's belief that he was engaging in "sexual banter." Such findings are not demeanor-based, as laid out by *Bernstein*,

and are instead derivative inferences to which the Panel owes no heightened deference in the *Anderson-Shrieves* analysis. *See Maryland Bd. of Physicians v. Elliott*, 170 Md. App. 369, 388 (2006). The Panel rejects the State's request that Nurse 1's credibility be granted deference.

According to Nurse 1, as she was leaving the hospital and was in a hallway near the parking lot, Dr. Wilkerson leaned against her from behind until she was pressed against a wall and then he whispered something sexual into her ear. The ALJ found the nurse to be consistent and forthcoming. However, this incident differs significantly from the other allegations against Dr. Wilkerson that were independently substantiated. In the other instances, there was testimony from numerous individuals who confirmed that Dr. Wilkerson would say verbally abusive and sexually inappropriate comments to coworkers and staff. There was testimony that Dr. Wilkerson would lean in close and whisper things to Nurse 1 and that she would be visibly disgusted and would sometimes express her disgust or tell him to leave her alone. There was a clear pattern of conduct that was confirmed by several people with mutually reinforcing testimony.

In contrast, the allegation about Dr. Wilkerson physically assaulting Nurse 1 appears to be an isolated incident and not the type of behavior that any other colleagues complained of or saw. This alleged assault does not match Dr. Wilkerson's previous or subsequent conduct. No other allegations of inappropriate sexual physical touching were raised by any witnesses. Dr. Wilkerson is alleged to have assaulted Nurse 1 in a public place, but the incident was not observed by anyone.[2] Nurse 1 did not recall whether she told anyone contemporaneously, but

[2] The Board does not believe that the testimony from a resident was referring to this incident. The resident who was walking with Dr. Wilkerson described an encounter with Nurse 1 in a hallway in the hospital, where they talked and then did a little dance to get by one another. Dr. Wilkerson argues before the Panel that this was the incident in question. However, that event occurred in 2018, not early-to-mid 2017. It occurred in a different hallway than described by Nurse 1. And Dr. Wilkerson was walking with

she believed that she had. Her friend, however, said that she brought it up in August 2018, which was a year or more after Nurse 1 stated that it had occurred. Nurse 1 does not remember what time of day, what month, or what time of year the incident occurred. There was no substantiated evidence that Nurse 1 told anyone or recorded anything immediately after the event occurred. The first written statement was in August 2018. And her friend recalled Nurse 1 telling her about the incident just before Nurse 1 wrote the written statement, which was about a year or year-and-a-half after the incident.

The Panel does not find sufficient evidence to show by a preponderance of the evidence that Dr. Wilkerson pressed his body into Nurse 1. Dr. Wilkerson's exception is granted. The Panel declines to adopt paragraph 22 of the ALJ's Findings of Fact.

Immoral Conduct in the Practice of Medicine, Health Occ. § 14-404(a)(3)(i)

Dr. Wilkerson filed exceptions to the conclusion that his behavior was immoral. The ALJ found that Dr. Wilkerson's verbally abusive comments were unprofessional, but the sexual comments to Nurse 1 and pressing his body into her were also immoral. Dr. Wilkerson claims that the Board has previously found verbally disruptive behavior including yelling and profanity and found sexually explicit comments to be only unprofessional and not immoral. He claims that the actions he was accused of do not constitute immoral conduct. Upon a review of the comments that Dr. Wilkerson made to Nurse 1 and to others, the Panel finds that while the comments were highly unprofessional, they were not immoral. The Panel disagrees with the ALJ's finding of immoral conduct in the practice of medicine in this case. Health Occ. § 14-404(a)(3)(i).

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the Resident, not by himself. The Panel did not find this testimony to be persuasive in determining whether the incident concerning Nurse 1 occurred.

CONCLUSIONS OF LAW

Disciplinary Panel B concludes, as a matter of law, that Dr. Wilkerson is guilty of unprofessional conduct in the practice of medicine, in violation of § 14-404(a)(3)(ii) of the Health Occupations Article. The Panel dismisses the charge of immoral conduct in the practice of medicine, Health Occ. § 14-404(a)(3)(i).

SANCTION

As a sanction, the ALJ recommended a reprimand, a one year stayed suspension, and completion of additional training on professionalism and workplace boundaries. Dr. Wilkerson requested that the Board not impose a suspension, and impose a reprimand without any suspension, stayed or otherwise. The State argues that Dr. Wilkerson's license should be suspended without a stay, pending an evaluation by MPRP deeming Dr. Wilkerson fit to return to practice, followed by a three-year period of probation, to include courses on professionalism and workplace boundaries.

Dr. Wilkerson argues that he has taken steps to educate himself about workplace boundaries, voluntarily seeking out consultation from the Maryland Professional Health Program including undergoing a "fitness to practice assessment" and completing a professional boundaries workshop at the Acumen Institute in Kansas. He also noted that the atmosphere at his workplace contributed to his behavior and should be considered when imposing a sanction. He further notes that he has been unable to work since 2018 and argued that a suspension, even stayed would lead to him losing his board certification.

The State argues that Dr. Wilkerson's license should be suspended until he has been evaluated and deemed fit to return to the practice of medicine. The State argues that Dr. Wilkerson's deliberate conduct, his long-standing pattern of unprofessional behavior, and the

potential for patient harm were relevant aggravating factors. *See* COMAR 10.32.02.09B(6)(b), (c), (d). The State compared this situation to two other Board cases that resulted in suspensions, one that involved abusive belligerent conduct and the other involved unprofessional sexual misconduct.

When deciding on a sanction, the disciplinary panel may consider aggravating and mitigating factors in the Board's regulations. COMAR 10.32.02.09B. The following mitigating factors are present in this case: Dr. Wilkerson has no prior disciplinary record, he admitted the misconduct, and he has cooperated with the Board's investigation. COMAR 10.32.02.09B(5)(a), (c). In terms of aggravating factors, the Panel agrees that there was a pattern of behavior and potential patient harm based on the work environment. COMAR 10.32.02.09B(6)(c), (d).

Dr. Wilkerson's interactions with his coworkers were inappropriate and unprofessional. The Panel is encouraged by Dr. Wilkerson's rehabilitative activities and his acknowledgement of his errors in making verbally abusive comments or sexual comments. The Panel believes that Dr. Wilkerson should be further evaluated by MPRP and should continue to work to improve his workplace interactions and believes that this can be accomplished during a period of probation.

Disciplinary Panel B, therefore, will reprimand Dr. Wilkerson and place him on probation for a minimum period of one year and require him to enroll in the Maryland Professional Rehabilitation Program and follow all the customary provisions for evaluation and treatment.

ORDER

It is, by an affirmative vote of a majority of a quorum of Disciplinary Panel B, hereby **ORDERED** that Donald K. Wilkerson, M.D., is **REPRIMANDED**; it is further

ORDERED that Dr. Wilkerson is placed on **PROBATION** for a minimum of **ONE YEAR**.[3] During probation, Dr. Wilkerson shall comply with the following terms and conditions of probation:

Dr. Wilkerson shall enroll in the Maryland Professional Rehabilitation Program (MPRP) as follows:

(a) Within 5 business days, Dr. Wilkerson shall contact MPRP to schedule an initial consultation for enrollment;
(b) Within 15 business days, Dr. Wilkerson shall enter into a Participant Rehabilitation Agreement and Participant Rehabilitation Plan with MPRP;
(c) Dr. Wilkerson shall fully and timely cooperate and comply with all MPRP's referrals, rules, and requirements, including, but not limited to, the terms and conditions of the Participant Rehabilitation Agreement(s) and Participant Rehabilitation Plan(s) entered with MPRP, and shall fully participate and comply with all therapy, treatment, evaluations, and screenings as directed by MPRP;
(d) Dr. Wilkerson shall sign and update the written release/consent forms requested by the Board and MPRP, including release/consent forms to authorize MPRP to make verbal and written disclosures to the Board and to authorize the Board to disclose relevant information from MPRP records and files in a public order. Dr. Wilkerson shall not withdraw his release/consent;
(e) Dr. Wilkerson shall also sign any written release/consent forms to authorize MPRP to exchange with (i.e., disclose to and receive from) outside entities (including all of Dr. Wilkerson's current therapists and treatment providers) verbal and written information concerning Dr. Wilkerson and to ensure that MPRP is authorized to receive the medical records of Dr. Wilkerson, including, but not limited to, mental health and drug or alcohol evaluation and treatment records. Dr. Wilkerson shall not withdraw his release/consent;
(f) Dr. Wilkerson's failure to comply with any of the above terms or conditions including terms or conditions of the Participant Rehabilitation Agreement(s) or Participant Rehabilitation Plan(s) constitutes a violation of this Final Decision and Order;

ORDERED that after the minimum period of probation imposed by the Final Decision and Order has passed and if Dr. Wilkerson has fully and satisfactorily complied with all terms and conditions for the probation, Dr. Wilkerson may submit a written petition to Disciplinary Panel B for termination of the probation. Dr. Wilkerson may be required to appear before Disciplinary Panel B to discuss his petition for termination. If Disciplinary Panel B determines

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

that it is safe for Dr. Wilkerson to terminate the probation, the probation shall be terminated through an order of Disciplinary Panel B. If Disciplinary Panel B determines that it is not safe for Dr. Wilkerson to return to the practice of medicine without monitoring through MPRP, the probation and enrollment in MPRP shall continue through an order of Disciplinary Panel B for a length of time determined by Disciplinary Panel B; and it is further

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

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

ORDERED that, if Dr. Wilkerson allegedly fails to comply with any term or condition imposed by this Final Decision and Order, Dr. Wilkerson shall be given notice and an opportunity for a hearing. If Disciplinary Panel B 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. If Disciplinary Panel B determines there is no genuine dispute as to a material fact, Dr. Wilkerson shall be given a show cause hearing before Disciplinary Panel B; and it is further

ORDERED that after the appropriate hearing, if the disciplinary panel determines that Dr. Wilkerson has failed to comply with any term or condition imposed by this Final Decision and Order, the disciplinary panel may reprimand Dr. Wilkerson, place Dr. Wilkerson on probation with appropriate terms and conditions, or suspend with appropriate terms and conditions, or revoke Dr. Wilkerson'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. Wilkerson; and it is further

ORDERED that the effective date of the Final Decision and Order is the date the Final Decision and Order is signed by the Executive Director of the Board. The Executive Director signs the Final Decision and Order on behalf of Disciplinary Panel B; and it is further

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

03/05/2021
Date

Signature on File

Christine A. Farrelly, Executive Director
Maryland State Board of Physicians

NOTICE OF RIGHT TO PETITION FOR JUDICIAL REVIEW

Pursuant to Md. Code Ann., Health Occ. § 14-408(a), Dr. Wilkerson has the right to seek judicial review of this Final Decision and Order. Any petition for judicial review shall be filed within 30 days from the date of mailing of this Final Decision and Order. The cover letter accompanying this final decision and 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. Wilkerson 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:

David S. Finkler
Assistant Attorney General
Department of Health and Mental Hygiene
300 West Preston Street, Suite 302
Baltimore, Maryland 21201

Exhibit 1

MARYLAND STATE BOARD OF	*	BEFORE LORRAINE E. FRASER,
PHYSICIANS	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE
DONALD K. WILKERSON, M.D.,	*	OF ADMINISTRATIVE HEARINGS
RESPONDENT	*	
LICENSE No.: D53875	*	OAH No.: MDH-MBP2-71-20-04001

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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 October 30, 2019, a disciplinary panel of the Maryland State Board of Physicians (Board or MBP) issued charges against Donald K. Wilkerson, 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) (the Act). Specifically, the Respondent is charged with violating section 14-404(a)(3) of the Act. Md. Code Ann., Health Occ. 14-404(a)(3) (Supp. 2020); Code of Maryland Regulations (COMAR) 10.32.02.03E(3)(d). The disciplinary panel to which the complaint was assigned forwarded the charges to the Office of the Attorney General for prosecution, and another disciplinary panel delegated the matter 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 August 18, 19, 20, and 27, 2020. On August 18-20, 2020, the hearing was held in-person at the OAH in Hunt Valley, Maryland, with some witnesses appearing via videoconference. On August 27, 2020, closing arguments were held via telephone. Md. Code Ann., Health Occ. § 14-405(a) (Supp. 2020); COMAR 10.32.02.04. Michael Brown, Assistant Attorney General and Administrative Prosecutor, represented the State of Maryland (State). Natalie McSherry, Esquire, and Amy Askew, Esquire, represented the Respondent, who was present.

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 immoral or unprofessional conduct in the practice of medicine? If so,

2. What sanction is appropriate?

SUMMARY OF THE EVIDENCE

Exhibits[1]

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

State Ex. A1 Letter from [redacted] M.D., VP, Chief Medical Officer [redacted] Hospital, to the Board, 8/24/18

State Ex. A2 The Respondent's personnel file from [redacted] Hospital, 10/11/18

State Ex. A3 Transcript of the interview with [redacted] M.D., 11/29/18

State Ex. B1 Transcript of the interview with [redacted] R.N., 11/29/18

[1] The parties pre-marked their exhibits; however, the parties did not offer all documents for admission into evidence. Thus, there are gaps in the sequential numbering.

State Ex. B2 Complaint letter from [redacted]

State Ex. C1 Transcript of the interview with [redacted] 12/11/18

State Ex. C2 Email to [redacted] from [redacted] 8/22/18

State Ex. D1 Transcript of the interview with [redacted] 12/11/18

State Ex. E1 Transcript of the interview with [redacted] M.D., 11/29/18

State Ex. E3 Note written by [redacted] M.D., 3/14/18; Performance Improvement Plan, 3/14/18

State Ex. E5 Email to [redacted] from [redacted] M.D., 8/14/18

State Ex. E6 Email to [redacted] M.D., from [redacted] 8/15/17

State Ex. E7 Note written by [redacted] M.D., 8/6/17

State Ex. G1 Transcript of the interview with [redacted] R.N., 11/29/18

State Ex. H1 Transcript of the interview with [redacted] N.P., R.N., 12/11/18

State Ex. H2 Email to [redacted] from [redacted] 11/6/15

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

Resp. Ex. 1 The Respondent's curriculum vitae

Resp. Ex. 2 The Respondent's MBP physician profile

Resp. Ex. 3 The Respondent's American Medical Association physician profile

Resp. Ex. 4 The Respondent's response to the Board, 10/10/18

Resp. Ex. 5 Transcript of the interview with [redacted] R.N., 11/29/18

Resp. Ex. 7 Transcript of the interview with [redacted] M.D., 3/21/19

Resp. Ex. 8 Certificate of Completion Harassment Prevention Essentials, 10/6/18

Resp. Ex. 9 Communicating with Tact seminar, 10/30/18

Resp. Ex. 11 Professional Boundary Training, 2/7/20

Resp. Ex. 12 American Board of Surgery policy on Ethics and Professionalism, 3/2015

Resp. Ex. 13 American Board of Surgery policy on Revocation of Certificate, 3/2018

Resp. Ex. 14 American Board of Surgery policy on Reconsideration and Appeals, 12/2019

Resp. Ex. 16 Photograph of [redacted] Hospital campus map

Resp. Ex. 17 Photograph of [redacted] Hospital map of first floor and ground floor

Testimony

The following witnesses testified on behalf of the Board: [redacted] R.N.; [redacted] M.D.; [redacted] N.P., R.N.; [redacted] Cardiovascular Technologist; [redacted] M.D.; [redacted] Special Procedures Technologist; and [redacted] R.N.

The Respondent testified in his own behalf, and presented the following witnesses: [redacted] M.D.; [redacted] R.N. [redacted] M.D.; [redacted] M.D.; [redacted] M.D.; and [redacted] M.D.

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. He is board certified in general and vascular surgery.

2. The Respondent practiced medicine at [redacted] Hospital from 1998 until August 16, 2018, performing vascular surgery. He was employed by [redacted] Hospital from 1998 to 2003. From 2003 to 2010, he was in private practice and performed procedures at [redacted] Hospital. In 2010, [redacted] Hospital bought the private practice and he was again an employee of the hospital. [redacted] Hospital suspended the Respondent from his employment on August 16, 2018 and terminated his employment on August 23, 2018.

3. On March 14, 2018, [redacted] Hospital placed the Respondent on a performance improvement plan for the following behavior: ignoring warnings about excessive radiation;

habitual tardiness to the operating room; late, incomplete, or delayed medical record and billing documentation; frequently engaging in bullying, disruptive, abusive, inappropriate, and intimidating behavior toward nursing staff and other associates; using foul language around staff and patients; and failing to participate in peer review and prospective case conferences and adequately assess surgical case selection.

4. The Respondent's personnel file at [redacted] Hospital contains complaints from various staff members over the years that the Respondent was verbally abusive and used profanity toward them. The complaints span the years 2005 through 2018. Some of the incidents occurred in front of patients.

5. The Respondent frequently yelled at, cursed, and berated staff, including residents, nurses, radiology technologists, and clerical staff. The Respondent's behavior was so frequent that staff who worked with him accepted it as routine.

6. On one occasion, the Respondent angrily chased a radiology technician down the hall because he felt the technician had given him the wrong stent during a procedure. Another doctor intervened and calmed down the Respondent. Ms. [redacted] escorted the technician from the area.

7. On another occasion, a travelling nurse, who happened to be a nun, told the Respondent that the AICU[2] did not have a bed available for his patient. The Respondent told the nurse to tell the AICU to go fuck themselves.

8. On another occasion, the Respondent was dictating a note when he received a phone call from a resident. The Respondent began berating the resident and calling him names while being recorded. The transcriptionist reported the incident.

[2] Advanced Intensive Care Unit.

9. On multiple occasions, the Respondent asked for the wrong product during a procedure and when it was handed to him, he yelled that staff knew what he meant.

10. Once the Respondent told a resident to get his fat fucking leg out of his way.

11. Once the Respondent told a resident he did not need to wear big surgical gloves because his penis was not that big.

12. The Respondent has called Dr. [redacted] a fat mother fucker.

13. On occasion, the Respondent has yelled at and made insensitive remarks to patients, such as there is no crying in here, you did this to yourself, and I'm going to have to take your leg off.

14. In 2015, [redacted] a nurse practitioner, was hired to assist the Respondent and Dr. [redacted]. The first week, the Respondent discussed problems he was having with billing and money owed to him and told her that if she could assist him, she would be given "sloppy kisses."[3]

15. In August 2017, physicians and residents were discussing a patient of the Respondent's who had a complication following surgery. A stent placed by the Respondent protruded through the skin requiring additional surgery. The Respondent responded angrily and defensively and did not facilitate learning for the residents.

16. On July 28, 2018, a clerical coordinator was attempting to reach the on call vascular surgeon but erroneously called the Respondent instead. The Respondent screamed at her that he was not the physician on call.

17. [redacted] R.N., worked as a nurse at [redacted] Hospital in the Interventional Radiology unit. She worked frequently with the Respondent.

[3] State Ex. A2, p. 000049.

18. Sometime in early 2016, the Respondent began making inappropriate comments to Ms. [redacted] of a sexual nature. The Respondent's behavior started as flirtatious and became increasingly inappropriate. Eventually, the Respondent made sexual comments to Ms. [redacted] almost every time she saw him. The Respondent always whispered these comments in Ms. [redacted] ear.

19. On multiple occasions, other staff members observed the Respondent whispering in Ms. [redacted] ear but did not hear what the Respondent said. Ms. [redacted] was visibly uncomfortable when the Respondent was whispering in her ear. Afterward, Ms. [redacted] said the Respondent's comments were sexual in nature.

20. The Respondent's comments to Ms. [redacted] included talking about his penis size, saying he wanted to violate her, he liked her breasts and wanted to cum on them, he wanted to fuck her and do naughty things, he wanted to have sex with her in her ass, and he wanted to lick champagne off her body. He made comments about her body, saying she looked attractive or sexy, and he wanted to see her breasts and see her naked. He invited her to his house for dinner.

21. Ms. [redacted] ignored the Respondent's comments at times, sometimes she tried to make a joke of his comments, and other times she told him to get lost or he did not have a chance.

22. Sometime in mid-2017, Ms. [redacted] was leaving the hospital on a weekend after being called in for a procedure and the Respondent was entering at the same time. Ms [redacted] stopped to ask the Respondent why he was there at the hospital. The Respondent replied that he was coming to see her and pushed her against the wall from behind, pressing his body against hers and his groin against her back. He whispered in her ear something about wanting to violate her or give it to her good. Ms. [redacted] asked him to get off her, which he did and then laughed, and she left. No one else was present.

23. On August 13, 2018, Ms. [redacted] called the Respondent about concerns she had regarding one of the Respondent's patients that was scheduled for a procedure that day. The Respondent screamed at Ms. [redacted], saying "I don't give a fuck [redacted] about the patient's concern. She is crazy. Stop trying to cancel my fucking case."[4] Ms. [redacted] nurse manager, [redacted], overheard the Respondent yelling through the telephone. The Respondent then hung up, ending the phone call.

24. Later that day, when the Respondent arrived at the hospital to perform the patient's procedure, he called Ms. [redacted] out into the hallway and said something inappropriate. She walked away quickly.

25. After the procedure was complete, the Respondent approached Ms. [redacted] and whispered, "I think we should have make-up sex."[5] Ms. [redacted] replied, "You're disgusting."[6]

26. Ms. [redacted] filed a written complaint after the incident.

DISCUSSION

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) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)). In this case, the State bears the burden to show the Respondent violated section 14-404(a)(3) of the Act by a preponderance of the evidence. COMAR 28.02.01.21K(1)-(2)(a). As discussed below, I find the State has met its burden.

[4] State Ex. A2, p. 000018.
[5] *Id.* at p. 000019.
[6] State Ex. B1, p. 8.

The grounds for reprimand or probation of a licensee, or suspension or revocation of a license under the 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.

Md. Code Ann., Health Occ. § 14-404(a)(3) (Supp. 2020).

The State argues that the Respondent is guilty of immoral or unprofessional conduct in the way he spoke to staff and the way he spoke and acted toward Ms. [redacted]

The Respondent concedes he acted unprofessionally at times but contends he and Ms. [redacted] engaged in sexual banter mutually. He denies engaging in immoral conduct and denies pushing his body against hers against a wall.

The Witnesses

Ms. [redacted] testified that when she first started working with the Respondent in June of 2011 he was professional, funny, and pleasant. She described him as a jokester. Over time she observed that some days the Respondent was jovial, while other days he was erratic. The Respondent made fun of staff, including residents, and said mean things to patients. The Respondent said something about thunder thighs to an overweight resident. The Respondent yelled at patients that there was no crying in the procedure room, they (the patient) did this to themselves, and he was going to have to take the patient's leg off. Ms. [redacted] said the Respondent started making sexual comments to her about two to two and a half years before she filed her complaint and his behavior escalated over time. He made comments about her body, her breasts, and the way she looked. He described his penis size, how good he was in bed, and

what he wanted to do to her sexually, such as lick champagne off her breasts, violate her, have sex rectally, and fuck her. He invited her to his home for dinner. She said she never started these sexual conversations, they were not lengthy, and often came out of nowhere. She responded by "shooting him down," telling him that was not going to happen, he was gross, or he was a pervert, and walking away. He whispered these comments to her in the procedure room and the control room while other staff were present. Staff observed him whispering to her. She told colleagues what he said to her. Eventually, the Respondent whispered comments to her almost every time she saw him.

Ms. [redacted] described one incident when she was leaving the hospital and the Respondent was entering and he pressed his body against hers from behind, pressing her face against the wall and saying that he wanted to violate her. She could feel his groin. She told him to get off, which he did, and then he stood there laughing. She said she thought he was disgusting and that it was not funny at all. She said she was concerned because the Respondent had never touched her before in such a manner.

Ms. [redacted] explained that she did not report the Respondent's behavior earlier because she was afraid of backlash and thought it would cause a significant strain at work, and she worked with him frequently. She said he would have made her life difficult and she did not want to create discord in their small department. She said she is a single mother and needed her job. She said she tried to get out of the situations with the Respondent and that she told him to stop. She also asked other nurses to fill in for her during the Respondent's procedures.

Ms. [redacted] described the events of August 13, 2018. She called the Respondent about a patient who was scheduled for a procedure and there was a concern with her lab results. The Respondent screamed at Ms. [redacted], saying that he did not give a fuck, the patient was crazy, and accused Ms. [redacted] of trying to cancel the procedure. Then he hung up on her. Her nurse

manager, Ms. [redacted] overheard the Respondent screaming at Ms. [redacted] When the Respondent arrived at the hospital to perform the procedure, he asked to see Ms. [redacted] in the hallway and made a snide remark. She walked away. After the procedure, the Respondent said to Ms. [redacted] that he knew she was angry and that they should have make-up sex. Ms. [redacted] testified that she was done with the Respondent's behavior at that point and filed a formal complaint.

Dr. [redacted] stated she was the Chief Medical Officer at [redacted] in 2018. She testified that when she interviewed the Respondent about Ms. [redacted] complaint, he admitted that he made the comment about having make-up sex. He said he did not recall the other incidents Ms. [redacted] reported. He described their relationship as friendly. She explained that the Respondent was terminated from his employment after an investigation because there were multiple other issues with the Respondent's behavior and he had been on a Performance Improvement Plan since March 2018.

Dr. [redacted] said that she had been told of prior reports of the Respondent engaging in disruptive behavior and profanity in the operating room. She mentioned complaints from the nurse practitioner (Ms. [redacted] who worked in the Respondent's office, a telephone operator, an emergency room nurse, and regarding a travelling nurse who was a nun. She described an incident in which the Respondent was dictating a post-operative note and a resident called him on the phone. The Respondent spoke to the resident in a demeaning manner. Their conversation was recorded as part of the Respondent's notes and the transcriptionist heard the conversation and reported it. Dr. [redacted] learned staff did not bother to file complaints about the Respondent's behavior because they felt nothing would be done. For example, the Respondent would ask staff for a certain instrument and then yell that was not what he needed and to give him what he needed. Nurses did not feel comfortable raising clinical concerns with the

Respondent because of how he responded, accusing them of trying to cancel his cases. She described the Respondent as creating a toxic work environment that affected patient safety.

Ms. [redacted] testified that the second day she worked with the Respondent he discussed money he was owed for procedures and wanted her help with the CTP[7] codes. He said that if she could help with the codes he would give her sloppy kisses. She thought the comment was inappropriate. She told him that the codes were not her job but that someone in billing could enter the codes. She stated that she was uncomfortable with the sexual nature of the Respondent's statement, which caused her to avoid interactions with him. She said she once commented to the Respondent that Dr [redacted] must have superhero administrative powers because he was fixing her notes in the system. The Respondent replied that Dr. [redacted] was no superhero; he had seen Dr. [redacted] naked in the locker room and he was nothing but fat. She thought the comment was inappropriate and odd because she thought they were partners and friends. She described the Respondent as loud and she and others did not like it.

Ms. [redacted] testified that some interactions with the Respondent were good but at other times he would get very upset with staff, curse, push them out of the way, and yell if they were not moving fast enough. She recalled an instance when a resident was not moving fast enough for the Respondent and the Respondent told the resident to get his fat thighs out of the way, elbowed him, and pushed him aside. She described the Respondent as always in a hurry which created a chaotic, tense, and stressful atmosphere. She said that she always had to repeat what the Respondent asked for to check that was what he actually wanted. She stated he cursed more than all of the other doctors she worked with. She said when a nurse called the Respondent about a case that needed to be moved or postponed for clinical reasons, he would get angry. She observed the Respondent sitting close to Ms. [redacted] and whispering in her ear. She could tell

[7] CTP was not defined.

from Ms. [redacted] body language that she was uncomfortable. She heard Ms. [redacted] tell the Respondent "no, I'm not going to do that." She saw Ms. [redacted] get up and move away from the Respondent.

Dr. [redacted] testified that despite previous counseling the Respondent's behavior did not improve and he was placed on a Performance Improvement Plan in March 2018. He described the Respondent as persistently late to the operating room for years, repeatedly having high levels on his radiation badges - which was a risk to himself and others, not submitting medical and billing records timely, and behaving less than professionally. He stated that nurses were intimidated by the Respondent over the years but would not document their complaints because they were afraid of retaliation.

Dr. [redacted] described an incident in which a clerk in the emergency department was attempting to contact the on call vascular surgeon and called the Respondent in error. The clerk reported that the Respondent was very rude, demeaning, and aggressive to her. Dr. [redacted] said that the Respondent explained to him that he was trying to figure out if he was needed even though he was not the surgeon on call. Dr. [redacted] said he gave the Respondent the benefit of the doubt. He noted another incident in which the Respondent was very unprofessional, agitated, and angry while one of his cases was discussed during a weekly morbidity and mortality conference with residents. He noted another incident in which the Respondent used profanity toward a travelling nurse who was a nun. He described the Respondent's behavior toward Ms. [redacted] as intimidating and unprofessional.

Dr. [redacted] testified that [redacted] in Human Resources investigated Ms. [redacted] complaint about the Respondent. When confronted with the allegations, the Respondent replied that he and Ms. [redacted] had a social relationship and that his comments were part of their usual banter.

Ms. [redacted] testified that as a Special Procedures Technologist she assisted the vascular surgeons including the Respondent. She described him as very friendly and generous outside the lab but inside the lab he was difficult, said inappropriate things, and bullied staff, residents, and patients. She said that if she brought concerns to the Respondent's attention he would push back, saying why the fuck was she telling him that or he did not care a fuck about that. She described an incident in which a resident was putting on gloves and the Respondent asked why he was putting on those big gloves because his penis was not that big. She heard the Respondent tell another resident to move his fat fucking leg out of the way while a patient was present. She said the Respondent cared a lot about his patients but that she heard him tell a patient to hold still or he would chop their leg off. She heard the Respondent tell an IV drug user who was crying to stop crying because they did this to themselves. She heard the Respondent call Dr. [redacted] a fat mother fucker in front of patients and staff. She said she dreaded working with the Respondent because he was difficult, yelled, and wore her down. She observed the Respondent whispering in Ms. [redacted] ear and them laughing and chuckling; she said Ms. [redacted] would laugh it off or cringe. She asked Ms. [redacted] what the Respondent said and she replied he made sexual comments and he was being gross, crude, and ridiculous. She said the Respondent would often ask for the wrong item during a procedure, she would repeat what he said and bring the item, and the Respondent would say that was not what he asked for. She felt the Respondent was demeaning and degrading and that she could not do anything right. She said he cursed often. She agreed a lot of the residents liked the Respondent.

Ms. [redacted] was the nurse manager in the clinical unit. She said she had a good working relationship with the Respondent. She was aware nurses were nervous to call him and tell him about problems with his patients because he did not want to hear what they had to say and accused them of not wanting to work on his patients. She said he used profanity and his

behavior was aggressive. She said nurses and technologists did not want to file formal complaints against the Respondent because they were afraid of repercussions. She recalled an incident in which the Respondent chased a technologist down the hall because he felt the technologist had given him the wrong stent. The Respondent was very aggressive, banging on the door and yelling profanity. She and the Chairman of Radiology intervened; the doctor spoke to the Respondent while she escorted the technologist out of the area. She said when staff called her about problems with the Respondent she would deescalate the situation but did not confront the Respondent because they had to work closely together. When she reported incidents to Dr. [redacted] he replied that the complaint needed to be in writing. She testified that she could hear the Respondent over the phone when Ms. [redacted] called to tell him about the abnormal lab results on August 13, 2018. She stated that when Ms. [redacted] told her about the Respondent's sexual comments and pinning her against the wall, she told Ms. [redacted] that they had to report it to Human Resources.

Ms. [redacted] worked as a nurse in the operating room and in the special procedures unit. She worked with the Respondent almost every day. She testified the Respondent taught the residents with tough love but did not bully them. She said the residents loved the Respondent. She stated the Respondent took care of his patients like family. She described Ms. [redacted] as flip and abrupt and said her language and behavior were not appropriate for work. She said there were inappropriate conversations with sexual innuendos in the special procedures unit. She recalled an occasion when the Respondent was rushing into the unit and Ms. [redacted] said to him that she knew he was late because he was jerking off in the shower. On another occasion she observed Ms. [redacted] rub her breasts on the Respondent while he was scrubbed in and could not react. She said she once heard Ms. [redacted] make a comment to [redacted][8] about make-up sex. She

[8] [redacted] was not further identified.

stated she never heard other staff complain about the Respondent making inappropriate comments or acting inappropriately. She said she had seen the Respondent frustrated but not demeaning or malicious.

Dr. [redacted] worked as a resident under the Respondent. He described the Respondent as an excellent, caring surgeon who was demanding and great with patients. He said the Respondent was an excellent mentor. He acknowledged hearing the Respondent swear but said he did not direct it toward staff or do so in front of patients. He did not agree the Respondent berated or bullied staff. He stated that when the Respondent asked for the wrong piece of equipment it was because he was thinking two or three steps ahead, and that he would say not to give him what he asked for but give him what he needed. He described the nurses and technologists as friendly but maybe not the most disciplined and not so eager to perform procedures late in the day. He said he heard Ms. [redacted] make sexually suggestive comments and he was uncomfortable with it. He stated there was lewd and bawdy talk in the special procedures unit but that he never heard the Respondent make lewd comments. He noted the residents gave the Respondent two teaching awards.

Dr. [redacted] also worked as a resident under the Respondent. She said he was her mentor and inspired her to be a vascular surgeon. She described him as a caring, passionate, hardworking physician. She denied ever seeing him act unprofessionally with patients. She admitted hearing him curse during a procedure. She described the operating room as a high stress environment and said that everyone cursed. She said she felt the Respondent cared about the residents personally and they awarded him attending physician of the year. She said he had high standards but did not intimidate residents or other staff. She stated that when she posted a patient for a procedure in the special procedures unit she had to make sure nothing was wrong or the staff would cancel or delay the case. She overheard staff in the special procedures unit

talking about their personal life and some of the conversations were inappropriate. She described Ms. [redacted] as loud, outgoing, and talkative. She said she overheard Ms. [redacted] discuss something sexual and wondered why that was being discussed in the unit. She stated that the Respondent and Ms. [redacted] would go back and forth and she could not imagine Ms. [redacted] being embarrassed.

Dr. [redacted] was another resident who worked under the Respondent. He described the Respondent as a very good vascular surgeon who cared a lot about his patients and staff. He acknowledged the Respondent may have said something inappropriate in the operating room where it was stressful but never in front of patients. The Respondent was loved by his patients and really cared about the residents. He described the Respondent as funny, always joking, with no filter or loud sometimes, and said he was really enjoyable to work with. He stated he learned a lot from the Respondent and never saw him act intimidating, bullying, or mean toward staff. He described the staff in the special procedures unit as unprofessional, aggressive, tense, confrontational and said they engaged in crude, vulgar conversations. He said it was his least favorite place at [redacted] and he felt uncomfortable there. He said the special procedures staff would yell back at the surgeons. He said if he called to schedule a case, staff would question why he was scheduling the procedure then and complain that they had a life. He explained that the doctors could not control the timing of patients coming from the emergency department. He described Ms. [redacted] has having a strong personality and said she was often loud and aggressive. He described the Respondent and Ms. [redacted] as friendly with each other and did not see them talking privately. He said the Respondent did not know how to whisper; he was very loud and yelled across the room.

Dr. [redacted] was another resident who worked under the Respondent. She described the nurses and other staff in the special procedures unit as a close-knit group who were sometimes

cordial to residents and sometimes not. She described Ms. [redacted] as abrasive at times and not always kind or respectful. Dr. [redacted] said she tread lightly with Ms. [redacted] She observed back and forth banter between the Respondent and Ms. [redacted] including sexual comments made by both. She described the atmosphere in the special procedures unit as sometimes less than professional, with inappropriate joking and high stress, and many staff engaged in off color discussions or discussed things that should not be discussed in the workplace. She said the Respondent had a good relationship with the residents; he could be tough at times but pushed the residents to be better. She admitted hearing the Respondent raise his voice and use profanity but said it was not directed at anyone. She denied seeing him engage in immoral conduct or seeing him press his body against Ms. [redacted] She said at holidays he would have parties at his house and invite people who did not have family in town.

Dr. [redacted] recruited the Respondent to work at [redacted] they worked together for years and were in private practice together. Dr. [redacted] stated he never heard the Respondent use harsh language toward patients and that his patients loved him. He said the residents loved the Respondent; he did not berate them. He explained he and the Respondent pushed the residents to improve their skills. He said every day a doctor or technician might ask for the wrong equipment because there was a whole wall of catheters and wires. He never saw the Respondent bully or intimidate anyone but said he could be loud.

Dr. [redacted] saw the Respondent interact with the staff in the special procedures unit, where he said it was friendly in general but the tone was not always professional. He had overheard many conversations between the nurses and technicians and they were not always professional and were frequently of a sexual nature. He described the way Ms. [redacted] talked as very unprofessional. He said Ms. [redacted] engaged in sexual conversations, never complained about the Respondent, and did not appear hesitant to work with him or embarrassed. He stated he

overheard off color remarks between the Respondent and Ms. [redacted] and the banter between them. He did not recall the Respondent whispering to Ms. [redacted] He acknowledged hearing foul language in the operating room and swearing himself but said it was not demeaning to others or bullying. No one told him that the Respondent was bullying. He heard reports from Dr. [redacted] that he discussed with the Respondent. He heard one report that the Respondent told a patient if they did not stop moving, he would have to cut off their legs. He was not aware of the details of Ms. [redacted] complaint, Ms. [redacted] s complaint, or the Respondent's Performance Improvement Plan.

The Respondent testified regarding his background and how he came to [redacted] in 1998 to join his mentor Dr. [redacted] He described his career as a vascular surgeon at [redacted] and in his private practice with Dr [redacted] He stated he worked in the vascular lab where there were patient examination rooms or in the special procedures unit or the operating room. He explained that often a lab value or EKG would be missing and a nurse in the special procedures unit would recommend cancelling the procedure. He said he would be able to track down the needed information and push for the procedure to go forward.

The Respondent stated that he worked with Ms. [redacted] frequently. He said initially his relationship with Ms. [redacted] was confrontational. He described her as having a strong personality with no filter. He said she would go out of her way to cancel procedures in the special procedures unit, especially on Fridays. He described an occasion when he needed to perform a procedure for an urgent case on a weekend. He said Ms. [redacted] was the nurse on call for the special procedures unit but she refused to come in so he performed the procedure in the operating room instead. He described another occasion when he asked Ms. [redacted] to get an ultrasound to locate a puncture on a patient and Ms. [redacted] replied she was not going to get him "shit." He said he spoke to Ms. [redacted] about the case and after that their relationship improved.

He described how after he washed at the scrub station, a technician would put a gown on him and then a nurse would tie the gown. He said Ms. [redacted] gave him "a couple of zings," which he described as sexual teases. He stated he was surprised at first and then responded in kind. For example, Ms. [redacted] would tell him his penis was the size of a mosquito. He would reply with a giggle and say something complimentary about her breasts.

The Respondent said Ms. [redacted] offered to set him up on a date with her mother. He stated Ms. [redacted] discussed her first marriage and ultimate divorce. She told him she did not like Black men and her first husband was Lebanese.[9] She said she was living with her boyfriend and her daughter and that her sex life with her boyfriend was unsatisfying because he could not maintain an erection. She told him she thought her breasts were too big. He said he responded to her teases and she always initiated it. She never complained about his comments.

He denied pressing his body against Ms. [redacted] in a hallway as she described. However, he described a time when he was walking down a hall with Dr. [redacted] and they encountered Ms. [redacted] He said he grabbed Ms. [redacted] hand from behind and said, "Oh [redacted] you belong to us." Ms. [redacted] pulled her hand back and said, "you're an old fool." He said he and Ms. [redacted] had a "dance" during which he thought to himself "don't let my groin touch her" and it did not. He said he was just being a jerk and teasing; he was not trying to perform a sexually explicit act.

The Respondent admitted he made a comment about having make-up sex to Ms. [redacted] He described a hectic day with three cases scheduled, two in the operating room and one in the special procedures unit. He said there was confusion in the morning and the first patient was in the special procedures unit but should have been in the operating room. He stated he was at home rushing into the shower when Ms. [redacted] called to tell him the 1:30 p.m. case in the

[9] Both the Respondent and Ms. [redacted] are Black.

special procedures unit needed to be cancelled because the patient could not lie flat. When he saw Ms. [redacted] in the special procedures unit she was upset with him and said he had cursed at her. After the procedure, he was helping the patient off the table and Ms. [redacted] was still mad at him. He testified: "I said, [redacted] you're so mad at me we should have make-up sex." He described this as an off-color tease. He stated he always thought Ms. [redacted] was the aggressor; she never tried to leave or said she was uncomfortable.

He agreed his conversations with Ms. [redacted] were unprofessional, such as when she teased him about his penis and he teased her about her breasts. He stated that he should not have engaged in adult themed whispering in the workplace. He admitted he crossed boundaries. He said he should have told Ms. [redacted] that he did not want to have such conversations. He denied seeking out Ms. [redacted] but admitted he may have sought her out if she were the nurse taking care of his patient that day. He denied whispering sexual comments in Ms. [redacted] ear but admitted he could have. He did not recall talking about his penis with Ms. [redacted] except in response to something she had said. He admitted making comments about Ms. [redacted] breasts but only in response to her teases. He agreed he may have said he would like to lick champagne off her breasts; he said she had big breasts. He agreed his statements were not appropriate. He said he was never aware of Ms. [redacted] feelings; she never said he should stop. He denied saying he wanted to have anal sex with Ms. [redacted]

He stated he was not told of the complaint Ms. [redacted] filed until November 2019. He said he did not offer her sloppy kisses. He explained he needed help; [redacted] had the second busiest emergency department and he was on call every other night. He had a patient come in with complications while he was in the operating room. Ms. [redacted] took care of his patient. He testified: "I said I am so grateful I owe you sloppy kisses." He said it was not intended unprofessionally. He said he did not know Ms. [redacted] thought he was creepy.

He denied chasing a technician down the hall. He described attempting to block a hole in a patient's vein with a wall graft; the procedure did not work, and the patient died. The patient's autopsy showed a wall stent made of mesh was used instead of a graft without openings. He said he wanted to discuss the case with the technician. The technician disappeared behind a door, the chief came out and they discussed the case.

He said he was aware of about ten complaints about him. He stated he met with Dr. [redacted] but Dr. [redacted] did not show him his personnel file. Dr. [redacted] only told him to tone down his profanity. He recalled the incident when he cursed at the travelling nurse who was a nun and said he met with Dr. [redacted] about it. He recalled receiving a telephone call from an emergency department clerk when he was not the surgeon on call. He maintained he was never rude to patients. He said he did not think he bullied anyone. He may have raised his voice with a patient to stay still and stop crying so he could get clean images. He explained that without good images he could not do the procedure to save the limb. He denied berating residents and said he does not think he yelled as much as he is accused of yelling. He said he might have cursed at a situation or at himself, but not at others. He was close to the residents and a demanding teacher because he expected the best from them. He had a good relationship with most of the nurses and technicians and thought of them as a work family. He denied asking for the wrong tool and said he asked technicians to show him a tool before opening it because they were expensive. He denied confusing a catheter with a wire. He said staff may have been insulted when he did not want to cancel a procedure but not intimidated. He did not think his language was intimidating; special procedures staff were a bawdy group and all of them spoke their minds. He did not recall staff calling Ms. [redacted] about his behavior. He acknowledged his chronic problems arriving late to the operating room and the effect on efficiency. He said he

was happy to have the Performance Improvement Plan because it allowed him to keep his job at [redacted] He stated he was not aware that staff thought he was bullying until February 2018.

The Respondent submitted documentation showing that he completed a webinar entitled Harassment Prevention Essentials on October 6, 2018 hosted by Mastery Technologies, Inc. He also attended a two-day seminar entitled Communicating With Tact on October 30-31, 2018 hosted by SkillPath/National Seminars Training. In addition, he completed Professional Boundary Training for Medical Professionals on February 6-7, 2020 hosted by Acumen Institute. He testified that he attended these seminars because he wanted the Board to know he took the charges against him seriously. He said it has been a learning process and that he wished he had taken the boundaries class much earlier.

The Respondent acknowledged that after he was fired by [redacted], he was initially angry but those feelings turned to humiliation. He recognized now that his sexual comments were unprofessional. He realized the workplace is not a family. He denied he acted immorally.

He stated that in the two years since he was fired by [redacted], he has applied to work at to over three hundred programs and has been denied at every one. He recognized that he will probably never work as a vascular surgeon again. He would like to work again. He is currently conducting medical evaluations for [redacted]

Unprofessional or Immoral Conduct

At its core, this case is one of differing perceptions. The Respondent believed he had a joking, friendly relationship with staff and a justified impatience with others who impeded patients' procedures. Dr. [redacted] Ms. [redacted] and the former residents who testified appear to have understood the Respondent in this light. In contrast, Dr. [redacted] Dr. [redacted] Ms. [redacted] Ms. [redacted] Ms. [redacted] Ms. [redacted] Ms. [redacted] Ms. [redacted] and others in written complaints, described multiple instances in which the Respondent was aggressive, disruptive,

intimidating, profane, inappropriate, and unprofessional. The evidence shows both descriptions of the Respondent were true at times.

While the Respondent may have been joking, friendly, and a good mentor most of the time, there were numerous instances, detailed above, when the Respondent was verbally abusive and profane. Complaints about the Respondent's behavior spanned years and came from many different sources. The Respondent's yelling and profanity were so frequent that staff who worked with him accepted it as routine. Such behavior is unprofessional and detracts from patient care.

The most serious charges are based on the Respondent's conduct with Ms. [redacted] The Respondent admits he engaged in what he viewed as consensual sexual banter with Ms. [redacted] Dr. [redacted] stated he overheard banter and off-color remarks between the Respondent and Ms. [redacted] Dr. [redacted] Ms. [redacted], and several of the former residents testified they overheard sexual conversations among staff in the special procedures unit, including Ms. [redacted]

Sexual conversations in the workplace, even if they were consensual, are inappropriate and unprofessional. Even if Ms. [redacted] initiated and willingly engaged in such conversations, the Respondent had his own professional obligation to decline to engage in such behavior. That is, even if Ms. [redacted] were unprofessional, that does not excuse the Respondent's unprofessional behavior.

Moreover, the Respondent failed to understand that sexual conversations with a subordinate include a power imbalance, which can cause a subordinate to feel she must play along and not complain, fearing retaliation. As a nurse, Ms [redacted] was clearly subordinate to the Respondent. Whether the Respondent was Ms [redacted] employer or whether he in fact retaliated against her is immaterial. As her superior, the Respondent was in a position of authority over Ms. [redacted] In addition, they worked together frequently.

Further, the Respondent ignored Ms. [redacted] statements that indicated she was not interested in him sexually or engaging in such conversations with him. Ms. [redacted] told the Respondent that she did not like Black men, the sexual activities he whispered to her were not going to happen, he was gross, he was a pervert, and she walked away. Ms. [redacted] looked visibly uncomfortable while the Respondent was whispering to her, which other female staff observed. Ms. [redacted] also offered to arrange a date between her mother and the Respondent, a clear indication she was not interested in him herself. Thus, the evidence shows the sexual conversations were not consensual. Rather, the Respondent's behavior was unprofessional and immoral.

Finally, the Respondent engaged in unprofessional and immoral behavior when he pressed his body against Ms. [redacted] body from behind, pressing her against a wall. Throughout her testimony, Ms. [redacted] was consistent and forthcoming. Her testimony regarding the Respondent's behavior generally and his whispering to her was corroborated by others. Ms. [redacted] description of the Respondent pressing her against the wall was detailed and credible, and I believe it occurred as she described. Notably, when Ms. [redacted] asked the Respondent to get off her, he did so and then laughed. His reaction is consistent with the Respondent's view that his interactions with Ms. [redacted] were all joking "sexual banter." In reality, Ms. [redacted] did not find the Respondent's behavior funny. She traded scheduled procedures with other nurses so that she did not have to work with the Respondent directly.

In general, the Respondent has minimized his behavior or, in some instances, denied it altogether. Regarding the Respondent's yelling and cursing, it appears [redacted] tolerated the Respondent's behavior for many years. Such acquiescence seems to have led the Respondent to believe his behavior was acceptable. In addition, the Respondent was not alone in engaging in sexually inappropriate conversations in the special procedures unit. Thus, while the Respondent

is responsible for his unprofessional behavior, it did not occur in a vacuum. An atmosphere where sexually inappropriate conversations were common likely contributed to the Respondent's misguided belief that his comments were consensual joking sexual banter. However, I do believe the Respondent has started the process of educating himself regarding the importance of maintaining professional interactions and boundaries in the workplace.

Sanctions

In this case, the State seeks to impose the disciplinary sanctions of a reprimand and a one-year suspension. Md. Code Ann., Health Occ. § 14-404(a) (Supp. 2020); COMAR 10.32.02.09A, B(i) & (iii); COMAR 10.32.02.10.

The Respondent maintains that he has been unable to work as a surgeon for two years, which is punishment enough. The Respondent asserts a reprimand is the appropriate sanction.

I considered the mitigating and aggravating factors under COMAR 10.32.02.09A, B(5) & (6). There are several mitigating factors in the Respondent's favor. One, the Respondent does not have a prior disciplinary record. Two, the Respondent admitted some of his misconduct and was cooperative during the disciplinary proceedings. Three, the Respondent has attended three seminars to address his misconduct. Four, the Respondent has been partially rehabilitated and shows rehabilitation potential. Five, the Respondent's conduct appears impulsive rather than premeditated. There are two aggravating factors. One, the Respondent's conduct was a pattern of unprofessional behavior. Two, the Respondent's conduct potentially could have harmed patients. A patient could have been harmed if staff hesitated to bring clinical concerns to the Respondent's attention because he often reacted angrily, yelling at staff.

I recognize that the Respondent has been effectively unable to work as a surgeon for the past two years. I am encouraged that the Respondent attended two seminars in October 2018, shortly after he was dismissed from [redacted] I am also encouraged that the Respondent

completed the professional boundary training in February 2020 and recognizes now that his behavior was unprofessional. I agree that a reprimand is appropriate but I am not convinced that a one-year suspension is warranted at this time. Rather, I find that a one-year stayed suspension pending the Respondent's completion of additional training on professionalism and workplace boundaries as directed by the Board to be appropriate in this case.

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 immoral or unprofessional conduct in the practice of medicine. Md. Code Ann., Health Occ. § 14-404(a)(3) (Supp. 2020). As a result, I conclude that the Respondent is subject to disciplinary sanctions of a reprimand and a one-year stayed suspension pending the Respondent's completion of additional training on professionalism and workplace boundaries. *Id.*; COMAR 10.32.02.09A-B.

PROPOSED DISPOSITION

I **PROPOSE** that charges filed by the Maryland State Board of Physicians against the Respondent on October 30, 2019 be **UPHELD**; and

I **PROPOSE** that the Respondent be sanctioned by a reprimand and a one-year stayed suspension pending the Respondent's completion of additional training on professionalism and workplace boundaries.

November 16, 2020
Date Decision Mailed

Lorraine E. Fraser
Lorraine E. Fraser
Administrative Law Judge

LEF/da
188270

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 10.32.02.05C. The OAH is not a party to any review process.

Copies Mailed To:

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