IN THE MATTER OF	*	**BEFORE THE**
SURENDER K. VASWANI, M.D.	*	**MARYLAND STATE BOARD**
Respondent	*	**OF PHYSICIANS**
License Number D44431	*	**Case Number 2016-0629**

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AMENDED FINAL DECISION AND ORDER

On October 17, 2017, Disciplinary Panel B ("Panel B") of the Maryland State Board of Physicians (the "Board") charged Surender K. Vaswani, M.D. (the "Respondent"), alleging violations of the Maryland Medical Practice Act, Md. Code Ann., Health Occ. §§ 14-101—14-702, specifically with immoral and unprofessional conduct in the practice of medicine, *see* Health Occ. § 14-404(a)(3)(i) and (ii). In addition, Panel B charged the Respondent with violating the Board's regulations pertaining to sexual misconduct. *See* Health Occ. § 1-212; COMAR 10.32.17. The case was forwarded to the Office of Administrative Hearings ("OAH") for an evidentiary hearing. On April 10 and 11, 2018, an administrative law judge ("ALJ") of OAH held the evidentiary hearing.

On June 28, 2018, the ALJ issued a proposed decision. The ALJ concluded that the Respondent was 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 the Respondent engaged in sexual misconduct. The ALJ recommended that the Respondent's license be suspended for three years and that, prior to returning to practice, he complete counseling recommended by the Board.

The Respondent filed exceptions to the ALJ's proposed decision. On September 12, 2018, Board Disciplinary Panel A (the "Panel" or "Panel A") held a hearing on the exceptions. On January 14, 2019, Panel A issued a Final Decision and Order, concluding that the Respondent was

guilty of immoral and unprofessional conduct in the practice of medicine and engaged in sexual misconduct. The Panel revoked the Respondent's license to practice medicine in Maryland.

On February 12, 2019, the Respondent filed a petition for judicial review with the Circuit Court for Howard County. Due to an inaccurate transcription of an answer given by the Respondent at the evidentiary hearing at OAH, the circuit court referred the case back to Panel A, while the circuit court retained jurisdiction, for Panel A to consider the re-transcription of the Respondent's answer at issue and to consider the entire decision in light of the re-transcribed answer. Panel A has done so and has issued this Amended Final Decision and Order. Panel A has also added into the evidentiary record the re-transcription of the answer at issue (New Transcription page 295: 16-18) and the certified audio recording of the evidentiary hearing at OAH. The newly-transcribed answer at issue replaced for consideration by Panel A the original transcription of the Respondent's answer at issue (Original Transcription page 282: 13-14). Panel A did not consider the original transcription of the answer at issue after the circuit court referred this matter back to Panel A.

FINDINGS OF FACT

Panel A finds that the following facts were proven by the preponderance of evidence:

At all times relevant, the Respondent was licensed to practice medicine in the State of Maryland. He has specialized in allergy and immunology, and he has practiced and maintained medical offices in Columbia and Westminster, Maryland, at his solo-practice called the Allergy & Asthma Clinical Center. He has also maintained privileges at three hospitals in Maryland. He was initially licensed to practice medicine in Maryland in 1993.

Patient A

The Respondent began treating Patient A, a female, for allergies in March 2014. Patient A was 14 years old at the time. Patient A was referred to the Respondent with symptoms of asthma, allergic rhinitis,[1] and chest pains. Patient A continued to see the Respondent for allergy shots throughout 2014 and most of 2015.

Typically, when Patient A went to the Respondent's office for allergy shots, either her mother, her father, or both would be with her. Normally, she would be given the allergy shot and then be required to wait in the waiting room for approximately 30 minutes. Then, one of the Respondent's nurses or medical assistants would check Patient A's arm for any reaction to the shot. If there was no reaction, Patient A would go home.

Under the protocols of the practice, if a patient had a reaction to an allergy shot, the Respondent examines the patient to determine whether anaphylaxis, or a severe allergic reaction, is occurring. If a patient might be experiencing anaphylaxis, a medical assistant prepares a shot of epinephrine, which is the appropriate treatment for an anaphylactic reaction.

Typically, on a day when Patient A saw the Respondent for a follow-up appointment, either her mother or father would accompany her to the examination room during the Respondent's examination. For a patient under 18 years old, the Respondent maintained a policy that a parent, or an adult sibling of the patient, be present in the examination room at all times with the patient.

On October 29, 2015, Patient A went to the Respondent's office with her father for her allergy shot. Patient A was 15 years old at this time. Patient A was led back to the shot room and received her shot. Patient A's father remained in the waiting room. After receiving the shot, Patient A returned to the waiting room and stayed there for 30 minutes. The Respondent's staff

[1] The symptoms of rhinitis are a runny nose, nasal congestion, and sinus pressure.

called Patient A back to the shot room to check for any reactions. Patient A's father again remained in the waiting room.

Patient A reported after her shot, on October 29, 2015, that she was experiencing a runny nose. As a result, the Respondent took Patient A into the examination room to assess whether she was having a reaction to her allergy shot. With Patient A standing, with her back to the open door of the examination room, the Respondent reached up Patient A's shirt, pulled up her shirt and her bra, and exposed her breasts. The Respondent then squeezed each of her breasts with one hand, while his other hand was on her back. He separately squeezed each breast. The Respondent then pulled Patient A's bra and shirt back down. He did not explain why he touched her breasts in this manner. His touching of the patient's breasts was intentional. There was no medical justification for his groping of the patient's breasts. The character of his touching of Patient A's breasts was sexual. Patient A felt embarrassed and a little scared. The Respondent did not examine Patient A's ears, nose, or throat. Although he had a stethoscope around his neck, the Respondent did not use the stethoscope. The Respondent also did not palpate Patient A's chest area to assess for musculoskeletal tenderness.

The Respondent apologized to Patient A for his cold hands. He left the examination room to obtain sample nasal spray. He returned, gave the nasal spray to Patient A, and told her that, if the symptoms worsened, she should call his office or go to the emergency room. He then complemented her on her watch.

Patient A then hurried out of the examination room, met her father in the waiting room, and Patient A and her father left the office. Her father observed that she was unusually quick to leave the office and thought her daughter did not feel well. This was the last visit Patient A had with the Respondent. During Patient A's encounter with the Respondent in the examination room

on October 29, 2015, neither Patient's A father, nor any of the Respondent's staff members were in the examination room.

Later that day, Patient A told her parents about her encounter with the Respondent.

Patient A also told a family therapist and a priest. The family therapist reported the incident to the Carroll County Department of Social Services, Child Protective Services ("CPS").

On November 4, 2015, CPS reported the matter to the Carroll County Sheriff's Office. On November 10, 2015, Patient A was interviewed by a Carroll County detective. This interview was video recorded with audio.

On February 12, 2016, the Board received a complaint of the incident from CPS and conducted an investigation.

Patient B

Patient B was a patient of the Respondent's when she was 15 and 16 years old. She saw the Respondent regularly in 2015 and 2016 for allergies, which included hives, dermographism,[2] and allergic rhinitis. Patient B experienced hives on her lower legs and arms. The patient's hives were scattered and generalized.

Patient B's adult sister usually accompanied Patient B in the examination room when the Respondent examined Patient B. On one occasion, in 2016, Patient B's sister left the examination room to speak to her cousin, who was one of the Respondent's medical assistants. This left Patient B alone with the Respondent in the examination room. On this occasion, Patient B was wearing shorts, and, for approximately 30 seconds, the Respondent touched and rubbed patient B's thigh, approximately two to three inches from her vagina, over her shorts. Patient B was scared while

[2] Dermographism is a skin condition in which the skin has an abnormal response to scratching. In dermographism, with scratching, after a few minutes, there is a wheal response with well-defined swelling and redness.

this was taking place. The Respondent's sexual behavior, his touching and rubbing of Patient B upper thigh, over her shorts, was sexually suggestive and was not for a medical purpose.

When Patient B left the Respondent's office that day, she cried in her sister's car and told her sister about the Respondent's conduct. Patient B also told her mother that day.

Despite being uncomfortable, Patient B returned for further appointments with the Respondent. Patient B testified that she returned to the Respondent because he was one of the only allergists in the area that accepted her medical insurance. On these further visits with the Respondent, Patient B made certain that her sister did not leave the room while she was being examined by him.

The Board contacted Patient B as part of its investigation of the Respondent.

Patient C

Patient C became a patient of the Respondent on November 13, 2008, when she visited the Respondent for allergy testing. She was 15 years old. She had seasonal allergic rhinoconjuntivitis with postnasal drip.

On September 10, 2009, when Patient C was 16 years old, Patient C went to the Respondent's office because she had chest pains and difficulty breathing while in gym class. The Respondent performed spirometry to check for asthma. The Respondent, Patient C, and Patient C's mother then went into the parking lot for an exercise test, which required Patient C to run for several minutes. The Respondent, Patient C, and her mother then went into an examination room. The Respondent again performed spirometry and then had Patient C lie on her side on an examination table facing the back wall of the examination room. Patient C's mother was facing Patient C's back on the other side of the room and could not see what the Respondent was doing during the examination.

The Respondent began by using the stethoscope over the top of Patient C's shirt, around her chest. He then asked the patient for permission to put his stethoscope under her shirt. After Patient C agreed, the Respondent used the stethoscope around Patient C's chest, under her shirt. The Respondent then stopped using the stethoscope and reached under Patient C's shirt and bra, and, using one hand, he cupped her breasts one at a time, moving from one breast to the other several times, back and forth. Occasionally, the Respondent lifted Patient C's shirt with his other hand and looked underneath the shirt. The nature of the Respondent's touching of Patient C's breasts was intentional and sexual. He did not explain why he was touching her in this manner, and there was no medical justification for touching the patient's breasts in this manner. He spoke to Patient C's mother at the same time, who could not see what he was doing.

When the Respondent left the examination room, Patient C told her mother that the Respondent felt her breasts inappropriately. She was crying and upset. Patient C never returned to the Respondent's office.

Later that day, Patient C and her mother went to their family physician and inquired as to the proper method for a lung or chest examination. A nurse at the family physician's office explained how such an examination should be conducted, which did not include cupping the breasts.

After visiting the office of their family physician, Patient C and her mother went to the police department to report the Respondent's conduct. They were directed to the Carroll County Advocacy and Investigation Center ("CCAIC") so an investigation could proceed.

Still later that day, the Respondent called Patient C's mother to inquire about Patient C.

The following day, September 11, 2009, Patient C and her mother filed a report with CCAIC. Patient C was interviewed. The Carroll County Sheriff's Office conducted an investigation but criminal charges were not issued.

On September 29, 2009, the Respondent sent a letter to Patient C's mother. The Respondent wrote, "[t]here seems to be a misunderstanding about your daughter's recent visit to my office. I do apologize for that and wanted to let you know that I respect my patients."

On October 13, 2009, the Carroll County State's Attorney's Office referred the matter regarding Patient C to the Board. On February 3, 2010, the Board interviewed Patient C. On March 23, 2010, the Board interviewed the Respondent. The Board closed its investigation involving Patient C in 2010.

In 2016, after the Board received the complaint concerning the Respondent's conduct with Patient A, the Board re-opened the investigation involving Patient C and interviewed Patient C again, in 2016.

EXCEPTIONS

I. RESPONDENT'S EXCEPTIONS CONCERNING PATIENT A

The Respondent took exception to numerous findings that the ALJ made concerning his October 29, 2015, encounter with Patient A. The Respondent maintains that he did not grab, grope, or squeeze Patient A's breasts. The focus of the Respondent's exceptions was on the ALJ's credibility determinations and on the ALJ's factual findings that, during the October 29, 2015, visit, Patient A did not complain of chest pain and Patient A's father did not enter the examination room.

Credibility Determinations

The ALJ found Patient A's testimony credible. According to the ALJ, Patient A's testimony was consistent with her previous statements, she reported the incident on the date it occurred, and she had an immediate emotional reaction when leaving the Respondent's office. The ALJ found the Respondent less credible than Patient A, finding contradictions and hesitations in his testimony.

Pertaining to the ALJ's credibility determination of Patient A, the Respondent took exception to the ALJ's finding that Patient A's testimony at OAH was virtually identical to her interview with the Carroll County police detective and with her interview with the Board investigator. According to the Respondent's exceptions, neither the detective nor the Board investigator asked the patient about her "full symptoms or complaints which led to her rapid examination."

Pertaining to the ALJ's credibility determination of the Respondent, regarding the incident with Patient A, the Respondent states in his exceptions that the ALJ's finding of contradictions in his statements was based upon only one example. The one example the Respondent refers to is the ALJ's finding with respect to the Respondent's statements on whether he accidentally touched Patient A's breast(s).

The ALJ noted that, in his written response to the Board, the Respondent stated, "'there was neither accidental nor intentional contact with [Patient A's] breast at any time.'"[3] In contrast to that statement, the ALJ recounted that, when the Respondent was interviewed by the Board's investigators, he indicated that when he was palpating Patient A's chest it is possible that he

[3] The Respondent's written response was signed by both the Respondent and by the Respondent's attorney. The written response explains in it that "[t]he sentence structure and word usage in this response may be that of the attorney assisting in the preparation of this response and do not necessarily purport to be the exact words of the health care provider."

accidentally touched her. The ALJ also noted that, at the OAH hearing, the Respondent testified that he could have inadvertently touched Patient A's breast and that it "'may have happened.'" The ALJ also wrote that the Respondent testified at the OAH hearing that incidental contact did occur with Patient A's breast.[4]

The Panel finds that the Respondent's statements on whether he had accidental contact with Patient A's breast(s) are inconsistent. On October 26, 2016, when the Respondent was interviewed by the Board investigators, he was asked whether he touched Patient A's breast during the October 29, 2015, visit. The Respondent answered, "Did palpation, I may have touched but not intentionally," and that he thought that it "probably may have happened." But then, in a letter, dated November 1, 2016, to the Board, which he signed, his position on the matter changed. The letter states, "there was neither accidental nor intentional contact with the patient's breast at any time." However, on April 10, 2018, at OAH, the Respondent initially indicated that, when he places a stethoscope on the sternal area, the touching of the breasts "could" have happened.[5] (T. 209.) He was also asked whether it was necessary to palpate the breast area, and he answered,

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[4] The ALJ's finding that the Respondent testified at the OAH hearing that he did have incidental contact with Patient A's breast was based upon an inaccurate transcription of an answer the Respondent gave when testifying at OAH. The correct transcription of the Respondent's answer indicates that the Respondent answered that he had neither accidental nor intentional contact with Patient A's breasts. The Panel has disregarded the initial transcription of this answer of the Respondent, and the Panel has considered the re-transcription, which indicates that he testified that he did not have accidental or intentional contact with a breast of Patient A at the October 29, 2015, visit. The Panel considered the entire decision in this matter in light of the re-transcription of the Respondent's answer at issue. Still, even in its initial decision, the Panel had not given any weight to the part of the original transcription that incorrectly indicated that the Respondent testified that he intentionally touched Patient A's breast. The Panel deemed that purported admission as too much of an aberration from his other statements and was thus considered unreliable.

[5] The Respondent's answers on page 209 of the transcript are confusing. At first, he answers the question of whether he inadvertently touched the patient's breasts when he placed the stethoscope on her sternal area by stating, "Depending on the anatomy, that could happen, meaning never – never touching the breast." But then he was asked whether he had a "recollection of that?" The Respondent answered, "I don't remember, but with the exam, that could have happened."

"No." (T. 211.) And then he was asked whether that could have happened inadvertently, and he answered that it "could have happened." He was then asked whether he recalled any inadvertent touching, and he responded, "I think it may have happened." (T. 211.) But, later in his testimony, he returned to a definitive stance:

> Q. Okay. So you said today to Judge Sinrod that it's possible that you may have touched Patient A's breast. But when you provided this response to the Board, that's not what you said.
>
> A. Well, I'm saying it clearly here. Accidental nor intentional contact did not occur with her breasts.

Thus, the Respondent twice indicated that he *did not* accidentally touch a breast or the breasts of Patient A, but, on at least two occasions, he indicated that he *may have* accidentally touched a breast or the breast area of Patient A.[6] The Respondent's statements are inconsistent.

Regarding the Respondent's credibility, the ALJ did not base her finding that the Respondent was less credible than Patient A solely on the contradiction between no accidental contact and possible accidental contact of Patient A's breast(s). The ALJ also made a demeanor-based credibility determination of the Respondent by observing "hesitations" in his testimony. (Proposed Decision at 20.) Hesitations in testifying are demeanor-based for the sake of credibility determinations. *State Board of Physicians v. Bernstein,* 167 Md. App. 714, 759 (2006). And an ALJ's demeanor-based credibility determination is entitled to substantial deference and can only be rejected by the agency if the agency gives strong reasons for doing so. *Gabaldoni v. Board of Physician Quality Assurance,* 141 Md. App. 259, 261 (2001) (quoting *Department of Health and Mental Hygiene v. Shrieves,* 100 Md. App. 283, 302-03 (1994)). The Panel does not find strong reasons for rejecting the ALJ's demeanor-based credibility determination of the Respondent. In

[6] The ALJ's reliance on the inaccurate transcription on the one answer (discussed in footnote four) does not negate the ALJ's finding that the Respondent was less credible than Patient A.

addition to the Respondent's statements regarding whether he accidentally touched Patient A's breast(s), the Respondent made other statements that were inconsistent. For the October 29, 2015, visit, the Respondent wrote and signed an electronic medical record stating, in pertinent part:

> O/E [On Examination]: **ENT [Ear, Nose, and Throat]: TMs [Tympanic Membranes]- clear, pale turbinates, clear secretions, mild pharyngeal erythema. Sinus: no tenderness.** RS: no wheezes. Chest-no tender on palp. Cardiac: RSR, S1+, S2+, nonmurmurs.

(Emphasis added.) Consistent with this is the Respondent's written response, written with the assistance counsel, which states, "While awaiting the patient's father to come to the room, [the Respondent] performed a *rapid ENT exam*, chest palpation, and cardio-respiratory exam." (Emphasis added.) However, when providing oral testimony, the Respondent gave accounts of his October 29, 2015, interaction with Patient A, which *did not include mention of an ENT evaluation.* (T. 208-12; Board interview, 10/26/16, T. 26-30.)

Also, in his interview with the Board investigators, the Respondent said that prior to, *and during*, his examination of Patient A, on October 29, 2015, he explained to Patient A what he was doing. (Interview Transcript at 28.) But, in his testimony before the ALJ, he testified that he was so concerned about Patient A's reaction to the allergy shot that he could not take the time during the examination to explain to Patient A what he was doing. (T. at 292.)

Based upon the Respondent's inconsistent statements and the ALJ's demeanor-based credibility determination, the Panel does not find the Respondent's testimony credible with respect to his interaction with Patient A on October 29, 2015.

The Panel does find Patient A credible for the reasons explained by the ALJ. Patient A's statements were consistent, she reported the incident on the same day it occurred, and she had an emotional reaction upon leaving the Respondent's office.

Disputes regarding Possible Chest Pain and Whether Father Went to the Examination Room

There are two proposed factual findings of the ALJ upon which the Respondent takes special focus in challenging. First, the ALJ found that, at the October 29, 2015, visit, in response to the allergy shot, Patient A only complained of a runny nose and did not complain of chest pain. Second, the ALJ found that, at that same visit, Patient A's father did not go to the examination room. The ALJ, however, did not find these two findings especially significant. The ALJ characterized the dispute regarding whether Patient A complained of chest pain as "a bit of a red herring" (Proposed Decision at 17) and the dispute regarding whether the father entered the examination room as "irrelevant" (Proposed Decision at 20). The Respondent claims that the ALJ's findings on these matters were erroneous.

Did Patient A Complain of Chest Pain at the Visit?

The Respondent argues that Patient A complained of chest pain or chest pressure at the office, on October 29, ,2015. The Respondent relies upon the electronic medical record for October 29, 2015, which states, "C/O [Complaint of]: nasal congestion, runny nose, Chest pressure after allergy inj." The Respondent also relies upon the testimony of Patient A's father testimony before the ALJ, in which the father stated on cross examination that Patient A complained of chest pains at the visit. The Panel, however, finds that Patient A did not complain of chest pain at this visit. Patient A testified that she did not complain of chest pain during the office visit. As stated previously, the Panel finds Patient A credible.

And, as also discussed above, the Respondent's medical records are not reliable. The Panel also does not find reliable the father's testimony concerning Patient A's alleged chest pains. The father did not mention that Patient A had chest pain when he was interviewed by the Board investigators nor did he on direct examination. And, on cross examination, his testimony on chest

pain was confusing. He testified at one point, "I did not hear her complain about the chest pain to the assistants." And the father admitted his memory involving his daughter's symptoms in reaction to the allergy shot was questionable. There is no dispute that Patient A complained of a runny nose, yet the father stated, at one point, that he did not recall her complaint about the runny nose, explaining, "It's quite a bit of time ago."

In any event, the Panel does not place much weight on the dispute over the patient's possible chest pain. Certainly, the decision could factor into our credibility determinations regarding the Respondent and the patient, but, the Panel, here, does not find it to be of much value in this respect. And the substance of the dispute over the chest pain adds little to the ultimate issue. If a patient does not complain of chest pain but does complain of a runny nose and/or nasal congestion in response to an allergy shot, the Panel would not fault a physician for urgently and immediately performing a proper medical examination. It is certainly not because the Respondent responded with urgency to the patient's reaction that the Panel is sanctioning him. It is his misconduct during his response that requires sanctioning. Put another way, it is how he responded, not when he responded, that disturbs the Panel.

Did Patient A's Father Enter the Examination Room?

Likewise, whether the father entered the examination room on October 29, 2015, is of minimal importance. There is no dispute that the father was not present to observe the Respondent's physical interaction with Patient A, on October 29, 2015. And the Panel is not sanctioning the Respondent for not having a parent chaperone this encounter. It is the Respondent's behavior during the period when the father was not present that is at issue. With that said, the Panel finds that the father neither entered the examination room on October 29, 2015, nor talked with the Respondent that day.

The Respondent contends that the father entered the examination room after the examination to discuss the patient's condition with him. The Respondent relies upon a medical note in which the Respondent handwrote the following:

> 10-29-15 — Dymista [nasal spray], dad to CB [call back]
> if no improv[ement]. d/w [discussed with] dad

The Respondent also relies upon his own testimony and the testimony of one of his medical assistants.

As previously discussed, the Panel has serious concerns about the reliability of the Respondent and his medical records. The electronic medical record for the visit does not refer to the father. Considering the aberration for the visit, that a parent was not present for the examination, the fact that the father is not mentioned in the electronic medical record tends to support the testimony of both Patient A and her father that the father did not go to the examination room and that the Respondent did not discuss the patient's condition with the father.

The Respondent also relies upon the testimony of a certain medical assistant whom the ALJ found not credible. The medical assistant testified that the father went to the examination room. The medical assistant testified that she herself did not go into the examination room but walked back and forth in the hallway by the examination room where she saw the Respondent listening to Patient A's chest with a stethoscope. The medical assistant explained that she has a detailed memory of the visit because she remembers instances when patients have reactions to allergy shots taken at the office. The medical assistant, however, could not recall the name of any specific patients who recently had had a reaction to an allergy shot nor the date of the last time a patient had a reaction to a shot. She eventually testified that there was actually no reason why she would remember Patient A as opposed to any other patient. The medical assistant also testified that the Respondent pressed the stethoscope over the patient's shirt, while the Respondent testified

that he pressed the stethoscope against the patient's chest under her shirt. The Panel accepts the ALJ's finding that the medical assistant's testimony was not credible.

Moreover, the father's testimony that he did not go back to the examination room is convincing.

The Panel finds that Patient A's father did not go to the examination room during the October 29, 2015, visit and that the Respondent did not discuss Patient A's condition with her father that day.

Medical Urgency

The Respondent takes exception to the ALJ's findings addressing the urgency of his examination of Patient A. The crux of the Respondent's argument seems to be that, because of the urgency of the matter, the Respondent was medically justified in conducting an examination without waiting for the presence of Patient A's father. For example, the Respondent takes exception to the ALJ's finding of fact 8 that "[f]or anaphylaxis to be present, two major anatomical systems, such as skin, respiratory or cardiac, must exhibit some allergic reaction." The ALJ premised this finding on the testimony of the Respondent's expert witness, who testified:

> . . . , the serious allergic reactions in the context of having gotten a known injection with something you're allergic to involves two systems being involved. So we're looking particularly for evidence of hives in the skin and a respiratory component or a cardiovascular component with regard to change in blood pressure or pulse.

(T. 338.) The Respondent argues, notwithstanding this testimony from his own witness, that the ALJ's finding is a "material oversimplification." Ultimately, the dispute as to whether the Respondent groped Patient A's breasts does not turn on whether there was a medical urgency for an examination or whether the Respondent reasonably believed there was medical urgency. And it certainly does not turn on the indicators for anaphylaxis. The dispute turns on the credibility of

the patient and of the Respondent, to which the indicators for anaphylaxis offer little insight. Therefore, the Panel will not adopt the ALJ's finding of fact 8, as it provides little value to the discussion. Along these lines, the Respondent took exception to the ALJ's summary of his expert witness's testimony, arguing that it ignored the expert's testimony indicating that a rapid examination was justified in this case. The Panel does not find that an urgent examination was unjustified. But as already stated, the urgency of the examination offers little insight as to whether the Respondent groped Patient A's breasts.

Did the Respondent Concede that Patient A Felt Uncomfortable With Examination?

The Respondent took exception to the ALJ's finding that the Respondent conceded that Patient A felt uncomfortable with the examination. The Panel cannot locate in the record where the Respondent stated this. The Panel grants this exception and thus finds that the Respondent did not concede that Patient A felt uncomfortable with the examination.

Did the Respondent Touch Patient A's Nipples?

The Respondent took exception to the ALJ's finding that the Respondent touched Patient A's nipples. According to the Respondent, Patient A did not specify in her testimony at OAH that Patient A touched her nipples. Patient A, however, specifically stated during her interview with the police detective and in her interview with the Board investigators that the Respondent touched her nipples, and there was nothing in her testimony before the ALJ to suggest that he did not. This exception is denied.

In sum, the Respondent's actions, with respect his interactions with Patient A, on October 29, 2015, constitute immoral and unprofessional conduct in the practice of medicine, in violation of Health Occ. § 14-404(a)(3)(i) and (ii), and sexual misconduct, *see* COMAR 10.32.17.02B(4)(a),(b)(v) (sexual violation); COMAR 10.32.17.03.

II. RESPONDENT'S EXCEPTIONS CONCERNING PATIENT B

The Respondent takes exception to the ALJ's finding that the Respondent's touching of Patient B's thigh (over the patient's shorts) was sexual in nature. The Respondent's position is that his touching of Patient B's thigh was a medically appropriate part of an examination of the patient. In his exceptions, the Respondent states, "to rule out red dermographism,[7] a specific sub-type of dermographic urticarial, he would apply pressure on the skin as outlined in the medical literature." The Respondent's medical records for Patient B do not refer to red dermographism.[8] In any event, the Respondent cites to transcript page 183 of the Respondent's testimony, where the medical literature that the Respondent is asked about is *Factitious urticaria: Red Dermographism*, Robert P. Warin, British Journal of Dermatology, Vol. 104, p. 285-88 (1981). According to the article, pressure is applied through scratching or rubbing. The Respondent testified on page 183 that "[y]ou have to rub the skin to elicit the response." The *Factitious urticarial: Red Dermographism* article states that rubbing is "carried out with the back of the middle finger nail stroked over a 20-30 mm length." The article states that scratching is carried out with either the dermographic instrument or the edge of the thumb nail. However, neither the scratching or rubbing method described in the article is consistent with the Respondent's touching as described by Patient B.

The Respondent specifically took exception to the ALJ's finding of fact 18, which states, in relevant part, "the Respondent touched and rubbed Patient B's thigh, approximately two to three inches below her vagina, both on her leg and over her shorts." The Respondent argues that Patient

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[7] Red dermographism differs from ordinary dermographism in that the skin response is more easily evoked by rubbing or scratching and the weal, which appears quicker, is more diffuse and less defined.

[8] The Respondent states in his exceptions that he would not have mentioned red dermorgraphism in his records because it was not present. The Respondent testified, however, that he diagnosed Patient B with red dermographism. (T. 223.) The records do not reflect a diagnosis of red dermographism.

B's statements were inconsistent, and the ALJ did not grasp the inconsistencies, which, according to the Respondent, demonstrate that the Patient B was not credible. The Respondent describes the purported inconsistency as follows: "[i]n Patient B's testimony to the Board investigator, she alleged that Respondent *massaged* her thigh. In her testimony at the hearing, however, she alleged that Respondent kept his hand on her thigh for thirty seconds." (Italics added.) The Respondent's description of the patient's testimony does not provide an accurate portrayal of Patient B's testimony.

First, Panel B cannot locate where Patient B used the word "massaged" in her interview with the Board investigators, and the Respondent does not identify where in the transcript the word is found. The patient did state that the Respondent would "stroke" her thigh and that he used his whole hand. Patient B also said in the interview that the Respondent "put his hand really close to my privates on the inner thigh. And it just made me very uncomfortable."

Second, during the hearing, Patient B testified to more than just that the Respondent "kept his hand on her thigh for thirty seconds." The patient testified at the hearing that the Respondent "stroked" her thighs. She made clear, in fact, that he did not rest his hand on her thigh, but that he rubbed his hand on her thigh. She also said that he used his whole hand, that his hand was approximately two inches from her groin area, and that his "hand was on top of my shorts when he did that. And he rubbed up and down." And the patient's statements reflect that the Respondent's touching was not consistent with the techniques used in a proper medical examination. The patient's statements are consistent. The Panel agrees with the ALJ that Panel B's testimony was credible, and the Panel does not accept the Respondent's testimony concerning Patient B. The Respondent's touching at issue was neither medically indicated nor medically appropriate and finds that it was sexual in nature and that it constitutes sexual misconduct. The

Panel does, however, depart from the ALJ's finding that the touching at issue was both over and under the patient's shorts. The Panel finds that the touching at issue was over the patient's shorts.

Remaining Exceptions concerning Patient B

The Respondent takes exception to the ALJ's proposed finding of fact 16, which states, "Patient B suffered from allergies and experienced hives on her lower legs and arms." The Respondent states that the patient experienced hives "not just on her lower legs and arms, but scattered throughout her body." The Panel finds that Patient B experienced hives on her arms and legs. Panel B also finds that her hives were scattered and generalized.

The Respondent takes exception to the ALJ's "criticism that he did not wear a glove." The ALJ's proposed finding of fact 17 states, "[h]e did not wear a glove." If this is the language the Respondent is referring to, the ALJ did not criticize the Respondent for not wearing a glove. The ALJ simply stated as a fact that "[h]e did not wear a glove."

The Respondent takes exception to the following finding by the ALJ: "[r]eferring to his electronic medical note from July 17, 2015, the Respondent explained that Patient B came to him that day with hives on her thighs, despite taking Allegra." (ALJ's proposed decision at 24.) The medical record states, "Had hives again on thighs, despite allegra." The Respondent argues that the patient "did not have hives during the examination." The Panel agrees with the Respondent that Patient B did not have active hives during the time she was in the Respondent's office.

In sum, the Respondent's actions, as described in Panel A's findings of fact with respect to his interactions at issue with Patient B, constitute immoral and unprofessional conduct in the practice of medicine, in violation of Health Occ. § 14-404(a)(3)(i) and (ii), and sexual misconduct, *see* COMAR 10.32.17.02B(2)(a) (sexual impropriety); COMAR 10.32.17.03.

III. RESPONDENT'S EXCEPTIONS CONCERNING PATIENT C

Patient C testified at the hearing that the Respondent "reached under my bra and cupped my boobs, and he would go from one -- stop -- from one to the other, just cupping them. Occasionally, he would lift my shirt with the other hand and look underneath and -- it just happened several times, back and forth with his hand." The ALJ found Patient C credible. The ALJ wrote, "Patient C's unwavering, consistent account of the facts and her immediate action to report the incident convinced me that she was being truthful." The ALJ found it compelling that Patient C told her mother that the Respondent's examination was inappropriate while they were still in the office, that it was reported the same day to Patient C's primary care physician and to the police. The ALJ also found it significant that Patient C's statements to the police detective the day after the incident were consistent with her testimony at the hearing. The Respondent's exceptions do not challenge the ALJ's reasoning for her credibility determination of Patient C. The Board adopts the ALJ's credibility determination of Patient C.

The ALJ found that the Respondent's testimony regarding whether he would go underneath a "loose bra" to palpate a female patient was "illogical." The Respondent's testimony at issue is as follows:

> Q. If you are examining a female patient wearing a bra, and she complains of pain where her bra is located, why would when you palpate, you necessarily go under the bra? Why could that palpitation not occur over the bra, loose or not?
>
> [Respondent's] A. Your Honor, if the patient is telling me - pointing to the place which happens to be under the bra that's where I'm hurting, when I place my hand, if the bra is loose already, of course my hand will be going under the bra. I'm not going under the bra because the bra is loose. I'm going there because that's where the patient's telling me to palpate because that's where the patient's hurting.

Q. Is there any reason, despite a loose bra, that you still can't place your hand on top of the bra?

A. I apologize. Once again, where the patient is pointing, that's where I'll put the hand.

Q. Right. And if the bra is there, loose or not, can you not put your hand on top of the bra?

A. If the bra happens to be loose, my hand will go underneath. If a bra is tight, I'm not going to unbuckle the bra and put the hand underneath.

(T. 270-71). The ALJ explained why she found the Respondent's testimony illogical: "[c]ertainly the Respondent could have placed his hand over Patient C's bra in the place where she indicated pain, whether or not her bra was loose." The Respondent took an exception, which is as follows: "Respondent excepts to the ALJ's classification of Respondent's testimony regarding Patient C's 'loose bra' as 'illogical.' Respondent maintains that the standard of care requires that a physician palpate the affected area indicated by the patient." The Panel cannot discern how the Respondent's point about the standard of care addresses whether it would be sufficient for the Respondent to place his hand over a patient's bra to palpate an area with pain, especially in light of the Respondent's testimony that "[i]f a bra is tight, I'm not going to unbuckle the bra and put the hand underneath." In other words, the Respondent's exception does not address the bra. The Panel, however, does not adopt the ALJ's characterization of the Respondent's testimony on this subject as illogical. The Panel instead finds that his testimony on this subject was evasive. The Respondent was unwilling to answer the question, which was asked three times.

The Respondent also takes exception to "the ALJ's characterization that Respondent acknowledged that he may have 'inadvertently touched her breast.'" The Respondent's exception states that he "acknowledged that he may have 'come into contact with' Patient C's breast." The Respondent cites to transcript page 263 of the hearing. The ALJ also cites to page 263 and wrote,

the Respondent "said the only disagreement he had with Patient C's version of the facts was that he did not cup her breast, although he may have inadvertently touched her breast." (ALJ's proposed decision at 32.) But, the Respondent's testimony, memorialized on page 263 of the hearing transcript, is misstated by both the Respondent and the ALJ. The transcript states:

> Q. And according to your interview in 2010, where you said "accidentally, yes, because I was in that area,"[9] you agree with Patient C that, at some point, your hand came into contact with Patient C's breast.
>
> [Respondent's] A. I did, but I did not do the cupping.
>
> Q. Okay. So where you disagree with Patient C is that -- that whether or not you cupped her breast; is that correct?
>
> A. That's correct.

The Respondent, here, indicates that his hand did come into contact with Patient C's breast.

The Respondent also takes exception to the ALJ's finding that the Respondent's testimony was inconsistent. The Respondent's testimony was inconsistent on two subjects with respect to Patient C. **First,** the Respondent testified that he (a) touched her breast. (T. 263; State's Ex. 15, T. 33.) But the Respondent also testified that he (b) may have accidentally touched her breast. (State's Ex. 15, T. 34.) **Second,** the Respondent (a) refused to acknowledge that he looked underneath her

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[9] During the Respondent's interview in 2010 with the Board's investigators, the Respondent testified as follows:

> Q. Okay. All right. So when you did that, did you happen, by any chance, recall if you actually went under the underwire bra line. went in that area at all?
> A. What can I tell you. On purpose, I never intentionally touched her breast.
> Q. Um-hmm.
> A. *Accidentally, yes, because I was in that area.*
> Q. Okay.
> A. Yeah. The side of the breast, yes.

State's Ex. 15, Tr. 33 (italics added).

shirt, not even to ensure that he did not accidentally touch her breasts. (T. 256-57). But the Respondent also testified that he (b) looked underneath her shirt where the patient said there was pain to look for bruises, (E. 15 at 32) and that he did look under her shirt (T. 261-63).

The Panel finds the Respondent's testimony concerning Patient C not credible. The Respondent was both evasive and inconsistent. The Panel finds that the Respondent cupped Patient C's breasts for no medical reason.

Remaining Exception concerning Patient C

The Respondent took exception to the ALJ's purported characterization of his examination of Patient C as a "routine check-up and a routine lung/chest examination." According to the Respondent's exception, this was not a "routine check-up," because Patient C presented with chest pain with exercise. The Respondent, however, does not identify where in the proposed decision the ALJ characterized the examination as a "routine check-up and a routine lung/chest examination," if such a characterization exists. Furthermore, the Respondent also fails to explain the significance of the exception. In any case, the ALJ's proposed decision makes clear that Patient C went to see the Respondent on September 10, 2009, as a result from chest pains and difficulty breathing in gym class. (ALJ's proposed decision at 8 and 29.) The Panel agrees with the ALJ that the visit on September 10, 2009, was the result of Patient C's chest pains and difficulty breathing during her gym class.

In sum, the Respondent's actions, with respect to his interactions with Patient C, on September 10, 2009, constitute immoral and unprofessional conduct in the practice of medicine, in violation of Health Occ. § 14-404(a)(3)(i) and (ii), and sexual misconduct, *see* COMAR 10.32.17.02B(4)(a),(b)(v) (sexual violation); COMAR 10.32.17.03.

CONCLUSIONS OF LAW

Based upon Panel A's findings of fact and discussion of the Respondent's exceptions, set forth above, Panel A concludes that the Respondent is guilty of immoral conduct in the practice of medicine, in violation of Health Occ. § 14-404(a)(3)(i); and that the Respondent is guilty of unprofessional conduct in the practice of medicine, in violation of Health Occ. § 14-404(a)(3)(ii). Panel A also finds that the Respondent engaged in sexual misconduct, in violation of COMAR 10.32.17.03, for his actions which constitute sexual impropriety, under COMAR 10.32.17.02B(2)(a), and sexual violations, under COMAR 10.32.017.02B(4)(a),(b)(v).

Sanction

As a sanction, the ALJ recommended that the Respondent's license to practice medicine be suspended for three years and that, prior to the reinstatement of his license, the Respondent complete counseling and therapy as recommended by the Board to address the behavior at issue in this case. The ALJ noted that the Respondent does not have any prior disciplinary history and was cooperative with the investigation, but, nevertheless, the Respondent was not forthcoming in his account of the facts and tried to pass off the incidents as accidental or incidental. The ALJ also explained that "Patient[s] A, B, and C have been continuously adversely affected by the Respondent's actions, and if this behavior does not cease, the risk to others is significant."

The Respondent took exception to the ALJ's proposed sanction. The Respondent argues that the Respondent cannot be forthcoming about admitting to allegations that he asserts did not occur and states that he has consistently and adamantly denied the allegations of intentional sexual action. The Respondent requests that the Panel dismiss the charges against him.

The State recommends, at a minimum, a three-year suspension of the Respondent's medical license with counseling or therapy as directed by the Panel. The State urges the Panel to consider

that the Respondent preyed upon vulnerable, teenage girls and that this pattern of behavior is a great risk to other young patients. The State detailed the testimony of Patients A, B, and C on the impact upon them of the Respondent's behavior. Each of the patients testified as to their distrust of male physicians based upon the Respondent's actions.

The Panel finds that the Respondent used his position as a physician to engage in sexual misconduct with three patients, who were each teenagers at the time. Based upon this pattern of sexual misconduct, the Panel finds that the Respondent poses a substantial risk to other patients. The revocation of the Respondent's license to practice medicine in Maryland is warranted.[10]

ORDER

Pursuant to Health Occ. § 14-404(a)(3)(i) and (ii) and Health Occ. § 1-212(c)(4), it is, by an affirmative vote of a majority of the quorum of Board Disciplinary Panel A, hereby

ORDERED that the license of Respondent Surender K. Vaswani, M.D. to practice medicine in Maryland (License No. D44431) is **REVOKED;** and it is further

ORDERED that this Amended Final Decision and Order supersedes the Final Decision and Order concerning Dr. Vaswani that was issued on January 14, 2019; and it is further

ORDERED that this Amended Final Decision and Order goes into effect upon the signature of the Executive Director for the Board, who signs on behalf of Panel A; and it is further

ORDERED that this is a public document.

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[10] As ordered by the circuit court, Panel A has considered its entire decision in light of the corrected transcription of the Respondent's answer at issue. Other than a modification of the Panel's findings concerning its credibility findings on Patient A and the Respondent, focusing on the Respondent's statements on whether he accidentally or may have accidentally touched Patient A's breast(s), the new transcription of the Respondent's answer does not substantively affect the Panel's decision, findings, conclusions, sanction, or order.

Signature on File

11/22/2019
Date

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

NOTICE OF RIGHT TO APPEAL

Because the circuit court retained jurisdiction while this matter was being addressed by Panel A upon referral from the circuit court, this matter returns to the circuit court, where the judicial review proceeding will resume without a new petition for judicial review.