IN THE MATTER OF	*	BEFORE THE
ROBERT HARDI, M.D.	*	MARYLAND STATE
Respondent.	*	BOARD OF PHYSICIANS
License Number: D30771	*	Case Number: 2218-0152A

* * * * * * * * * * * * *

FINAL DECISION AND ORDER

PROCEDURAL HISTORY

On March 19, 2019, Disciplinary Panel A of the Maryland State Board of Physicians ("Board") charged Robert Hardi, M.D., with immoral and unprofessional conduct in the practice of medicine and engaging in sexual misconduct.[1] *See* Md. Code Ann., Health Occ. § 14-404(a)(3)(i), (ii), Health Occ. § 1-212; COMAR 10.32.17. The charges alleged that Dr. Hardi had a sexual relationship with a patient, Individual A, and engaged in misconduct with Individuals B, C, D, E, and F that was, in general, sexual in nature.[2]

In August, 2019, an Administrative Law Judge ("ALJ") held a six-day evidentiary hearing at the Office of Administrative Hearings. At that hearing, the State introduced 23 exhibits and testimony from 13 witnesses. Dr. Hardi introduced 309 exhibits and testimony from 12 witnesses. On November 12, 2019, the ALJ issued a proposed decision recommending that the charges pertaining to Individual A be upheld. The ALJ, however, found that the State did not prove the allegations against Dr. Hardi pertaining to Individuals B, C, D, E, or F. The ALJ recommended that Dr. Hardi be suspended for one year, retroactive to March 5, 2019, the date

[1] On March 5, 2019, Disciplinary Panel A issued an order summarily suspending Dr. Hardi's license for the same conduct. An evidentiary hearing was not held for the summary suspension. The summary suspension is terminated as moot by this Final Decision and Order.

[2] For privacy and confidentiality purposes, the names of individuals and patient names are not included in this document and have been redacted from the attached ALJ Proposed Decision.

the summary suspension was imposed, and be ordered to pay a $10,000 fine. Dr. Hardi and the State both filed exceptions. On February 26, 2020, Disciplinary Panel B ("Panel B") held an oral exceptions hearing.

FINDINGS OF FACT

Panel B adopts the ALJ's Proposed Findings of Fact and the ALJ's Discussion with minor modifications. The ALJ's Proposed Findings of Fact ¶¶ 1-31, 33-111, and 113 and the Discussion (pages 19-41) are incorporated by reference into the body of this document as if set forth in full unless otherwise noted.[3] The findings of fact were proven by a preponderance of the evidence. The ALJ's Proposed Decision is attached as Exhibit 1. Paragraph 32 is replaced with the following:

32. It is most likely that the error that resulted in a future medical procedure being listed in the medical record was caused by the electronic medical recordkeeping computer program. The parts of that record listing the "Diagnoses" and "Plan", which includes an "MRI Abdomen/Pelvis with and w[ith]/o[ut] contrast" and "Bun/Creatinine" accurately reflect the patient visit that Individual A had with Dr. Hardi.

Paragraph 112 is replaced with the following:

112. The Respondent inadvertently touched Individual F's left breast when pointing to the source of the bleed that was located below her left breast.

INDIVIDUAL A

The ALJ found, and Dr. Hardi does not dispute, that Dr. Hardi had a sexual relationship with a coworker, Individual A, from approximately February 2016 until June 2017. The ALJ

[3] Panel B does not adopt the discussion on Page 26 on lines 12-22 that pertains to Finding of Fact ¶32. Also, Panel B does not adopt the discussion on pages 39 and 40 pertaining to the reasons Dr. Hardi touched Individual F.

found that Individual A was Dr. Hardi's patient during the sexual relationship, and as such, he is guilty of immoral and unprofessional conduct in the practice of medicine and engaged in sexual misconduct. Health Occ. § 14-404(a)(3)(i) & (ii); Health Occ. § 1-212; COMAR 10.32.17. It is undisputed that Individual A was Dr. Hardi's patient before and after the sexual relationship. The ALJ based his finding of a concurrent sexual and physician-patient relationship on several pieces of evidence.

First, Individual A testified that Dr. Hardi concurrently had a sexual relationship with Individual A while he treated her medically. Individual A testified that he saw her frequently, but he did not document his involvement, rather, he would write a prescription and provide her with medical advice verbally, without always recording a note in the chart. The ALJ found Individual A credible.

Second, the ALJ noted that Dr Hardi's name appears on the documents in Individual A's medical record for the time period that he was treating her. The record supports this finding. Patient records from the practice indicate that Dr. Hardi was the ordering physician for lab tests and referring physician for MRIs. For example, a record containing lab results from July 23, 2016, lists Dr. Hardi as the Ordering Physician. Exhibit A2 at 58. Dr. Hardi reviewed and signed the record on July 25, 2016. Exhibit A2 at 57. The radiologist record from August 2, 2016, regarding the MRI for the Abdomen with and without contrast listed Dr. Hardi as the requesting physician. Exhibit A2 at 54, 56. Dr. Hardi reviewed and signed the radiologist's report on August 11, 2016. *Id.* at 53, 55. Dr. Hardi was listed as the referring physician for a January 17, 2017 record where a PA in the practice is listed as the provider. Exhibit A2 at 160. That record's "plan" stated "MRI RLE/right ankle with and w/o contrast." Exhibit A2 at 160. That MRI was conducted on January 17, 2017 and Dr. Hardi was listed as the requesting

physician on the radiologist's report. Exhibit A2 at 50, 52. Dr. Hardi reviewed and signed the document on January 23, 2017 and February 8, 2017. Exhibit A2 at 49, 51.

The ALJ found that a practice record from July 21, 2016, was likely altered because it contains results from a September 28, 2017 medical procedure which was after the date that the medical record was written and because the signature line was blank and unsigned. ALJ Prop. Dec. ¶ 32; Exhibit A2 at 167. The ALJ speculated that someone else at the practice could have altered the record. The ALJ noted that Individual A had access to the records. ALJ Prop. Dec. at 26.

Panel B does not adopt the ALJ's finding that the July 21, 2016 record was altered. In the panel's view, there is likely a more innocent explanation for reference to the unchronological September 28, 2017, procedure result. Panel B finds that by a preponderance of the evidence, the Electronic Medical Record program automatically filled information in the July 21, 2016, record either when it was accessed after October 2017, or when it was printed in response to the Board's subpoena. Seven records from July 2015 through October 2017 with three different providers all include identical entries under the titles Past Medical History, Social History, and Family History.[4] Each of the first six entries that were created before the September 28, 2017, medical procedure occurred mention the medical procedure from that date. Each medical record was on a different date and had different listings under "Diagnoses" and "Plan." But each record was unsigned and contained the identical entries for the Past Medical History, Social History, and Family History. Based on the experience of panel members, the panel finds that it is most

[4] Specifically, the identical records include July 9, 2015 visit with Dr. Hardi, July 18, 2016 visit with Physician Assistant 1, July 21, 2016 visit with Dr. Hardi, January 17, 2017 visit where the provider was Physician Assistant 2 and the referring physician was Dr. Hardi, September 6, 2017 visit where the provider was Physician Assistant 2 and the referring physician was Dr. Hardi, and September 8, 2017 visit with Physician Assistant 2, and an October 12, 2017 visit with Dr. Hardi.

likely that these fields were blank on the original records or were overridden with the most recent information and were identically auto-filled by the Electronic Medical Records with the new information when the records were printed in response to the Board's subpoena. *See* State Gov't § 10-213(i) (The agency . . . may use its experience, technical competence and specialized knowledge in the evaluation of evidence.")

The July 21, 2016 visit with Dr. Hardi that described his plan as "MRI Abdomen/Pelvis with and w/o contrast" and "Bun/Creatinine" laboratory tests for Individual A, is substantiated by evidence other than this one medical record. The patient's records indicate that Dr. Hardi ordered an MRI on other practice documents. (State Ex. A2 p. 5). The laboratory lists Dr. Hardi as the Ordering Physician on a specimen from July 22, 2016. (State Ex. A2, p. 58). The lab report shows that Dr. Hardi reviewed and signed the lab results on July 25, 2016. *Id.* The radiologist report from August 2, 2016 lists Dr. Hardi as the requesting physician and states that it was signed by Dr. Hardi on August 11, 2016. Individual A also substantiated the treatment, testifying that she received medical care from Dr. Hardi during the period they were having a sexual relationship.

DR. HARDI'S EXCEPTIONS – INDIVIDUAL A

In his exceptions, Dr. Hardi admits that Individual A was a patient prior to their sexual relationship and admits that Individual A was a patient after the sexual relationship terminated but claims that she was not a patient during their sexual relationship. Dr. Hardi bases this on the ALJ's factual finding that the July 21, 2016 record was altered because it mentioned a procedure that had not yet occurred.[5] Dr. Hardi claims that because that record was altered, the visit never occurred, and the other electronic medical records should also not be relied upon. He further

[5] As noted above, Panel B did not accept this finding in Finding of Fact ¶32.

argues that Individual A's testimony should not be believed because, according to Dr. Hardi, Individual A altered the records to make it appear that their sexual relationship occurred while he was treating her.

Panel B finds that Individual A had a medical visit with Dr. Hardi on July 21, 2016. Individual A's records contain a lab report of "Bun/Creatinine" tests and a radiologist report of an MRI ordered at the July 21, 2016 visit. The lab and radiologist report listed Dr. Hardi as the ordering/requesting physician. The ALJ relied on the laboratory report to conclude that the patient-physician relationship existed during the sexual relationship period without reliance on the July 21, 2016 record.

Dr. Hardi's claim that Individual A altered the medical records to create a false "paper trail" of a patient-physician relationship is not consistent with the purported alterations. Of the six records that contain the identical description of a September 28, 2017 medical procedure that occurred after those visits, only two were incriminating, meaning only two were from the period of their sexual relationship. The remaining four records were not with Dr. Hardi during their sexual relationship. One record was for a visit with Dr. Hardi before their sexual relationship began. (Ex. A2 at 190). One record, where Dr. Hardi was listed as the referring physician, was for a visit after the sexual relationship ended. (Ex. A2 at 138). And two records do not involve visits with Dr. Hardi. These two records pertain to two physician assistants in the practice. (Ex. A2 at 148, 175). Dr. Hardi does not provide any explanation as to why those records would have been identically altered, and the Panel finds no logical reason for anyone to have done so. Dr. Hardi has also not offered an explanation on why the laboratory record from the laboratory and radiology reports from the radiologist would have listed Dr. Hardi as the ordering/requesting physician had he not ordered the labs or requested the MRI. Dr. Hardi provides no reason why

those records should not be relied upon. Panel B finds that the simplest explanation is likely the correct one, which is that the electronic medical record program, for unsigned records, updated or overwrote fields with the most recent information. Thus, when the electronic records were later printed, the unsigned records contained information that did not exist when the records were written. In any case, even without considering the unsigned records, the testimonial evidence and external documentary evidence demonstrates that Dr. Hardi saw Individual A for treatment, ordered laboratory tests and requested MRIs during their sexual relationship. Panel B thus agrees with the ALJ that Individual A was Dr. Hardi's patient during the period in which they engaged in a sexual relationship.

Dr. Hardi next argues that the ALJ mistakenly conflated the Braintree clinical trial[6] and prior treatment. The ALJ's Proposed Findings of Fact correctly describes a visit with Individual A, on September 20, 2017, as part of the Braintree Project. The ALJ, however, did not state that the treatment in 2016 was part of the Braintree study. Instead, the ALJ cites the Braintree study as an example of Dr. Hardi minimizing his role in treating Individual A. To clear any confusion, Panel B agrees that Dr. Hardi's treatment of Individual A during the sexual relationship was not during the Braintree clinical trial. This does not affect Panel B's finding that Dr. Hardi treated Individual A before the Braintree trial and during their sexual relationship.

Finally, Dr. Hardi argues that his self-reporting the sexual relationship to the Board is not probative of his guilt, because the admission was only that he had a relationship with a coworker who received treatment at a division where Dr. Hardi was a partner and not that she was his patient at the time. He claims that his self-report was not an admission of guilt, but, rather, an attempt to get ahead of an incorrect report that he anticipated from his employer. The Panel does

[6] The Braintree clinical trial was a clinical trial for a new type of colonoscopy preparation.

not rely upon this letter as evidence that Dr. Hardi's treatment of Individual A overlapped with their sexual relationship. Individual A's testimony and the medical records demonstrate that the patient relationship and sexual relationship overlapped. In sum, Dr. Hardi 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 engaged in sexual misconduct, in violation of Health Occ. § 1-212 and COMAR 10.32.17, with respect to Individual A.

INDIVIDUAL B

Panel B does not adopt the ALJ's reasoning for rejecting Individual B's testimony. To be clear, Panel B does not consider the following factors to be probative of Dr. Hardi's claim that he did not sexually assault Individual B: (1) that Individual B failed to promptly report the alleged sexual assault to her employer, (2) that Individual B told to a co-worker that Dr. Hardi "came on to me" rather than using the terms attempted rape or sexual assault, and (3) that Individual B did not appear distressed to her co-worker the morning after the alleged sexual assault. Panel B nevertheless agrees with the ALJ that there is insufficient evidence of sexual assault or to otherwise find a violation pertaining to Individual B.

STATE'S EXCEPTIONS – INDIVIDUALS C, E, AND F

The State argues that Dr. Hardi inappropriately cupped Individual C's breast when he auscultated her heart, attempted to help her remove her pants, and performed a rough rectal examination without telling her that he was about to perform the examination. In finding no violations, the ALJ relied on the fact that a medical student was present during the examination and did not identify any inappropriate conduct. In her letter, the medical student stated that Individual C opened and pulled down her own pants and that the patient was covered in a drape. The medical student stated that Dr. Hardi informed the patient regarding what he was doing at

every stage of the examination and observed Dr. Hardi use the stethoscope. The medical student also said that Dr. Hardi did not place his hands on Individual C's breasts. Based on this corroborating eyewitness account, Panel B agrees with the ALJ that there was insufficient evidence to support a violation with respect to Individual C.[7]

The State argues that Panel B should find that Dr. Hardi inappropriately unzipped Individual E's dress and put his hand on her nipple when listening to her heart with his stethoscope. The ALJ found that Individual's recollection was hazy based on her vertigo symptoms. Panel B concurs with the ALJ that there was insufficient evidence to support a violation.

Finally, the State argues Dr. Hardi acted unprofessionally by touching Individual F's breast. The State does not argue that this conduct was sexual or immoral. The ALJ found that, while Dr. Hardi touched her breast, he did so in the hallway while Individual F was fully clothed in order to show the source of her gastrointestinal bleed. Dr. Hardi explained that the bleed was at the end of the ribcage, just below her sternum. Panel B finds that Dr. Hardi did not intentionally touch Patient F's breast. Rather, the Panel believes that he was pointing at her sternum or ribcage and, when she stepped forward expecting to look at the medical chart in his hand, he inadvertently touched Individual F's breast. The Panel does not adopt the ALJ's reasoning that it would have been acceptable to intentionally touch her breast to show her the source of the bleed, both because the breast was not the location of the bleed and because it is inappropriate to touch a patient's breast for a non-clinical purpose without consent. In any case, the panel finds that the contact was inadvertent and did not constitute unprofessional conduct.

[7] The ALJ found that the allegations pertaining to Individual D were time barred. The State did not file exceptions to that finding, and thus, Panel B will not disturb the ALJ's conclusion.

CONCLUSIONS OF LAW

Disciplinary Panel B concludes, as a matter of law, that, with respect to Individual A, Dr. Hardi 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 that he engaged in sexual misconduct, in violation of Health Occ. § 1-212 and COMAR 10.32.17.

SANCTION

The ALJ recommended that Dr. Hardi be suspended for one year, retroactive to March 5, 2019, the date that Dr. Hardi was summarily suspended, and pay a fine of $10,000. The ALJ explained his reasoning on page 41 of his proposed decision. Panel B has reviewed and considered Dr. Hardi's arguments advocating for a reprimand in his exceptions. Panel B adopts the ALJ's sanction along with the ALJ's reasoning and the discussion supporting the sanction.

ORDER

It is, by an affirmative vote of a majority of a quorum of Disciplinary Panel B, hereby

ORDERED that the March 5, 2019 Order of Summary Suspension is **TERMINATED** as moot; and is further

ORDERED that Dr. Hardi's license to practice medicine in Maryland is **SUSPENDED** for a period of **ONE YEAR** retroactive to March 5, 2019; and it is further

ORDERED that within **ONE YEAR**, Dr. Hardi shall pay a civil fine of **$10,000**. The Payment shall be made 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. Hardi's license if Dr. Hardi fails to timely pay the fine to the Board; 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).

Signature on File

03/23/2020
Date

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. Hardi 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. Hardi 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
Maryland Department of Health
300 West Preston Street, Suite 302
Baltimore, Maryland 21201

Exhibit 1

MARYLAND STATE	*	BEFORE JEROME WOODS, II,
BOARD OF PHYSICIANS	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE
ROBERT HARDI, M.D.,	*	OF ADMINISTRATIVE HEARINGS
RESPONDENT	*	OAH No.: MDH-MBP1-71-19-16961
LICENSE No.: D30771	*	MBP No: 2218-0152A

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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 March 19, 2019, the Maryland State Board of Physicians (Board or State) issued charges against Robert Hardi, M.D. (Respondent), for alleged violations of the State law governing the practice of medicine. Md. Code Ann., Health Occ. §§ 14-101 *et. seq.* (2014 & Supp. 2019). Specifically, the Respondent is charged with violating section 14-404(a)(3)(i) (Supp. 2019) (immoral conduct in the practice of medicine); section 16-404(a)(3)(ii) (Supp. 2019) (unprofessional conduct in the practice of medicine); section 1-212 (sexual misconduct); and Code of Maryland Regulations (COMAR) 10.32.17 which prohibits sexual misconduct.

The Board forwarded the charges to the Office of the Attorney General for prosecution, regarding the Respondent's alleged actions towards six individuals.[1]

On May 30, 2019, the Respondent requested a hearing on the Board's charges and intended reprimand, suspension or revocation of his license to practice medicine in Maryland. On that same date, the Board delegated the matter to the Office of Administrative Hearings (OAH) for a hearing on the charges. The Board further delegated to the OAH the authority to issue Proposed Findings of Fact, Proposed Conclusion(s) of Law, and a Proposed Disposition. Md. Code Ann., State Gov't § 10-205(b) (2014).

On June 19, 2019, I conducted an in-person scheduling conference at the OAH headquarters in Hunt Valley, Maryland. Michael Brown, Assistant Attorney General, Administrative Prosecutor, appeared on behalf of the State of Maryland. The Respondent did not appear, but was represented by Kevin A. Dunn, Esquire and Christopher C. Dahl, Esquire.

On July 29, 2019, I conducted an in-person pre-hearing conference at the OAH headquarters in Hunt Valley, Maryland.

I conducted the hearing on the merits on August 12, 13, 14, 19, 20, and 21, 2019 at the OAH. Health Occ. § 14-405(a) (Supp. 2019); COMAR 10.32.02.04.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the Rules of Procedure for the Board, and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2019); Code of Maryland Regulations (COMAR) 10.32.02; COMAR 28.02.01.

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[1] For ease of reference, I will identify the persons in this note one time and will continue to refer to them by their respective assigned letters for confidentiality and privacy purposes: Individual A [redacted]; Individual B [redacted]; Individual C [redacted]; Individual D [redacted]; Individual E [redacted]; and Individual F [redacted].

ISSUES[1]

1. Whether the Respondent's consensual sexual relationship with Individual A, while she was a patient, constituted (i) unprofessional conduct in the practice of medicine; (ii) immoral conduct in the practice of medicine; and/or (iii) sexual misconduct, as charged by the Board?
2. Whether the Respondent engaged in conduct with Individual B in 2014 that constituted (i) unprofessional conduct in the practice of medicine; (ii) immoral conduct in the practice of medicine; and/or (iii) sexual misconduct, as charged by the Board?
3. Whether the Respondent conducted an examination of Individual C that constituted (i) unprofessional conduct in the practice of medicine; (ii) immoral conduct in the practice of medicine; and/or (iii) sexual misconduct, as charged by the Board?
4. Whether the Respondent conducted an examination of Individual D that constituted (i) unprofessional conduct in the practice of medicine; (ii) immoral conduct in the practice of medicine; and/or (iii) sexual misconduct, as charged by the Board?
5. Whether the complaint of Individual D is time barred?
6. Whether the Respondent conducted an examination of Individual E that constituted (i) unprofessional conduct in the practice of medicine; (ii) immoral conduct in the practice of medicine; and/or (iii) sexual misconduct, as charged by the Board?
7. Whether the Respondent touched Individual F in a manner that constituted (i) unprofessional conduct in the practice of medicine; (ii) immoral conduct in the practice of medicine; and/or (iii) sexual misconduct, as charged by the Board?

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[1] On August 6, 2019, I issued a written ruling on the Respondent's Motion to Dismiss or in the Alternative, for Summary Decision, as to Individuals B, C, D and E. The parties were advised at the pre-hearing conference that issues concerning peer review and jurisdiction regarding these individuals would not be addressed in my proposed decision if I made rulings on these issues prior to the hearing on the merits.

8. Whether the charges related to Individual F are barred by the Board's failure to conduct a peer review?

9. What sanctions are appropriate if the Respondent violated the applicable law?

SUMMARY OF THE EVIDENCE

Exhibits

I have attached an Exhibit List to this Proposed Decision.

Testimony

The State presented the following witnesses:

1. [redacted], M.D.;
2. Individual A, R.N., patient;
3. Individual B, O.T., R.N., patient;
4. Individual C, patient;
5. Individual D, patient;
6. Individual E, P.A., patient;
7. Individual F, patient;
8. [redacted];[1]
9. [redacted], Chief Operating Officer, [redacted];
10. [redacted] M.D;[2]
11. [redacted], Office Manager, [redacted];
12. Gretchen Westphal, Compliance Analyst, Board; and
13. [redacted], former Chief Operating Officer, Marketing Director.[3]

The Respondent testified and presented the following witnesses:

[1] This witness was also subpoenaed by the Respondent.
[2] This witness was also subpoenaed by the Respondent.
[3] This witness was also subpoenaed by the Respondent.

1. [redacted];
2. [redacted], P.A.;
3. [redacted];
4. [redacted], M.D.;
5. [redacted], M.D;
6. [redacted];
7. [redacted], M.D.;
8. [redacted], Esq.
9. [redacted];
10. [redacted];
11. [redacted]; and
12. [redacted].

PROPOSED FINDINGS OF FACT

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

1. At all times relevant, the Respondent was and is licensed to practice medicine in the State of Maryland.

2. The Respondent has been licensed to practice medicine since May 3, 1984, under license number D30771. The license expires September 30, 2020.

3. The Respondent is also licensed to practice medicine in New York, New Mexico, Virginia and Washington, D.C.

4. The Respondent is board certified in Internal Medicine with a sub-certification in Gastroenterology.

5. The Respondent holds hospital privileges at one Maryland hospital and two out-of-State hospitals.

6. At all times relevant hereto, the Respondent was a shareholder and partner of a health care facility, [redacted]. In or around 2009, [redacted] merged into [redacted]. [redacted] has offices in Chevy Chase, Maryland and Washington, D.C.

7. The Respondent practiced medicine at [redacted] as a physician-owner until approximately February 2018.

8. From approximately 1996 through February 2018, the Respondent acted as Medical Director and Principal Investigator at [redacted], which is affiliated with [redacted].

9. The Respondent resigned from [redacted] in February 2018 in lieu of termination.

10. On February 13, 2018, the Respondent's attorney sent a letter to the Board on the Respondent's behalf. The letter was entitled, "Dr. Robert Hardi, M.D., Self-Disclosure." (State Ex. G3).

11. In the letter, the Respondent reported that he had a "consensual intimate sexual relationship with the practice manager [Individual A] of the [redacted] division of [redacted], who also received treatment at that division."

12. The Respondent is married and was married during the time he was having a consensual sexual relationship with Individual A.

13. Upon receipt of the letter, the Board began an investigation and assigned Gretchen Westphal, compliance analyst, to investigate the matter.

14. As part of the investigation, Ms. Westphal interviewed the following persons who provided answers to questions, under the penalties of perjury:

a. Respondent;

b. Individuals A, B, C, D, E, and F;

c. [redacted], M.D., President and Chief Executive Officer, [redacted];

d. [redacted], Director, Human Resources, [redacted];

e. [redacted], Chief Marketing Officer, [redacted];

f. [redacted], M.D., Practice Partner, [redacted];

g. [redacted], Research Coordinator; and

h. [redacted], M.D., Practice Partner.

15. During the Respondent's interview with Ms. Westphal, the Respondent acknowledged having a sexual relationship with Individual A. He denied having sexual relationships with subordinate staff at [redacted], but acknowledged having a consensual sexual relationship with another physician at the practice.

16. During the time that the Respondent was treating Individual A at [redacted], he was also having a consensual sexual relationship with her. The Respondent had been providing gastroenterology care to Individual A since before Individual A came to be employed at [redacted] and through at least the end of September 2017.

17. Individuals A, B, C, D, E and F did not file any complaints with the Board concerning the Respondent.

18. The State has brought charges against the Respondent alleging the Respondent engaged in unprofessional and/or immoral conduct relating to six persons identified as Individual A, B, C, D, E, and F.

19. The Board summarily suspended the Respondent's license to practice medicine on March 5, 2019, and he has not been practicing medicine since that day.

20. On February 11, 2018, the Respondent completed a Course for Ethics (Workplace Ethics Training Class) and a Course for Sexual Harassment (Sexual Harassment Prevention Class).

21. On February 12, 2018, the Respondent completed a Sensitivity Training in the Workplace course.

Individual A

22. Individual A first became acquainted with the Respondent approximately twenty-five years ago when she was a staff nurse at a hospital where the Respondent practiced medicine.

23. During the course of Individual A's employment with the hospital, she began receiving treatment from the Respondent as a patient for a chronic medical condition.

24. In 2010, the Respondent informed Individual A that was in need of a Practice Manager.

25. On or about June 1, 2010, Individual A began working with as a Practice Manager.

26. While Individual A was working at , she continued to be a patient of the Respondent.

27. In approximately February 2016, the Respondent and Individual A began having a sexual relationship. The sexual relationship lasted until June 2017 and consisted of multiple sexual encounters, including sexual intercourse at hotels.

28. patient records for Individual A contain the occurrences when a physician ordered a procedure or test be conducted. By way of physician order, the patient records indicate that on July 21, 2016, the Respondent ordered an "MRI Abdomen/Pelvis with and w/o contrast" be performed for Individual A. (State Ex. A2, p. 5).

29. Lab results from July 23, 2016, 5:37 a.m. for Individual A indicate that a specimen was

collected on July 22, 2016. In the lab result report, Individual A's name appears on the line that states "Patient Name." The Respondent is identified as the "Ordering Physician." (State. Ex. A2, p. 58).

30. The July 23, 2016 lab report indicates the report was reviewed and signed by the Respondent on July 25, 2016 at 8:42 a.m.

31. [redacted] patient records for Individual A from **July 21, 2016**, indicate the Respondent as the physician provider for Individual A. This record was created on July 21, 2016 11:43 a.m. The record references a colonoscopy that occurred in the then future on **September 28, 2017**.

32. Someone altered the July 21, 2016 patient record for Individual A to include a September 28, 2017 medical procedure. It was altered because the event had not occurred yet. Someone added the colonoscopy reference to the July 21, 2016 record.

33. The July 21, 2016 medical record has a space for an electronic signature. The signature line is blank and was not signed.

34. On September 19, 2017, [redacted] sent an appointment reminder to Individual A that she had an appointment with the Respondent at the [redacted] Chevy Chase location. (State Ex. A2, p. 10).

35. [redacted] medical records for Individual A indicate that the Respondent examined her on September 20, 2017 for a screening visit regarding bowel preparation. The screening visit was part of a study for the Braintree Project. This project was a clinical trial for a new type of colonoscopy preparation.

36. During the visit, the Respondent made observations and findings. He recorded the results of the visit in a medical record that he electronically signed on September 21, 2017 at 10:42.00 a.m. (Bd. Ex. 2, p. 216).

37. On September 28, 2017, the Respondent completed a Colonoscopy Report for Individual A regarding his treatment of her. Additionally, he prepared a written Pre-Procedure History and Physical Report and Physician Standing Orders. He electronically signed the documents on September 28, 2017.

38. On or around December 2017, Individual A resigned from [redacted] in lieu of termination.

39. [redacted] sought to terminate Individual A as a result of her poor work performance.

40. When Individual A separated from employment with [redacted], she informed management staff that she had engaged in a sexual relationship with the Respondent, while he was also her physician.

41. As a result of Individual A's disclosure regarding her sexual relationship with the Respondent, management staff conducted an investigation.

42. At the conclusion of the investigation, management staff determined the Respondent had a sexual relationship with Individual A while he was her physician. Management recommended the Respondent be terminated as a result of this disclosure.

Individual B

43. Individual B worked with the Respondent at [redacted] as a clinical research nurse coordinator from approximately 2014 through May 2016 in the [redacted] research department.

44. The Respondent was one of the persons responsible for supervising Individual B during the time she was employed with [redacted]. [redacted], Manager of the Research Department, also supervised Individual B.

45. [redacted] is a former co-worker of Individual B at [redacted].

46. Ms. [redacted] no longer works for [redacted]. She separated from employment on good terms and now works with another company not affiliated with [redacted].

47. In October 2014, Individual B, Ms. , and the Respondent went to Florida for a work-related trip regarding protocols and studies for the medical practice.

48. During the Florida trip, at Ms. 's request, the Respondent, Individual B and Ms. went to the hotel hot tub, prior to a scheduled group dinner, to relax and enjoy wine and appetizers. (Transcript, p. 1072).

49. After relaxing in the hot tub for approximately ten minutes, Individual B left the hot tub and went to her room.

50. Individual B went to the breakfast/meeting the day after relaxing in the hot tub with the Respondent and Ms. . The Respondent and Ms. were at the breakfast/meeting. Individual B did not have any discussions with the Respondent or Ms. regarding any interaction with the Respondent upon leaving the hot tub.

51. Sometime during the week following the Florida trip, Individual B told Ms. that the Respondent "came on to her." (Transcript p. 175, line 6).

52. Individual B did not tell Ms. that the Respondent attempted to rape her or commit any other crime of a sexual nature.

53. On May 23, 2016, Individual B was terminated from . The Respondent and Ms. were instrumental in determining that Individual B should be terminated from employment with

54. When Individual B was terminated from , she met with Ms. and , Human Resources Director.

55. On May 23, 2016, Ms. , wrote down her recollections from the May 23, 2016 meeting. (Resp. Ex. 37).

56. Individual B was terminated from [redacted] because of poor work performance, which impacted the drug studies [redacted] was responsible for. Individual B's poor work performance included committing errors in documenting whether protocols were properly followed during drug trials, putting into question whether the documentation regarding the trials was legitimate. This occurred on a study involving a drug to treat ulcerative colitis, regarding the company [redacted]. (Resp. Ex. 321, p. 01705).

57. Individual B's poor work performance was documented and she was given an opportunity to improve her deficiencies.

58. During the termination meeting, Individual B requested to meet with Ms. [redacted] privately. During the private meeting, Individual B reported that during the Florida trip in October 2014, after she left the hot tub, the Respondent invited Individual B to the Respondent's hotel room. Individual B claimed that while in the hotel room, the Respondent grabbed her breast, buttocks and crotch area and attempted to force her to have sexual relations with him.

59. During the meeting, Ms. [redacted] asked Individual B why she waited until May 23, 2016 to express her concerns regarding the Florida trip. Individual B responded, "It's my word versus his. I'm tired of going to court. I just had to go to court for the custody of my son and I'm tired." (Resp. Ex. 37, p. 00457).

60. Individual B did not disclose these accusations to any human resources staff, concerning any inappropriate behavior from the Respondent, subsequent to the Florida trip, until May 23, 2016.

61. During the Florida trip, Individual B did not report any inappropriate behavior on the part of the Respondent towards her, to any human resources personnel at CDC, including [redacted].

62. On June 4, 2018, approximately four years after the Florida trip, Individual B filed a police report with the Montgomery County Maryland Police Department (MCPD) regarding the incident in Florida that occurred in the Summer of 2014. An MCPD police officer interviewed Individual B regarding her allegations against the Respondent.

63. After Individual B was terminated, she filed a complaint with the Equal Employment Opportunity Commission (EEOC) concerning [redacted] and Individual B's alleged inappropriate treatment by the Respondent.

64. Individual B told the MCPD the EEOC "complaint was investigated" and the EEOC determined "nothing wrong had occurred." (Resp. 80, p. 00760).

65. Individual B complained to the Board that approximately two months after the work-related trip to Florida in 2014, Individual B reported to her human resources office that the Respondent invited her to his hotel room and accosted her in a sexual manner.

Individual C

66. Individual C has a medical condition that caused her to experience irregular bowel movements, loss of appetite, weight loss and severe back pain. As a result of her symptoms, Individual C made an appointment with a Physician's Assistant at [redacted] for March 9, 2017.

67. Prior to the appointment, the Physician's Assistant left the office and could not perform the examination. The Respondent agreed to conduct the examination instead of the Physician's Assistant.

68. On March 9, 2017, the Respondent examined Individual C at the [redacted] facility in Washington, D.C. During the examination, there were three persons in the examination room: the Respondent, Individual C and [redacted], a student in medical school.

69. During the exam, Individual C experienced pain in her rectum.

70. On March 9, 2017, Individual C sent correspondence to [redacted],

Practice Manager at [redacted], expressing complaints regarding the Respondent's conduct and performance during her examination. Individual C expressed her belief that the Respondent was, "unprofessional, condescending and aggressive." She further expressed that during the examination, "it seemed as though he was cupping my left breast" (Resp. Ex. 45, p. 00483).

71. In the correspondence to Ms. [redacted], Individual C wrote concerning the Respondent, "the doctor then proceeded to, in my opinion, aggressively unzip and unbutton my pants- he did not tell me what he was going to do and did not ask for my assistance or allow me to undo my pants when he struggled with the task." (Resp. Ex. 45, p. 00483).

72. On or about March 24, 2017, Individual C filed a complaint with the Washington, D.C. Department of Health regarding the Respondent's conduct while performing her examination on March 9, 2017.

73. CDC staff informed the Respondent of Individual C's complaint.

74. On March 11, 2017, the Respondent sent correspondence to Individual C. Although the Respondent disagreed with Individual C's complaint, he apologized for her "unpleasant experience." Additionally, the Respondent did not recall whether he touched Individual C's breast while listening to her heart but stated that he "did not cup it." He also stated that he informed Individual C that he was going to do a rectal examination. (Resp. Ex. 45, p. 00486).

75. On May 4, 2017, Ms. [redacted] sent a letter to the Washington, D.C. Department of Health, informing them that "at all times during the examination, I was present in the room with [the Respondent] and the patient, and had an opportunity to observe and hear what was happening." (Resp. Ex. 47, p. 00505).

76. Ms. [redacted] stated in her letter to the Washington, D.C. Department of Health, that during the rectal examination, the patient did not appear to have any pain or discomfort. I also have no recollection of her making any statement whatsoever that she was

unwilling to proceed with the examination, or having shown any signs that [the Respondent] was hurting her during the examination" (Resp. Ex. 47, p. 00505).

77. When examining Individual C, the Respondent explained to Individual C that he needed to feel her abdomen. Individual C opened up her pants so that the Respondent could conduct the examination. Individual C pulled down her pants and undergarments so that the examination could take place, and she was covered by a drape. The Respondent did not cup Individual C's breasts.

78. When the Respondent performed the rectal examination, he explained to Individual C what he was doing. During the rectal examination, Individual C did not express that she was experiencing any pain or discomfort.

79. The Washington, D.C. Department of Health investigated Individual C's complaint concerning her examination on March 9, 2017.

80. On November 7, 2017, the Washington, D.C. Department of Health sent written correspondence to the Respondent informing him that it "did not find that initiation of formal disciplinary action was warranted" regarding the matter. (Resp. Ex. 310, p. 01682).

81. The Washington, D.C. Department of Health expressed concerns regarding the Respondent's "communication with patients and has chosen to resolve the matter by issuing a confidential letter of concern" to the Respondent. (Resp. Ex. 310, p 01682).

Individual D

82. Individual D is diagnosed with Crohn's disease and received treatment from the Respondent on March 1, 2006 for the condition.

83. Individual D received treatment from the Respondent in the Chevy Chase office of [redacted].

84. On September 27, 2006, Individual D received treatment from the Respondent in the

Washington, D.C. office of [redacted]. At the examination, Individual D's rectum was "extremely tender." (Resp. Ex. 126).

85. Individual D experienced pain and discomfort during his exam on September 27, 2006 as a result of soreness and tenderness which was present prior to the examination.

86. On October 6, 2006, October 20, 2006, and November 6, 2006, Individual D received treatment from the Respondent in the Washington, D.C. office of [redacted].

87. On or about May 18, 2018, Individual D filed a complaint with the Board regarding the Respondent's conduct while performing the examination.

88. On November 6, 2006, Individual D received treatment from the Respondent in the Washington, D.C. office of [redacted].

89. Individual D did not file a complaint with the Board prior to May 18, 2018.

Individual E

90. Individual E worked as a Physician's Assistant at [redacted] from July 2016 through December 2018.

91. Individual E had a good and cordial work relationship with the Respondent.

92. While at work on March 7, 2017, Individual E began experiencing symptoms of vertigo. As a result, the Office Manager, [redacted] requested the Respondent examine Individual E.

93. On March 7, 2017, the Respondent examined Individual E at the [redacted] facility in Washington, D.C. The examination lasted for approximately three to five minutes. During the examination, Individual E was very nauseous and experiencing discomfort, not caused by the Respondent. Individual E and the Respondent were the only persons present when the examination took place.

94. The examination room Individual E was examined in does not have windows.

95. Because Individual E's eyes were sensitive to light, the Exam was conducted with the lights off. Ambient light entered the room from under the closed door.

96. On March 10, 2017, the Respondent sent an email to Individual E stating, "Hope you are getting better." (Resp. Ex. 320).

97. On March 10, 2017, Individual E sent an email reply to the Respondent, stating, "Thank you. Am not so dizzy today, just very tired. Koszonom!!" (Resp. Ex. 320).

98. The word "koszonom" means thank you in Hungarian. The Respondent speaks fluent English, but his primary language is Hungarian.

99. Individual E does not speak Hungarian. She looked up how to say thank you in Hungarian on the internet.

100. Approximately one week after the March 7, 2017 examination, Individual E spoke with Ms. [redacted] and told her she was upset as a result of the examination. Specifically, Individual E said that she was upset because the Respondent unzipped her dress and touched her breast when auscultating her heart (listening to the heart with a stethoscope). Individual E requested that Ms. [redacted] take no action regarding what she shared with her.

101. In August 2017, Individual E had an MRI unrelated to the March 7, 2017 examination. Individual E requested that the Respondent review the results of the MRI with her, because she had a "cordial" relationship with the Respondent, and she was afraid to review the results on her own. (Transcript p. 470, lines 1 through 3).

102. The day after the MRI review, Individual E sent the Respondent a thank you note. The note states, "Dr. Hardi, thank you ever so much for helping me with my MRI results twice. It was very kind of you to do that for me. I hear you like pistachios. Enjoy. Sincerely, [redacted]." (Resp. Ex. 319).

103. Individual E did not file a complaint with the Board regarding the Respondent's actions during the March 7, 2017 examination, but she complained to Gretchen Westphal on October 4, 2018, when being interviewed by the Board regarding the investigation concerning Individual A, and stated that the Respondent touched her nipple when auscultating her heart.

Individual F

104. In February 2015, the Respondent conducted an examination of Individual F, as a result of a potential gastrointestinal (GI) bleed. The Respondent examined Individual F after an endoscopic medical procedure.

105. At the time of the examination, the Respondent could not find Individual F's medical chart and as a result, requested that a nurse retrieve it.

106. While waiting for the chart, the Respondent asked Individual F various questions regarding her health and her symptoms.

107. During the examination, Individual F inquired about where her GI bleed was coming from.

108. During the medical examination, the Respondent's medical chart was unable to be located and as a result, the Respondent concluded the examination.

109. When the examination concluded, the Respondent left the room and Individual F put her clothes on including her winter overcoat.

110. When Individual F left the examination room she was walking down the hallway and the Respondent called out to her and informed her that her medical chart was found.

111. While the Respondent was holding the chart, Individual F said, "Show me where the bleed was?" (Transcript p. 785, line 16).

112. The Respondent placed his hand on Individual F's left breast, the source of the bleed, according to the Respondent.

113. No other persons were present in the hallway when the conversation between Individual F and the Respondent took place.

DISCUSSION

The Governing Law

The Board may reprimand any licensee, impose probation, or suspend a license for any violation of section 14-404(a) of the Health Occupations Article of the Annotated Code of Maryland. The Board charged the Respondent with violating the following sub-sections of the Medical Practice Act:

> **§ 14-404. Denials, reprimands, probations, suspensions, and revocations – Grounds.**
>
> (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) (Supp. 2019).

Section 1-212 of the Health Occupations Article of the Maryland Code states:

> (a) Each health occupations board authorized to issue a license or certificate under this article shall adopt regulations that:
> (1) Prohibit sexual misconduct; and
> (2) Provide for the discipline of a licensee or certificate holder found to be guilty of sexual misconduct.
> (b) For the purposes of the regulations adopted in accordance with subsection (a) of this section, "sexual misconduct" shall be construed to include, at a minimum, behavior where a health care provider:
> (1) Has engaged in sexual behavior with a client or patient in the context of a professional evaluation, treatment, procedure, or other service to the client or patient, regardless of the setting in which professional service is provided;
> (2) Has engaged in sexual behavior with a client or patient under the pretense of diagnostic or therapeutic intent or benefit; or

(3) Has engaged in any sexual behavior that would be considered unethical or unprofessional according to the code of ethics, professional standards of conduct, or regulations of the appropriate health occupations board under this article.

(c) Subject to the provisions of the law governing contested cases, if an applicant, licensee, or certificate holder violates a regulation adopted under subsection (a) of this section a board may:

....

(2) Reprimand the licensee or certificate holder;
(3) Place the licensee or certificate holder on probation; or
(4) Suspend or revoke the license or certificate.

Md. Code Ann., Health Occ. § 1-212(a), (b) and (c) (Supp. 2019).

In addition, the Board charged the Respondent with violating the provisions of COMAR 10.32.17, which existed at the relevant time, as follows:

.01 Scope.

This chapter prohibits sexual misconduct against patients or key third parties by individuals licensed or certified under Health Occupations Article, Titles 14 and 15, Annotated Code of Maryland.

.02 Definitions.

B Terms Defined

(2) Sexual Impropriety.

(a) "Sexual impropriety" means behavior, gestures, or expressions that are seductive, sexually suggestive, or sexually demeaning to a patient or a key third party regardless of whether the sexual impropriety occurs inside or outside of a professional setting.

(b) "Sexual impropriety" includes, but is not limited to:

(i) Failure to provide privacy for disrobing;
(ii) Performing a pelvic or rectal examination without the use of gloves;
(iii) Using the health care practitioner-patient relationship to initiate or solicit a dating, romantic, or sexual relationship; and
(iv) Initiation by the health care practitioner of conversation regarding the health care practitioner's sexual problems, sexual likes or dislikes, or fantasies.

(3) "Sexual misconduct" means a health care practitioner's behavior toward a patient, former patient, or key third party, which includes:

(a) Sexual impropriety;
(b) Sexual violation; or
(c) Engaging in a dating, romantic, or sexual relationship which violates the code of ethics of the American Medical Association, American Osteopathic

Association, American Psychiatric Association, or other standard recognized professional code of ethics of the health care practitioner's discipline or specialty.

(4) Sexual Violation.

(a) "Sexual violation" means health care practitioner-patient or key third party sex, whether or not initiated by the patient or key third party, and engaging in any conduct with a patient or key third party that is sexual or may be reasonably interpreted as sexual, regardless of whether the sexual violation occurs inside or outside of a professional setting.

(b) "Sexual violation" includes, but is not limited to:

(i) Sexual intercourse, genital to genital contact;

(ii) Oral to genital contact;

(iii) Oral to anal contact or genital to anal contact;

(iv) Kissing in a romantic or sexual manner;

(v) Touching the patient's breasts, genitals, or any sexualized body part;

(vi) Actively causing the patient or key third party to touch the health care practitioner's breasts, genitals, or any sexualized body part;

(vii) Encouraging the patient to masturbate in the presence of the health care practitioner or masturbation by the health care practitioner while the patient is present;

(viii) Offering to provide practice-related services, such as drugs, in exchange for sexual favors; and

(ix) Intentionally exposing the health care practitioner's breasts, genitals, or any sexualized body part.

.03 Sexual Misconduct.

A. Individuals licensed or certified under Health Occupations Article, Titles 14 and 15, Annotated Code of Maryland, may not engage in sexual misconduct.

B. Health Occupations Article, §§ 14-404(a)(3) and 15-314(3), Annotated Code of Maryland, includes, but is not limited to, sexual misconduct.

While the Act fails to provide any standard for or definition of the phrase "unprofessional conduct," the Maryland Court of Appeals reasonably defined the term to include conduct that breaches rules or ethical codes of professional conduct or conduct unbecoming to a member in good standing in the profession. *Finucan v. Maryland Bd. of Physicians Quality Assurance*, 380 Md. 577, 593, *cert. denied*, 543 U.S. 862 (2004).

As the moving party, the State has the burden to prove the Charges against the Respondent. Md. Code Ann., Health Occ. § 14-405(b)(2) (2009); Md. Code Ann., State Gov't §

10-217 (2014). The standard of proof is by a preponderance of the evidence. *Md. Board of Physicians v. Elliott,* 170 Md. App. 369, 433-34 (2006), *cert. denied* 396 Md. 12 (2006). The State must prove that the acts described in the Charges are "more likely so than not." MPJI-Cv 1:7(a).

Jurisdiction and Peer Review: Individuals B, C, D and E

With regard to jurisdiction and peer review issues, on August 6, 2019, I issued a written ruling on the Respondents Motion to Dismiss or in the Alternative, for Summary Decision, as to Individuals B, C, D and E. I ruled that the allegations concerning Individual B and all Individuals examined by the Respondent (C, D and E) outside of the State cannot be dismissed as the Board has the jurisdiction to prosecute the Charges against the Respondent. As I have already issued a ruling on the Board's power and obligation to investigate and discipline licensed Maryland physicians regardless of where the conduct occurred, jurisdiction is not addressed in this decision. Additionally, the Respondent argued the charges against him arising from the allegations of Individuals C, D, and E should be dismissed because the Board did not conduct peer reviews. I ruled that the Respondent is not charged with violating sections 14-404(a)(22) (failing to meet appropriate standards for delivery of medical and surgical care in an outpatient facility as determined by peer review) or 14-404(a)(40) (failing to keep adequate medical records). Peer review is statutorily required for charges arising under section 14-404(a)(22) and 14-404(40). The Board was within its rights to determine the charges against the Respondent. Consequently, I shall not address the peer review arguments pertaining to Individuals C, D, and E as I have already ruled on that matter.

Analysis

Touching Similarities

In this case, it should be noted that the Respondent was alleged to have touched the breasts of at least three patients (Individual C, E and F) in an unprofessional, immoral or sexual manner. It is also undisputed that the Respondent liked to engage in displays of affection in the workplace. Several witnesses who worked with the Respondent either liked the displays of affection or promptly told the Respondent they did not like it. The Respondent offered testimony and letters from dozens of patients who think he is both an outstanding doctor and human being, and never did anything that was sexually inappropriate, offensive, illegal or immoral. The fact that three women have come forward out of the hundreds of patients the Respondent has examined and treated similarly that may have involved inadvertent touching of a breast does not automatically mean the Respondent committed the behavior he was accused of. Similarly, the fact that a considerable number of patients came forward on the Respondent's behalf to express their opinion that he is outstanding, does not mean he could not have done what he was accused of doing in this case. For these reasons, I evaluated the charges arising from the Respondent's actions with each Individual on the evidence received including testimony and all relevant exhibits as it pertained to each Individual.

After considering all of the evidence presented in light of the applicable legal authority, I conclude that the State has met its burden of proof with regard to Individual A. It demonstrated that the Respondent is subject to sanction under section 14-404(a)(3)(i) and (ii) of the Act, because he was guilty of sexual misconduct, immoral and unprofessional conduct in the practice of medicine. That immoral and unprofessional conduct involved his engaging in "sexual impropriety" as defined by COMAR 10.32.17.02B(3)(a) and (b) as a result of engaging in a consensual sexual relationship with a then current patient. The evidence that the Respondent

provided in his defense, including his own testimony, does not refute or even mitigate the seriousness of the charges brought against him by the Board with regard to Individual A.

For reasons fully explained below, I conclude that the State has not met its burden of proof with regard to Individuals B, C, D, E and F.

Below, I address the Respondent's conduct vis-à-vis each Individual as it relates to the relevant provisions of law. After I conclude the discussions, I will turn to the sanction that I believe the Board should adopt for the violations involving Individual A.

Individual A

It is undisputed that the Respondent and Individual A met approximately twenty five years ago when Individual A worked at a hospital where the Respondent was employed as a physician. It is also undisputed that while married, the Respondent began a sexual relationship with Individual A. What is disputed is whether the sexual relationship occurred while the Respondent was treating Individual A as a patient. After a careful review of all of the evidence, I find that during the sexual relationship, the Respondent was treating Individual A as a patient.

What prompted the Board's charges against the Respondent, was the letter he sent to the Board through his legal representative disclosing that he had a "consensual intimate sexual relationship with the practice manager [Individual A] of the [redacted] division of [redacted], who also received treatment at that division." (State Ex. G3).

During the hearing, the Respondent indicated that he was not treating Individual A while she was involved in a sexual relationship with him from February 2016 through June 2017. Individual A testified that she was having a sexual relationship with the Respondent during this time period, while he was treating her medically. I found Individual A credible and the

Respondent not credible for the following reasons. The Respondent testified as follows:

> Q. Aside from the Braintree research project, had you provided medical services to [Individual A] in the last five years?
>
> **A. No, I have not.**
>
> Q. And what was the Braintree Project?
>
> **A. It was a clinical trial trying to show that a new type of colonoscopy preparation is not inferior to the** (inaudible) method.
>
> Q. And what was [Individual A's] role in that Braintree study?
>
> **A. She was one of the subjects in the trial.** (Transcript p. 838).

This exchange is particularly noteworthy because it is a clear attempt by the Respondent to minimize or underplay his role in providing treatment for Individual A during the study. As a subject of the clinical trial, the record is very clear that the Respondent was treating Individual A. For example, patient records for Individual A indicate that on July 21, 2016, the Respondent ordered an "MRI Abdomen/Pelvis with and w/o contrast" be performed for Individual A. Individual A's name is indicated in plain English on the line that reads "Patient Name." The physician's name that is listed as the one who gave the order, is the Respondent. (State Ex. A2, p. 5). Moreover, the lab results from July 23, 2016, 5:37 a.m. for Individual A, indicate that a specimen was collected on July 22, 2016. In the lab result report, Individual A's name appears on the line that states "Patient Name." The Respondent is identified as the "Ordering Physician" and the document was electronically signed by the Respondent on July 25, 2016 (Bd. Ex. A2, p. 58).

When Ms. Westphal, the Board Investigator, interviewed Individual A, she was unambiguous in her assertion that she was having a sexual relationship with the Respondent during the time period that the Respondent was treating her and these documents confirm that,

making her testimony credible. The Respondent attempted to minimize the importance of these documents arguing that all he did was open the documents on his computer because they were in his task folder. I find that he opened the documents because he was the physician at the practice who ordered the lab work as part of his treatment of Individual A. I further do not believe the Respondent for the following reason. A review of a radiologist report from August 2, 2016, indicates the Respondent as the requesting physician for the contrast scans. The document lists Individual A's symptoms as "malignant neoplasm of cervix, uteri, unspecified." On the document section for sign off, it indicates, "signed by Robert Hardi on 8/11/2016 11:37 a.m." (State Ex. A2, p. 54).

The Respondent's name appears on other documents in Individual A's medical record for the time period that he was treating her while they were having a sexual relationship. However, I only gave weight to those documents that could be authenticated. For example, a [redacted] patient record for Individual A from July 21, 2016, identifies the Respondent as the physician provider for Individual A. This record was created on July 21, 2016 at 11:43 a.m. The record references a colonoscopy that occurred on September 28, 2017. Someone altered the July 21, 2016 patient record to include a September 28, 2017 medical procedure. This is not a typographical error. The record was deliberately altered to include the September 28, 2017 medical procedure which could not have been known when the note was drafted on July 21, 2016. The July 21, 2016 medical record has a space for an electronic signature. The signature line is blank and un signed. It is undisputed that many people at [redacted], including Individual A, had access to Individual A's electronic medical record and could have altered these documents. I do not know who altered the documents. Nevertheless, the records that can be authenticated indicate that the Respondent ordered and reviewed lab work for Individual A regarding symptoms she experienced because he was treating her for her medical condition that caused her to participate in the study. Any other

explanation is simply not plausible given the unambiguous wording of the documents and the Respondent's actions.

Ms. Westphal's Investigative Report is accurate when it states, "the Respondent self-reported to the Board that he engaged in a personal/sexual relationship with his patient/practice administrator of [redacted], [Individual A]. In light of the evidence examined-above, I reasonably conclude that the Respondent's self-disclosure letter, though written in a passive and awkward manner, confirms the assertion that he was having a sexual relationship not simply with a patient of the practice, but his patient. Despite the Respondent's long-term familiarity with Individual A, as a medical professional, the Respondent should have held himself to a higher standard of behavior, and refrained from engaging in a sexual relationship with her while he was treating her. The Respondent's conduct degraded the atmosphere of professionalism in the office as his behavior contributed to gossip that ensued from persons working at the practice who became aware of his sexual relationship with Individual A. Moreover, the Respondent's testimony, replete with denial, further eroded his dignity as he could provide no credible explanation for why he would order tests for Individual A if he wasn't treating her. Sexual liaisons pose real risk of patient harm from a doctor's exploitation of a patient's vulnerability. The Respondent's conduct constituted immoral and unprofessional misconduct in the practice of medicine, in violation of Section 14-404(a)(3)(i) and (ii) of the Health Occupations Article and sexual misconduct, as prohibited by COMAR 10.32.17.01 and .02B(3)(a) and (b).

Individual B

Individual B was employed with [redacted] as a research nurse coordinator from approximately 2014 through May 2016. Individual B claims that on a work-related trip to Florida in 2014, the Respondent sexually assaulted her. I assessed the Respondent's and

Individual B's credibility or lack thereof, from the content of their testimonies, testimonies of relevant witnesses, and relevant exhibits.

Prior to the alleged incident, Individual B, the Respondent and [redacted], the manager of her [redacted] division, were relaxing in the hotel hot tub. Individual B does not allege that the Respondent did anything to her while in the hot tub. Individual B testified that upon leaving the hot tub, later in the evening, the Respondent pulled her into his room and sexually assaulted her. Specifically, Individual B testified as follows:

> **I remember him having like a robe on, a hotel robe on or white robe. And next thing you know, I mean, he pulled me in the room and he was -- excuse me he was trying to kiss me and we were like wrestling. Like I'm wrestling and, you know, with him, you know, thinking oh my god this is crazy. And we're scrambling in that room. And I'm thinking I can't, I gotta get out of here. And I remember in all that scrambling, I remember thinking I can't -- I just can't get to that bed. I just -- I cannot end up on that bed. And I remember seeing like his ring his wedding band was on the side table next to the bed by his wallet and I was thinking to myself he knows exactly what he's doing. He's taking -- he has taken his band off. And I remember catching a glimpse of myself in the mirror that's on the wall and, you know, like right when you come into the hotel room, and seeing myself like -- it's almost like an out of body experience. You're asking yourself like is this -- this is crazy. And thankfully and I mean he's touching me and, you know, hands all over my body and trying to get under my dress and thankfully because I had that swimsuit on, he couldn't, you know, get to my clothes. Get to me I should say. But yeah hand -- swimsuit was -- I mean sorry his hands were, you know, in parts of swimsuit and under my dress. And I remember kicking off my shoes and that was the only way I was like able to get enough leverage to like, you know, we ended up being all in a tussle.**
>
> Q. And when he began to pull you in the room, what -- what did you think was happening at that point? What was going through your mind?
>
> **A. Like, I didn't initially think rape, but I just thought, yeah I thought is this man like wanting to kiss me, like wanting to have sex with me. That's the first thing I thought, you know, in my mind I didn't equate it to rape. I**

just thought yeah I don't want you like this, like you know. I don't even know how to describe it but yeah it's.

Q: So and you described that Dr. Hardi's hands were on our body?
A: Yes.

Q: What parts of your body was he touching?
A: I mean everything because it was like my butt, my breasts, my arms, my head, like the back of my head. You know at some point he like put his hand on my vagina, you know.
Q: Did he try to get under your bathing suit?
A: Yeah. (Transcript p. 14-16).

Individual B testified that she was able to flee from the Respondent and that no sexual activity occurred.

The Respondent testified that he did not do any of the things Individual B alleged. He was specific in his denial and said he "categorically" denied all of her allegations including any allegations that he made explicit sexual language about her body and things he would like to do to her body. I do not find Individual B credible and I find the Respondent's denial of engaging in sexual misconduct including assaulting Individual B to be credible for the following reasons. It is undisputed that Ms. [redacted] was not present when the altercation is alleged to have occurred, nor any other person. Consequently, the fact that there are no eye-witnesses to the alleged incident by no means necessarily defeats Individual B's credibility, since sexual assaults or misconduct often occur in secret. Additionally, the fact that the Respondent may have a reputation for being very touchy/feely in the work environment does not necessarily mean that he sexually assaulted or engaged in misconduct toward Individual B. As there is conflicting evidence, I have carefully reviewed and determined which evidence in this case is most reliable—and thus persuasive—in helping me determine what actually happened regarding this allegation.

Individual B was adamant that approximately two months after she returned from Florida, she told [redacted] from [redacted] human resources, her version of what she

believes the Respondent did to her in Florida. There is no independent evidence to corroborate Individual B's assertion that she reported the allegations of sexual misconduct. Moreover, on May 23, 2016, Individual B was terminated from [redacted] for documented poor work performance. Ms. [redacted] and Ms. [redacted] met with Individual B for a termination meeting on May 23, 2016. Ms. [redacted] memorialized her conversation with Individual B in writing. Specifically, on May 23, 2016, Ms. [redacted], wrote down her recollections from the May 23, 2016 meeting. (Resp. Ex. 37). The memo drafted by Ms. [redacted] indicates that during the termination meeting, Individual B requested to meet with Ms. [redacted] privately. During the private meeting, Individual B reported her accusations against the Respondent. During the meeting, Ms. [redacted] asked Individual B why she waited until May 23, 2016 to express her concerns regarding the Florida trip. Individual B responded, "It's my word versus his. I'm tired of going to court. I just had to go to court for the custody of my son and I'm tired." (Resp. Ex. 37, p. 00457).

Individual B did not disclose her accusations concerning any inappropriate behavior from the Respondent to any human resources staff, subsequent to the Florida trip, until May 23, 2016. When Gretchen Westphal interviewed Ms. [redacted] on June 11, 2018, Ms. [redacted] informed Ms. Westphal that Individual B did not disclose any complaints regarding the Florida trip until the day of her termination. Individual B testified that she does not believe Ms. [redacted] is accurate. However, when cross examined, Individual B acknowledged that she could provide no reason for her belief that Ms. [redacted] would lie about Individual B reporting Respondent's misconduct earlier than May 23, 2016. Additionally, during the Florida trip, Individual B did not report any inappropriate behavior on the part of the Respondent towards her, to any human resources personnel at [redacted], including her supervisor Ms. [redacted] [redacted], who attended the same conference.

Individual B testified that approximately two weeks after the Florida trip she told her co-worker of the accusations against the Respondent. Ms. testified that to the best of her recollection, the only thing she remembers Individual B telling her was "Dr. Hardi came on to me." Ms. was very specific and acknowledged that Individual B did not report any type of behavior on the part of the Respondent that was criminally sexual or assaultive. Individual B's description to the Board and in her testimony was very graphic and beyond a mere suggestion of someone expressing an amorous interest in the form of "coming on to me." The behavior described was extremely violent and sexually assaultive. I must emphasize that a delay in reporting sexual assault is not uncommon and may happen for many reasons. However, in this case, there is simply no evidence to corroborate the assertion that Individual B made a disclosure to any human being after the alleged sexual assault. According to the only witness with the Respondent and Individual B on the Florida trip, Ms. , Individual B came to breakfast the day after the alleged incident and did not display any signs that she was troubled about anything. Lastly, Individual B testified that after the alleged incident with the Respondent, she was so overcome with grief and anguish that she immediately called her boyfriend. However, when questioned at the hearing, she was unable to remember her boyfriend's name. It strains credulity that Individual B was extremely distraught, reached out to someone and can remember the details of an alleged assault but does not remember the last name of a boyfriend that she claims she trusted enough to disclose the details of her assault. This further detracts from Individual B's credibility. In assessing Individual B's lack of credibility, I further find that all of the evidence indicates she alleged a sexual assault occurred and only disclosed her allegations on the very same day she was terminated for cause. This is a potential motive to fabricate the sexual assault allegations. Under the totality of the evidence, there is simply no corroborating, independent evidence to support Individual B's assertions.

With regard to the Respondent, it is clear that he also has a motive to lie about what happened following the hot tub encounter. He would like to continue practicing medicine and certainly avoid criminal prosecution. However, there is no evidence that corroborates Individual B's assertions and no evidence that the Respondent is lying in his steadfast denial of assaulting Individual B or his denial regarding any other sexual misconduct towards her. The Respondent acknowledged that he complements women on their apparel and may physically touch someone in a non-sexual way to show affection, but only does so with people who would reciprocate. Indeed, the record is replete with testimony and stories from some women who enjoyed the compliments and consensual displays of physical affection toward them. Nevertheless, the evidence indicates the Respondent knows the difference between a warm physical embrace and offering flattering words and flat out sexual assault and sexual violence. Moreover, there is no evidence that the Respondent was verbally inappropriate towards Individual B. Individual B testified that the Respondent would say things like "move your beautiful brown butt out of the way." Despite this assertion, there is nothing to corroborate it. There is however Individual B's assertion that upon termination, she filed a complaint with the EEOC. She acknowledged that the EEOC did not find [redacted] staff, including the Respondent, did anything unlawful towards her when she was employed with [redacted]. This is another reason why I find the Respondent more credible regarding his denial of wrongdoing than Individual B's allegations.

Confining my analysis solely to the Respondent's interactions with Individual B, there is no corroborating evidence of any behavior manifested by him that would support a finding of immoral and unprofessional misconduct in the practice of medicine, in violation of Section 14-404(a)(3)(i) and (ii) of the Health Occupations Article and sexual misconduct, as prohibited by COMAR 10.32.17.01 and .02B.

Individual C

On March 9, 2017, the Respondent examined Individual C at the [redacted] facility in Washington, D.C. [redacted], a medical student observed the examination. The Respondent adamantly testified that he did not do anything inappropriate toward Individual C during or after the examination.

Individual C complained to the Board that while the Respondent examined her and auscultated her heart, it seemed as though the Respondent cupped her left breast. She also complained that the Respondent aggressively unzipped and unbuttoned her pants and did not explain what he was doing during the examination. Individual C is still very angry with the Respondent, believes he spoke to her condescendingly, and believes he unjustifiably caused her to experience great pain when he examined her rectum. The Respondent denies intentionally causing any pain and does not believe he used the auscultation of Individual C's heart to touch her breast inappropriately. My impression of Individual C is that she experienced pain during her examination. However, I cannot find that the Respondent intentionally caused pain or did anything that was sexually inappropriate for the following reasons.

Individual C filed a complaint with the Washington, D.C. Board of Health regarding her examination conducted by the Respondent. The Washington, D.C. Board of Health investigated and found no wrong doing on Respondent's part. This finding is but one piece in my analysis of whether the Respondent violated the law when examining Individual C. What is even more persuasive is that the only eye witness to the examination other than the Respondent and Individual C, was a medical student who, less than two months after the examination, wrote a detailed letter to the Washington, D.C. Board of Health concerning her observations. Ms. [redacted] did not testify at the hearing on the merits and her letter is hearsay. The Administrative Procedure Act (APA) and the OAH Rules of Procedure discuss hearsay evidence. The APA

explicitly provides that "[e]vidence may not be excluded solely on the basis that it is hearsay." Md. Code Ann., State Gov't § 1-213(c)(3) (2014).

The OAH Rules of Procedure agree:

> A. Evidence shall be admitted in accordance with State Government Article, §10-213, Annotated Code of Maryland, and other pertinent law.
>
> B. The judge may admit evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs, and give probative effect to that evidence.
>
> C. Evidence may not be excluded solely on the basis that it is hearsay.

COMAR 28.02.01.21.

It is well settled that "if such evidence is credible and sufficiently probative, hearsay may be the sole basis for the decision of the administrative body." *Redding v. Board of County Com'rs for Prince George's County*, 263 Md. 94, 110-111 (1971), *cert. denied*, 406 U.S. 923 (1972); *see Kade v. Charles H. Hickey Sch.*, 80 Md. App. 721, 725 (1989).

Ms. [REDACTED]'s letter is reliable as she was present during the examination at all times. The State could offer no credible reason as to why Ms. [REDACTED] would lie to support the Respondent's assertions that he did nothing wrong, and certainly presented no evidence for why I should not believe Ms. [REDACTED]. Ms. [REDACTED] noted the Respondent informed Individual C regarding what he was doing at every stage of the examination. Ms. [REDACTED] indicated that Individual C appeared to understand all of the Respondent's directives and that Individual C pulled down her pants and undergarments so that the Respondent could examine her. Ms. [REDACTED] also stated that she observed the Respondent use the stethoscope and that the Respondent did not place his hands on Individual C's breasts. All of Ms. [REDACTED]'s observations corroborate the Respondent's denial of wrong doing, thereby strengthening his testimony. Further, her observations do not require any expertise beyond what a layperson would understand of what was going on in the examination environment. Lastly, the Respondent described how he

performed an auscultation of the Patient's heart. He indicated there could be some inadvertent touching of a breast, but not intentional.

I conclude from a preponderance of the credible evidence that it is more likely than not that the Respondent did not engage in sexual misconduct or immoral or unprofessional conduct when examining Individual C. I found the Respondent's denial to be credible for the reasons explained above and there is no corroborating evidence of any behavior manifested by the Respondent that would support a finding of sexual, immoral and unprofessional misconduct in the practice of medicine, in violation of Section 14-404(a)(3)(i) and (ii) of the Health Occupations Article and sexual misconduct, as prohibited by COMAR 10.32.17.01 and .02B.

Individual D

On or about May 18, 2018, the Board received a complaint from Individual D involving an incident that occurred in 2006 when the Respondent performed a rectal examination on him. Individual D testified that the examination was very painful. The Respondent did not have a specific recollection of the examination as it occurred in 2006. A review of the medical records indicate that the examination occurred on September 27, 2006. The medical records also indicate that at the time of the examination on September 27, 2006, Individual D experienced soreness and tenderness of his rectum which was present before the examination took place.

Individual D claims that during the examination, he experienced great pain and requested the Respondent cease the examination but that the Respondent would not stop examining Individual D's anus with his finger. The Respondent also claims that the experience with the Respondent was so traumatic that he did not go back for any more visits with the Respondent. However, the medical records indicate the Respondent examined Individual D multiple times after the September 27, 2006 examination.

Individual D claims he filed a complaint with the Board in 2006 complaining of the Respondent's actions. There is nothing in the evidentiary record to support this assertion. Moreover, the Board Investigator Gretchen Westphal, testified that the Board does not lose complaints. She further testified that the Board's database does not indicate Individual D filed a complaint prior to May 18, 2018. For this reason, the charges regarding Individual D shall be dismissed as the Respondent requests. With regard to time limitations, the law is as follows:

§ 1-603. Charges

> (a) Time limitation. -- Except as provided in subsection (b) of this section, a health occupations board may not bring charges against a licensee or certificate holder based solely on events contained in a complaint the board receives more than 6 years after:
>
> (1) The day the complainant actually discovered the facts that form the basis of the complaint; or
>
> (2) The day when a reasonable person exercising due diligence should have discovered the facts that form the basis of the complaint.

Md. Code Ann., Health Occ. § 1-603(a) (Supp. 2019).

The parties acknowledge that Md. Code Ann., Health Occ. § 1-603 was enacted in 2010. I agree with the Respondent that there is a time-bar for the following reason. The annotations to section 1-603 indicate that it does not apply to any complaint made before the effective date of the Act. The annotation to Health Occ. section 1-603, at Section 5, chs. 533 and 534, Acts 2010, specifically states "except as otherwise provided by law, this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any complaint made to a health occupations board on or before the effective date of this act." In this case, the Board did not receive a complaint concerning the Respondent from Individual D before the relevant law's effective date in 2010. There is simply no evidence to support a finding that a complaint was filed in 2006 as alleged by Individual D. As a result, even though the evidence is

such that I do not believe the Respondent harmed Individual D or did anything unlawful, the charges regarding Individual D are dismissed because they are time barred.

Individual E

Individual E worked as a Physician's Assistant at [redacted] from July 2016 through December 2018. Individual E had a good and cordial work relationship with the Respondent. While at work on March 7, 2017, Individual E began experiencing symptoms of vertigo. As a result, the Office Manager, [redacted], requested the Respondent examine Individual E. The Board interviewed Individual E . Individual E complained to the Board that the Respondent put his stethoscope and his hand inside her bra when auscultating her heart. She also claimed that the Respondent zipped her dress back up upon completing the examination. [redacted] testified and confirmed that Individual E seemed upset after the examination.

The Respondent testified that he emergently examined Individual E prior to having to leave to go to the hospital to perform a pre-scheduled procedure for another patient and as a result, he was somewhat rushed. The Respondent testified that he conducted the examination using only the ambient light from under the door because Individual E was experiencing light sensitivity. Consequently, the room was dim as there were no windows. The Respondent also testified that he does not remember who zipped or unzipped the dress and that he conducted the examination in a somewhat rushed fashion and that it lasted for approximately five minutes. He also denies improperly auscultating Individual E's heart in order to touch her breast. I cannot find that the Respondent did anything that was sexually inappropriate or unprofessional for the following reasons.

The only persons present during the examination were Individual E and the Respondent. Individual E testified as follows:

> **Dr. Hardi proceeded to examine me. He asked me what was wrong and I told him I had bad vertigo. And he -- I don't recall all the particulars of the examination, I think he palpated my neck. I had on a dress that unzipped in the front, and he unzipped my dress down to about my pubic area. And he took a stethoscope and I -- may have also taken my lungs, I don't really recall. But he took the stethoscope and put it inside my bra and had his hand on my nipple to listen to my heart. He then took the stethoscope off. I think he might have felt my abdomen and one of us zipped up my dress. I honestly don't recall. I was very sick. Very nauseous. I felt like I was going to vomit. I don't recall who zipped up the dress and he said I would be okay and he left the room. (Transcript p. 445).**

It is very clear from Individual E's testimony that she cannot remember with certainty the specifics of what may have occurred. In her testimony, she uses language such as "I don't recall", "I don't really recall", "I honestly don't recall", "I was very sick" and "I don't recall who zipped up the dress." This is very important in light of the fact that the Respondent denies any wrong doing. It is important to note that Individual E is a subordinate of the Respondent and testified quite credibly that she really didn't want to complain as she did not want to risk any sort of retaliation. I have considered this while reviewing her testimony. However, in light of the fact that it is undisputed that Individual E was extremely uncomfortable because of her symptoms, sensitive to light, and the examination was conducted in a rushed manner, I do not believe anything unlawful occurred and Individual E's memory could be tainted by the symptoms and overwhelming discomfort she experienced. Moreover, I must consider the fact that subsequent to the incident, Individual E sought out the Respondent for additional consultation when she was under no obligation to do so. I conclude from a preponderance of the credible evidence that it is more likely than not that the Respondent did not engage in sexual

misconduct or immoral or unprofessional conduct when examining Individual E. I found the Respondent's denial to be credible for the reasons explained above and there is no corroborating evidence of any behavior manifested by the Respondent toward individual E during the examination in question that would support a finding of sexual, immoral and unprofessional misconduct in the practice of medicine, in violation of Section 14-404(a)(3)(i) and (ii) of the Health Occupations Article and sexual misconduct, as prohibited by COMAR 10.32.17.01 and .02B.

Individual F

In February 2015, the Respondent conducted an examination of Individual F, as a result of a potential GI bleed. The Respondent examined Individual F after an endoscopic medical procedure. Subsequent to the examination, Individual F requested the Respondent show her the source of the bleed. When Individual F made the request, she was standing a few feet from the examination room, in the hallway and no other persons were present. Individual F testified that the Respondent placed his left hand on her left breast. Individual F's testimony is consistent with what she told the Board. For his part, the Respondent testified that he only vaguely remembers Individual F. He testified that he probably touched the breast with his finger but did not do so to feel it.

I find it more likely than not that the Respondent touched the breast with his hand in order to comply with Individual F's request to show her the source of her bleed. It is clear that Individual F was alarmed and shocked by the action. The Respondent indicated that there was no diagram in the medical chart and that is why he touched her body to comply with the request. There were no other persons present and Individual F and the Respondent acknowledge that she was fully clothed and wearing an outer coat as it was winter. It clearly would have been prudent for the Respondent to have called Individual F back into the examination room to comply with

her request. However, given the fact that the Respondent was fully clothed, wearing an outer coat and the conversation took place in a section of the hallway where no others persons were present and the Respondent was complying with the request to show the source of the bleed, I do not find that the Respondent's actions were unprofessional, immoral or sexual in nature. He responded to a request to show a patient the source of a bleed. In context of the query, the Respondent's actions were reasonable given that the examination had just taken place. Had there been a chart with a diagram, the Respondent's actions may have been different.

With regard to peer review concerning the Respondent's actions toward Individual F, the Respondent argued the charges against him arising from Individual F should be dismissed because the Board did not conduct a peer review of his action. The State argues that it did not regard the Respondent's actions as a standard of care issue but viewed the allegation as immoral/and or unprofessional conduct by a licensed physician. In this case, the Respondent is not charged with violating sections 14-404(a)(22) (failing to meet appropriate standards for delivery of medical and surgical care in an outpatient facility as determined by peer review) or 14-404(a)(40) (failing to keep adequate medical records). Peer review is statutorily required for charges arising under section 14-404(a)(22) and 14-404(40). The Board is within its powers to determine the charges against the Respondent and the charges alleged with respect to Individual F did not require peer review. Nevertheless, for the reasons stated-above, the Respondent has not engaged in any behavior toward individual F that would support a finding of sexual, immoral and unprofessional misconduct in the practice of medicine, in violation of Section 14-404(a)(3)(i) and (ii) of the Health Occupations Article and sexual misconduct, as prohibited by COMAR 10.32.17.01 and .02B.

Sanctions

The Board is Maryland's "governmental agency responsible for investigating and disciplining physicians for professional misconduct." *Cornfeld v. Board of Physicians,* 174 Md. App. 456, 481 (2007). "The Board's mission [is] to regulate the use of physician's licenses in Maryland in order to protect and preserve the public health." *Id.* at 481 (internal quotations and citations omitted). The purpose of the Board's disciplinary authority is to protect the public, not to punish physicians. *McDonnell v. Comm. on Med. Disc.,* 301 Md. 426, 436 (1984).

COMAR 10.32.02.10(3)(a) provides that the maximum sanction for a violation of COMAR 10.32.17.02 is revocation. The minimum sanction is a reprimand. Sanctions may also include a fine, which would range from $10,000.00 to $50,000.00.

The Respondent's conduct in engaging in a sexual relationship with a patient he was treating was immoral and unprofessional and constitutes sexual misconduct. It is behavior unbecoming a licensed professional whose principle tenet of practice is to "do no harm." The Respondent has no other disciplinary violations and was cooperative with the investigation. However, not only was the Respondent having sexual relations with a patient he was treating, but that patient was also involved in managing the practice, which contributed to animosity in the work environment amongst subordinates who found out about the relationship. The Respondent enrolled and successfully completed courses regarding workplace ethics, sensitivity training and sexual harassment. The Respondent has been summarily suspended since March 5, 2019. The patient with whom the Respondent was having sexual relations was not harmed. Weighing the mitigating and aggravating factors in COMAR 10.32.02.09B, I recommend that the Board suspend the Respondent's license to practice medicine for a period of one year, retroactive to March 5, 2019, the date the Respondent was summarily suspended. Further, I recommend a fine of $10,000.00. This recommended sanction falls within the guidelines.

PROPOSED CONCLUSIONS OF LAW

Based on the Proposed Findings of Fact and Discussion, I conclude as a matter of law that the Respondent engaged in immoral conduct in the practice of medicine by engaging in a consensual sexual relationship with a patient, Individual A. Md. Code Ann., Health Occ. § 14-404(a)(3)(i) (2014 & Supp. 2019).

I further conclude as a matter of law that the Respondent engaged in unprofessional conduct in the practice of medicine by engaging in a consensual sexual relationship with a patient. Md. Code Ann., Health Occ. § 14-404(a)(3)(ii) (2014).

I further conclude as a matter of law that the Respondent engaged in sexual misconduct in the practice of medicine by engaging in a consensual sexual relationship with a patient he was treating. Md. Code Ann., Health Occ. § 1-212; COMAR 10.32.17.02B(3)(a) and (b); COMAR 10.32.17.03A.

I further conclude that the Board failed to prove that the Respondent violated section 14-404(a)(3)(i), (ii) of the Health Occupations Article of the Annotated Code of Maryland (2014 & Supp. 2019); COMAR 10.32.17.02B(3)(a) and (b); COMAR 10.32.17.03A pertaining to Individuals B, C, D, and E.

I further conclude as a matter of law that a one year suspension of the Respondent's medical license, retroactive to March 5, 2019, the date the Respondent was summarily suspended, is reasonably calculated to protect the public. *Attorney Grievance Comm'n of Md. v. Harris*, 371 Md. 510 (2002); Md. Code Ann., Health Occ. § 14-404(a) (Supp. 2019).

I further conclude that, as a result of my findings, the Board impose a fine of $10,000.00. Md. Code Ann., Health Occ. § 14-404(a) (Supp. 2019).

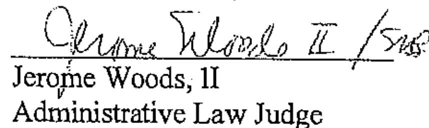
PROPOSED DISPOSITION

I **PROPOSE** that charges filed by the Maryland State Board of Physicians against the Respondent on March 19, 2019 regarding Individual A be **UPHELD** and regarding Individuals B, C, D, E, and F, be **DISMISSED.**

I **PROPOSE** that the Respondent be sanctioned by a one year suspension of his license to practice medicine, retroactive to March 5, 2019; and

I **PROPOSE** that the Respondent be ordered to pay a fine of $10,000.00.

November 12, 2019
Date Decision Mailed



Jerome Woods, II
Administrative Law Judge

JW/cj
#182554

NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party adversely affected by this proposed decision may file written exceptions with the disciplinary panel of the Board of Physicians that delegated the captioned case, and request a hearing on the exceptions. Md. Code Ann., State Gov't § 10-216(a) (Supp. 2019); COMAR 10.32.02.05. Exceptions must be filed within fifteen (15) days of the date of this proposed order. COMAR 10.32.02.05B. 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 (Supp. 2019); COMAR 10.32.02.05C. The Office of Administrative Hearings is not a party to any review process.

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