STATE OF FLORIDA
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

Petitioner,

vs.

DOH CASE NOS.: 2006-05930
DOAH CASE NO.: 08-4197PL
LICENSE NO.: ME0059702

JAMES S. PENDERGRAFT, IV, M.D.,

Respondent.
_____/

FINAL ORDER

THIS CAUSE came before the BOARD OF MEDICINE (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on December 4, 2009, in Orlando, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order, Respondent's Exceptions to the Recommended Order, Petitioner's Response to Respondent's Exceptions to the Recommended Order, Petitioner's Exceptions to the Recommended Order, and Respondent's Response to Petitioner's Exceptions to the Recommended Order (copies of which are attached hereto as Exhibits A, B, C, and D respectively) in the above-styled cause. Petitioner was represented by Greg Marr, Assistant General Counsel. Respondent was represented by Kenneth Metzger, Esquire.

Upon review of the Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

RULINGS ON RESPONDENT'S EXCEPTIONS

The Board reviewed the Respondent's Exceptions to the Recommended Order and the Petitioner's Response to Respondent's Exceptions and rules as follows:

1. Exception to Findings of Fact 1: The Board denied Respondent's exceptions to the findings of fact in paragraph 41 on page 9 of the Recommended Order on the grounds that the finding was based on competent substantial evidence.

2. Exception to Findings of Fact 2: The Board denied Respondent's exceptions to the second sentence in the findings of fact in paragraph 48 on page 10 of the Recommended Order on the grounds that the finding was based on competent substantial evidence.

3. Exceptions to Conclusion of Law 1: The Board denied Respondent's exceptions to the conclusion of law 61 on page 15 of the Recommended Order because Petitioner's application of Section 458.331(1)(m), Florida Statutes, to the circumstances presented to in this matter is based on the clear unambiguous language of the statute. The Respondent's claim as to the

legislative intent behind Section 458.331(1)(m) is misplaced because the statute is clear and unambiguous.

4. Exceptions to Conclusion of Law 2: The Board denied Respondent's exceptions to the conclusion of law 78 on page 20 of the Recommended Order. The Respondent asserted that because the legal conclusion was predicated on a factual finding that he believed should have been rejected (see exception 1 to findings of fact), the legal conclusion should also be rejected. The Board, however, already rejected Respondent's first exception to the factual findings, and therefore, rejected the exception to the corresponding legal conclusion.

5. Exceptions to Conclusion of Law 3: The Board denied Respondent's exceptions to the conclusion of law 78 on page 20 of the Recommended Order. The Respondent took further exception to conclusion of law 78 on the grounds that the Petitioner failed to prove all the elements of malpractice as set forth in Section 766.102, Florida Statutes. The Board rejected the Respondent's exception based on the grounds set forth by the Petitioner in its Response to Petitioner's Exceptions to the Recommended Order.

6. Exceptions to Conclusion of Law 4: The Board denied Respondent's exceptions to the conclusion of law 80 on pages 20 and 21 of the Recommended Order. The Respondent asserted that

because the legal conclusion was predicated on a factual finding that he believed should have been rejected (see exception 1 to findings of fact), the legal conclusion should also be rejected. The Board rejected the Respondent's exception based on the grounds set forth by the Petitioner in its Response to Petitioner's Exceptions to the Recommended Order.

7. Exceptions to Conclusion of Law 5: The Board denied Respondent's exceptions to the conclusion of law 82 on page 21 of the Recommended Order based on the grounds set forth by the Petitioner in its Response to Petitioner's Exceptions to the Recommended Order.

8. Exceptions to Conclusion of Law 6: The Board denied Respondent's exceptions to the conclusion of law 94 on page 24 and 25 of the Recommended Order because the Board believed that there was clear and convincing evidence in the record supporting the underlying conclusion of law. More specifically, the Board found that there was evidence in the record provided by the Petitioner's expert supporting the finding that having to look for the missing fetal body part in the hospital exposed the patient to further potential injury.

RULINGS ON PETITIONER'S EXCEPTIONS

9. Exceptions to Conclusion of Law 1 and 2: The Board denied Petitioner's exceptions to conclusions of law 72 and 80

in the Recommended Order. The Board believes that the requirement to have a DEA registration in order to prescribe certain medications is a "legal obligation" that is placed on a physician, not a minimum standard of care as to the appropriate care and treatment to render to a patient. There are no supporting findings of fact that indicate that ordering Demerol for the patient in this case was medically inappropriate other than the legal obligation for the ordering physician to have a DEA registration. The DEA registration has nothing to do with whether a patient received appropriate care and treatment in accordance with the standard of care.

The exceptions were also denied based on the reasons set forth in Respondent's Response to Petitioner's Exceptions.

10. The Board accepted and approved Petitioner's exceptions to conclusion of law 85 in the Recommended Order and its substituted language for paragraph 85. Conclusion of Law 85 in the Recommended Order inaccurately states that the Administrative Complaint alleges that the Respondent committed medical malpractice in violation of Section 458.331(1)(q). The Administrative Complaint does not allege medical malpractice in violation of Section 458.331(1)(q). The Respondent had no objection to the exception and the change.

11. Exceptions to Conclusion of Law 4: The Board approved in part and denied in part Petitioner's exceptions to conclusion of law 86 on page 23 if the Recommended Order. To the extent that the ALJ was making a determination that the Respondent did not violate Section 458.331(1)(q) because he was not involved in illicit activity at the time he ordered the Demerol, the Board rejects the ALJ's legal conclusion and accepts the Petitioner's exception. It has been previously determined by this Board and upheld by the Third District Court of Appeals in *Waters v. Department of Health, Board of Medicine*, 962 So.2d 1011 (Fla. 3rd DCA 2007) there need not be illicit activity on the part of the physician when finding that a physician violated Section 458.331(1)(q). This finding is supported by Board's previous cases, case law, and is more reasonable than that set forth by the ALJ.

The Board, however, rejects the Petitioner's objection to the ALJ's finding that the Respondent did not violate Section 458.331(1)(q) because he ordered rather than prescribed the Demerol he administered to the patient. The Petitioner asserts that there is no difference between prescribing and ordering a drug, and therefore, the Respondent could be found to have violated Section 458.331(1)(q). The Board rejects this reasoning because it believes there is a difference between

prescribing and ordering a drug. While "ordering" is not explicitly defined in statute, Chapter 458 makes a clear distinction between the two. For example, while under Section 458.347(4)(e), physician assistants are authorized to prescribe certain drugs under certain conditions, under Section 458.347(4)(e)9., such restrictions are not applicable to physician assistants "ordering" drugs for hospitalized patients under a supervisory physician's delegation.

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

2. There is competent substantial evidence to support the findings of fact.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 458, Florida Statutes.

2. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated herein by reference with the exception of Paragraph 85 of the Recommended Order which is amended to read as follows:

> 85. Count III of the Administrative Complaint alleged that the Respondent violated Subsection 458.331(1)(q) Florida Statutes (2005), by

"prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug , including any controlled substance, other than in the course of the physician's professional practice." Specifically, the Petitioner alleged that the Respondent violated Subsection 458.331(1)(q) Florida Statutes (2005), by ordering Demerol without proper DEA registration and through the administration of "excessive" Cytotec.

RESPONDENT'S EXCEPTIONS TO THE PENALTY

1. Exception to Penalty 1: The Board denied Respondent's first exception to the penalty because it does not possess the authority to determine whether an imposition of a penalty violates the principle of equal protection and because the recommended penalty is within the Board's disciplinary guidelines as stated in its rules.

2. Exception to Penalty 2: The Board denied Respondent's second exception to the penalty because the recommended penalty is within the Board's disciplinary guidelines as stated in its rules.

3. Exception to Penalty 3: The Board denied Respondent's third exception to the penalty because the recommended penalty is within the Board's disciplinary guidelines as stated in its rules.

PENALTY

Upon a complete review of the record in this case, the Board determines that the penalty recommended by the

Administrative Law Judge be ACCEPTED. WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

1. Respondent shall pay the costs associated with this case in the amount of $20,000.00. Said costs shall be paid within 30 days from the date this Final Order is filed.

2. Respondent's license to practice medicine in the State of Florida is hereby SUSPENDED for a period of 2 years.

3. Following the period of suspension, Respondent shall be placed on probation for a period of 3 years subject to the following terms and conditions:

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

b. Respondent shall not practice except under the **direct supervision** of a **BOARD CERTIFIED OB/GYN** physician fully licensed under Chapter 458 who has been approved by the Probation Committee. The supervisory physician shall share offices with Respondent. Absent provision for and compliance with the terms regarding temporary approval of a supervising physician set forth below, Respondent shall cease practice and not practice until the Probation Committee approves a supervising physician. Respondent shall have the supervising physician appear at the first probation appearance before the Probation Committee. Prior to approval of the supervising physician by the Committee, the Respondent shall provide to the supervising physician a copy of the Administrative Complaint and Final Order filed in this case. A failure of the Respondent or the supervising physician to appear at the scheduled probation meeting shall constitute a violation of the Board's Final Order. Prior to the approval of the supervising physician by the committee, Respondent shall submit to the committee a current curriculum vitae and description of the current practice of the proposed supervising physician. Said materials shall be received in the Board office no later than fourteen days before the Respondent's first scheduled probation appearance. The attached definition of a

supervising physician is incorporated herein. The responsibilities of a supervising physician shall include:

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

A. Brief statement of why physician is on probation.

B. Description of probationer's practice.

C. Brief statement of probationer's compliance with terms of probation.

D. Brief description of probationer's relationship with supervising physician.

E. Detail any problems which may have arisen with probationer.

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

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

monitoring/supervising physician is temporarily unable to provide supervision. Prior to practicing under the indirect supervision of the alternate monitoring physician or the direct supervision of the alternate supervising physician, Respondent shall so advise the Board in writing. Respondent shall further advise the Board in writing of the period of time during which Respondent shall practice under the supervision of the alternate monitoring/supervising physician. Respondent shall not practice unless Respondent is under the supervision of either the approved supervising/monitoring physician or the approved alternate.

c. CONTINUITY OF PRACTICE

(1) TOLLING PROVISIONS.

In the event the Respondent leaves the State of Florida for a period of 30 days or more or otherwise does not or may not engage in the active practice of medicine in the State of Florida, then certain provisions of the requirements in the Final Order shall be tolled and shall remain in a tolled status until Respondent returns to the active practice of medicine in the State of Florida. **Respondent shall notify the Compliance Officer 10 days prior to his/her return to practice in the State of Florida.** Unless otherwise set forth in the Final Order, **the**

following requirements and only the following requirements shall be tolled until the Respondent returns to active practice:

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

(B) The provisions regarding supervision whether direct or indirect by the monitor/supervisor, and required reports from the monitor/supervisor shall be tolled.

(2) ACTIVE PRACTICE.

In the event that Respondent leaves the active practice of medicine for a period of one year or more, the Respondent may be required to appear before the Board and demonstrate the ability to practice medicine with reasonable skill and safety to patients prior to resuming the practice of medicine in the State of Florida.

RULING ON AMENDED MOTION TO ASSESS COSTS

The Board reviewed the Petitioner's Amended Motion to Assess Costs, Respondent's Response and Objections to Petitioner's Motion to Assess Costs; Petitioner's Reply to Respondent's Response and Objections to Petitioner's Motion to Assess Costs; Notice of Supplemental Authority to Respondent's Response and Objections to Petitioner's Motion to Assess Costs. The Board imposes the costs associated with this case in the amount of $102,303.21. Said costs are to be paid within 30 days from the date this Final Order is filed.

(NOTE: SEE RULE 64B8-8.0011, FLORIDA ADMINISTRATIVE CODE. UNLESS OTHERWISE SPECIFIED BY FINAL ORDER, THE RULE SETS FORTH THE REQUIREMENTS FOR PERFORMANCE OF ALL PENALTIES CONTAINED IN THIS FINAL ORDER.)

DONE AND ORDERED this 25 day of JANUARY, ~~2009.~~ 2010

BOARD OF MEDICINE

Larry McPherson, Jr., Executive Director
For Fred Bearison, M.D., Chair

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF HEALTH AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to JAMES S. PENDERGRAFT, IV, M.D., 1103 Lucerne Terrace, Orlando, Florida

32806; to Kenneth Metzger, Esquire, Metzger, Grossman, Furlow & Bayo, LLC, 1408 N. Piedmont Way, Tallahassee, Florida 32308; to William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by interoffice delivery to Ephraim Livingston, Department of Health, 4052 Bald Cypress Way, Bin #C-65, Tallahassee, Florida 32399-3253 this 26 day of January, 2010.

Deputy Agency Clerk

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STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,

PETITIONER,

v. **CASE NOS.: 2006-05930**

JAMES S. PENDERGRAFT, IV, M.D.,

RESPONDENT.
_____/

ADMINISTRATIVE COMPLAINT

COMES NOW, Petitioner, Department of Health, by and through its undersigned counsel, and files this Administrative Complaint before the Board of Medicine against the Respondent, James S. Pendergraft, IV, M.D., and in support thereof alleges:

1. Petitioner is the state department charged with regulating the practice of medicine pursuant to Section 20.43, Florida Statutes; Chapter 456, Florida Statutes; and Chapter 458, Florida Statutes.

2. At all times material to this Complaint, Respondent was a licensed physician within the State of Florida, having been issued license number 59702.

3. Respondent's address of record is 1103 Lucerne Terrace, Orlando, Florida 32806.

4. Respondent is board certified in Obstetrics and Gynecology.

5. At all times material to this case, Respondent, alone or with one or more partners, owned and operated EPOC Clinic, Inc. ("EPOC"), located in Orlando specializing in abortions. This facility is not hospital.

6. On or about February 3, 2006, Patient S.B., a twenty-seven (27) year-old female, presented to EPOC requesting an elective abortion. Respondent was her physician.

7. A history and physical and ultrasound were performed and documented and the gestational age of the fetus placed at about 19 weeks. Cytotec medication (administered orally or intra-vaginally that helps soften and dilate the cervix to induce labor) with instructions on when and how to take it were given to Patient S.B. and she was sent home.

8. However, Patient S.B. did not return to EPOC until February 6th and the procedure was begun at the clinic using Cytotec.

9. Patient S.B. also received Demerol (a controlled substance listed in Chapter 893, Florida Statutes) and Phenergan during the process. The medical records indicate that the Respondent ordered these

medications. During all times relevant in this case, the Respondent did not have a current, valid DEA number to allow him, as a licensed physician, to prescribe, order or administer controlled substances.

10. The treatment plan for Patient S.B. was for Cytotec-200 ug every four hours. However, by Respondent's order, one additional dosage was administered at EPOC two hours after a prior dosage. The total amount of Cytotec administered was excessive.

11. Following that additional dosage, at about 3 PM on February 7th, the patient started experiencing right lower quadrant pain. An ultrasound found the fetus to be outside the uterine cavity. She was transferred to a hospital, Orlando Regional Medical Center, and underwent a supracervical hysterectomy and repair of a laceration.

12. The delivered fetus was missing a portion of the lower left limb that was subsequently located at the EPOC Clinic. Because the Respondent did not advise the hospital that part of the fetus' lower limb had been removed, there were unnecessary delays during surgery trying to find the missing extremity and taking an additional x-ray to confirm that it was not inside the abdomen.

13. Respondent's apparent attempted Dilation and Extraction (D&E) for Patient S.B. was performed without sufficient dilation of the cervix and caused a cervical laceration. That may have lead to the uterine rupture. The removal of the fetal limb should not have been performed under the circumstances.

14. The medical records lack adequate documentation of the removal of a portion of the fetal limb.

15. Respondent fell below the standard of care when, knowing that he did not possess a current, valid DEA number, he nonetheless prescribed, ordered or administered controlled substances to Patient S.B.

16. Respondent failed to keep adequate medical records that justified the course of treatment for Patient S.B.

COUNT I

17. Petitioner realleges and incorporates paragraphs one (1) through sixteen (16) as if fully set forth herein.

18. Section 458.331(1)(m), Florida Statutes (2005), sets forth grounds for disciplinary action by the Board of Medicine for failing to keep legible medical records that justify the course of treatment, including, but not limited to, patient histories; examination results; test results; records of

drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.

19. Respondent failed to keep legible medical records that justify the course of Patient S.B.'s medical treatment in one or more of the following ways:

A. By failing to keep adequate medical records that justified the course of treatment for Patient S.B.;

B. By failing to document why he ordered or administered one additional dosage Cytotec-200 µg two hours after a prior dosage;

C. By apparently attempting a D&E without documenting or justifying the procedure;

D. By inadequate documentation of the removal of a portion of the fetal limb.

20. Based on the foregoing, Respondent has violated Section 458.331(1)(m), Florida Statutes (2005), by failing to keep legible medical records that justify the course of Patient S.B.'s medical treatment.

COUNT II

21. Petitioner realleges and incorporates paragraphs one (1) through sixteen (16) as if fully set forth herein.

22. Section 458.331(1)(t)1, Florida Statutes (2005), provides that committing medical malpractice constitutes grounds for disciplinary action by the Board of Medicine. Medical Malpractice is defined in Section 456.50, Florida Statutes, to mean the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure. For purposes of Section 458.331(1)(t)1, Florida Statutes, the Board shall give great weight to the provisions of Section 766.102, Florida Statutes, which provide that the prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

23. Respondent failed to practice medicine within the prevailing professional standard of care in one or more of the following ways:

A. By having prescribed, ordered or administered controlled substances to Patient S.B. when he did not possess a current, valid DEA number;

B. By ordering or administering one additional dosage of Cytotec-200 µg two hours after a prior dosage;

C. By ordering or administering an excessive amount of Cytotec;

D. By apparently attempting a D&E without sufficient dilation of the cervix;

E. By causing a cervical laceration that may have lead to a uterine rupture;

F. By removal of a portion of the fetal limb;

G. By not advising the hospital that part of the fetus' lower limb had been removed causing unnecessary delays during surgery trying to find the missing extremity and the taking of an additional x-ray to confirm that it was not inside the abdomen.

H. By the lack of adequate documentation of the removal of a portion of the fetal limb.

24. Based on the foregoing, Respondent has violated Section 458.331(1)(t)1, Florida Statutes (2005), by committing medical malpractice by failing to practice medicine in accordance with the level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

COUNT III

25. Petitioner realleges and incorporates paragraphs one (1) through sixteen (16) as if fully set forth herein.

26. Section 458.331(1)(q), Florida Statutes (2005), provides that prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice constitute grounds for disciplinary action by the Board of Medicine. For the purposes of this section, it shall be legally presumed that prescribing, dispensing, administering, mixing, or otherwise preparing legend drugs, including all controlled substances, inappropriately or in excessive or inappropriate quantities is not in the best interest of the patient and is not in the course of the physician's professional practice, without regard to his or her intent.

27. Respondent prescribed, dispensed, administered, mixed, or otherwise prepared a legend drug, including any controlled substance, other than in the course of the physician's professional practice in one or more of the following ways:

A. By having prescribed, ordered or administered controlled substances to Patient S.B. when he did not possess a current, valid DEA number;

B. By ordering or administering one additional dosage Cytotec-200 µg two hours after a prior dosage;

C. By ordering or administering an excessive amount of Cytotec.

28. Based on the foregoing, Respondent violated Section 458.331(1)(q), Florida Statutes (2005), by prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice. For the purposes of paragraph 458.331(1)(q), it shall be legally presumed that prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including all controlled substances, inappropriately or in excessive or inappropriate quantities is not in the best

interest of the patient and not in the course of the physician's professional practice, without regard to his or her intent.

WHEREFORE, the Petitioner respectfully requests that the Board of Medicine enter an order imposing one or more of the following penalties: permanent revocation or suspension of Respondent's license, restriction of practice, imposition of an administrative fine, issuance of a reprimand, placement of the Respondent on probation, corrective action, refund of fees billed or collected, remedial education and/or any other relief that the Board deems appropriate.

SIGNED this 11th day of April, 2008.

Ana M. Viamonte Ros, M.D., M.P.H.
State Surgeon General

By: Irving Levine
Assistant General Counsel
DOH-Prosecution Services Unit
4052 Bald Cypress Way-Bin C-65
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FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK Rachel Rob
DATE 4-14-08

PCP: April 11, 2008

PCP Members: Ashkar, Lage and Beebe

NOTICE OF RIGHTS

Respondent has the right to request a hearing to be conducted in accordance with Section 120.569 and 120.57, Florida Statutes, to be represented by counsel or other qualified representative, to present evidence and argument, to call and cross-examine witnesses and to have subpoena and subpoena duces tecum issued on his or her behalf if a hearing is requested.

NOTICE REGARDING ASSESSMENT OF COSTS

Respondent is placed on notice that Petitioner has incurred costs related to the investigation and prosecution of this matter. Pursuant to Section 456.072(4), Florida Statutes, the Board shall assess costs related to the investigation and prosecution of a disciplinary matter, which may include attorney hours and costs, on the Respondent in addition any other discipline imposed.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
Petitioner,	)	
vs.	)	Case No. 08-4197PL
JAMES S. PENDERGRAFT, IV, M.D.,	)	
Respondent.	)	

RECOMMENDED ORDER

A formal administrative hearing in this case was held on May 20 and 21, 2009, in Orlando, Florida, and on July 10, 2009, by video teleconference between Tallahassee and Orlando, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Greg S. Marr, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Kenneth J. Metzger, Esquire
Metzger, Grossman, Furlow & Bayo, LLC
1408 North Piedmont Way
Tallahassee, Florida 32308

STATEMENT OF THE ISSUES

The issues in this case are whether the allegations of the Administrative Complaint are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated April 11, 2008, the Department of Health (Petitioner) alleged that James S. Pendergraft, IV, M.D. (Respondent), violated Subsections 458.331(1)(m), 458.331(1)(t)1., and 458.331(1)(q), Florida Statutes (2005).

The Respondent disputed the allegations and requested a formal administrative hearing. By letter dated August 25, 2008, the Petitioner forwarded the matter to the Division of Administrative Hearings. The hearing was initially scheduled to commence on December 16, 2008; was twice continued at the request of the parties; and, thereafter, was scheduled for May 20 through 22, 2009. Inclement weather prevented the travel to Orlando of an out-of-state witness planned for May 22, 2009, and the hearing recessed and was completed by video teleconference on July 10, 2009.

At the hearing, the Petitioner presented the testimony of five witnesses and had Exhibits numbered 1 and 3 admitted into evidence. The Respondent testified on his own behalf, presented the testimony of two additional witnesses, and had Exhibits

numbered 1 through 3 admitted into evidence. Joint Exhibits 1 through 5 were admitted into evidence.

On May 18, 2009, the Respondent filed a Motion to Dismiss related to certain allegations contained in the Administrative Complaint. No response to the motion has been filed. The motion has been granted as specifically addressed herein.

The Transcript of the proceedings held on May 20 and 21 was filed on June 26, 2009. The Transcript of the July 10, 2009, proceedings was filed on August 17, 2009. Both parties filed Proposed Recommended Orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is the state department charged with regulating the practice of medicine pursuant to Section 20.43 and Chapters 456 and 458, Florida Statutes (2005).

2. At all times material to this case, the Respondent was a physician licensed by the State of Florida, holding license number 59702 and was board-certified in obstetrics and gynecology. The Respondent owned, and practiced medicine at, EPOC Clinic, 609 Virginia Drive, Orlando, Florida.

3. On December 19, 2005, Patient S.B. presented to the EPOC Clinic to inquire about terminating a pregnancy, but elected not to proceed with the termination at that time.

4. On February 3, 2006, S.B. returned to the EPOC Clinic, having decided to terminate the pregnancy. A sonogram was performed, and S.B. was determined to be approximately 18 to 19 weeks gestation. At that time, she executed consent forms for pregnancy termination by medication, and dilation and extraction (D&E).

5. Patient S.B. had been pregnant three times previously and had birthed three children, each delivered live by cesarean section.

6. The patient's pregnancy termination was scheduled to commence on February 4, 2006, but S.B. was late in arriving at the clinic, and the procedure was rescheduled for February 6, 2006. The patient returned to the EPOC Clinic as rescheduled.

7. While at the EPOC Clinic on February 6 and 7, 2006, S.B. received medical care and treatment primarily from the Respondent and from Carmita Etienne, a medical assistant working at the clinic.

8. The termination was initiated with the use of "Cytotec," a drug that causes cervical dilation and uterine contractions, and which generally results in passage of the fetus into the vaginal vault.

9. Cytotec is commonly used in medication-based pregnancy termination. It is known to increase the potential for uterine

rupture during labor and delivery, the risk for which is noted within the relevant consent documents executed by the patient.

10. Cytotec tablets, in 200 microgram dosages, were administered orally to the patient by the Respondent's medical assistant.

11. S.B. received 200 micrograms of Cytotec at 10:00 a.m. on February 6, 2006, and received the same dosage at four-hour intervals through 10:00 a.m. on February 7, 2006, at which time the patient's cervix remained undilated.

12. The Respondent thereafter escalated the frequency of the Cytotec to every two hours, and the drug was administered two additional times on February 7, 2006, at noon and 2:00 p.m.

13. According to progress notes contained in the medical records, S.B. complained of discomfort on February 6, 2006, at 7:45 p.m. and on February 7, 2006, at 3:00 a.m.

14. Discomfort or pain is a typical element of labor, and S.B.'s discomfort was not unexpected.

15. Demerol, a controlled substance, is routinely used to relieve pain during medical procedures, including pregnancy terminations.

16. The medical assistant relayed S.B.'s reports of discomfort to the Respondent.

17. The Respondent ordered Demerol on both occasions to relieve S.B.'s pain.

18. A physician must be properly registered with the U.S. Drug Enforcement Administration (DEA) to order the administration of Demerol to a patient.

19. The Respondent was not properly registered with the DEA on February 6 or 7, 2006.

20. At the hearing, the Respondent denied that he ordered the Demerol. He testified that he was serving as a conduit between his medical assistant and another physician, Dr. Harry Perper, who also worked at the clinic and who was apparently properly registered with the DEA. The Respondent's testimony on this issue was not persuasive and has been rejected.

21. The evidence failed to establish that Dr. Perper ordered the administration of Demerol to the patient or that the Respondent merely relayed such orders from Dr. Perper to the medical assistant.

22. The Respondent asserted that he had not been registered with the DEA since 2002 and that everyone at the clinic knew he could not order controlled substances.

23. The patient's progress notes, created contemporaneously with the patient's treatment at the clinic, explicitly state that the orders for Demerol came from the Respondent.

24. The medical assistant who created the progress notes testified that she preferred talking to the Respondent rather

than Dr. Perper and that the directions she received for the patient's Demerol came from the Respondent.

25. The Respondent's assertion that he did not order the Demerol was not credible and has been rejected.

26. The Demerol was administered by the medical assistant through injection of the medication into S.B.'s buttocks, and the patient's pain was reduced.

27. The medical assistant denied that she personally administered the Demerol to the patient. Her denial was not credible and has been rejected.

28. The progress notes also state that the patient complained of "right side" pain at 3:00 p.m. on February 7, 2006.

29. At approximately 3:45 p.m. on February 7, 2006, the patient was apparently examined by Dr. Perper, who wrote "SROM" in the progress notes, signifying that a "spontaneous rupture of membranes" had occurred and indicating that the patient's "water had broken." He also documented his observation that a fetal part was protruding from the cervix into the vagina.

30. By that evening, the patient's termination was not completed. At approximately 7:00 p.m. on February 7, 2006, the medical assistant moved the patient into a procedure room at the Respondent's direction.

31. The instruments to perform a D&E were present in the procedure room. The Respondent began to perform an examination of S.B. to assess the situation and determine whether the termination procedure should be completed by D&E.

32. The Respondent utilized a speculum to open the patient's vagina and performed a sonogram on the patient's abdomen to identify the location of the fetus. The fetus was observed to be within S.B.'s uterus.

33. The Respondent observed a fetal part protruding through the cervical os into the vagina. In order to examine the extent of cervical dilation, he detached the part from the fetus by grasping the part with a "Hearn" instrument and twisting the instrument. After he detached the part, he withdrew the instrument and the part from the patient.

34. The Petitioner alleged that the Respondent "apparently" attempted a D&E. The evidence failed to support the allegation. The evidence failed to establish that the Respondent pulled on the exposed fetal part in an attempt to extract the fetus from the uterus.

35. The evidence failed to establish that the Respondent inserted the Hearn or any other instrument into the patient's cervix or uterus.

36. After removing the fetal part from the vagina, the Respondent placed the part on a tray. Almost immediately

thereafter, the Respondent's reviewed the ultrasound image and observed that the image indicated the fetus was no longer fully contained within the uterus.

37. The Respondent understood that the ultrasound image indicated a potential uterine perforation or rupture and, appropriately, concluded that the situation could be life-threatening for the patient.

38. He quickly contacted the Arnold Palmer Hospital to arrange for emergency transfer of S.B. to the hospital. The Respondent also spoke to two practitioners at the hospital.

39. Initially, he spoke by telephone to Dr. Pamela Cates, a resident physician at the hospital. Dr. Cates did not have the authority to admit the patient to the hospital and directed the Respondent to talk to Dr. Norman Lamberty, the "Ob/Gyn" physician on call and present at the hospital.

40. The Respondent spoke by telephone to Dr. Lamberty, who agreed to accept the transfer of the patient from the clinic to the hospital.

41. The Respondent failed to inform either Dr. Cates or Dr. Lamberty that he had removed a portion of the fetus from the patient at the clinic.

42. While waiting for an ambulance to arrive to transport the patient, the Respondent wrote a note to be transported to the hospital with the patient. Although in the note he

documented the treatment provided to the patient at the clinic, he failed to include the removal of the fetal part in the note.

43. The Respondent testified that he did not document his removal of the fetal part because he did not believe it was significant to the medical care the patient would receive at the hospital.

44. S.B. was transported to the hospital along with some of her medical records from the clinic and the Respondent's handwritten note. None of the documentation indicated that a part of the fetus had been removed at the clinic.

45. After S.B. arrived at the hospital, Dr. Lamberty removed the fetus and completed the abortion procedure.

46. Dr. Lamberty also repaired a cervical laceration and performed a hysterectomy. He noted that the uterine rupture occurred on the patient's right side and that the fetus was located not "floating" in the abdomen but "between two layers of tissue on the right side of the pelvis."

47. The evidence failed to establish that the cervical laceration occurred while the patient was at the clinic or that it was caused by treatment the patient received at the clinic.

48. Upon removing the fetus, Dr. Lamberty observed that the fetus was incomplete and that a portion of the fetal leg was missing. Dr. Lamberty began efforts to locate the missing part, which he reasonably presumed remained in the patient.

49. Dr. Lamberty's concern regarding the missing part was that potential exposure of the part to the patient's vagina would have contaminated the part with bacteria and that a risk of infection would be presented by leaving the part within the patient's pelvis or abdomen.

50. Dr. Lamberty was unable to locate the missing part, and, thereafter, radiological studies, including X-rays and a CT scan, were performed in an unsuccessful attempt to locate the part.

51. The patient remained hospitalized and on February 10, 2006, a second surgical procedure was performed on the patient, this time to remove a "Jackson-Pratt" drain that had been improperly sutured into the patient's abdomen at the time of the hysterectomy. The second surgery was unrelated to the search for the missing part.

52. Also on February 10, 2006, the hospital contacted the clinic to inquire as to the missing part and was advised that the part had been removed by the Respondent at the clinic.

CONCLUSIONS OF LAW

53. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2009).

54. The Respondent is the state agency charged with regulating the practice of medicine. § 20.43 and Chapters 456 and 458, Fla. Stat. (2005).

55. The Administrative Complaint charged the Respondent with violations of Subsection 458.331(1), Florida Statutes (2005), which provides in relevant part as follows:

> (1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):
>
> * * *
>
> (m) Failing to keep legible, as defined by department rule in consultation with the board, medical records that identify the licensed physician or the physician extender and supervising physician by name and professional title who is or are responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.
>
> * * *
>
> (q) Prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice. For the purposes of this paragraph, it shall be legally presumed that prescribing, dispensing, administering, mixing, or otherwise preparing legend drugs, including all controlled substances, inappropriately or in excessive or inappropriate quantities is not in the best

interest of the patient and is not in the course of the physician's professional practice, without regard to his or her intent.

* * *

(t) Notwithstanding s. 456.072(2) but as specified in s. 456.50(2):

1. Committing medical malpractice as defined in s. 456.50. The board shall give great weight to the provisions of s. 766.102 when enforcing this paragraph. Medical malpractice shall not be construed to require more than one instance, event, or act.

* * *

Nothing in this paragraph shall be construed to require that a physician be incompetent to practice medicine in order to be disciplined pursuant to this paragraph. A recommended order by an administrative law judge or a final order of the board finding a violation under this paragraph shall specify whether the licensee was found to have committed "gross medical malpractice," "repeated medical malpractice," or "medical malpractice," or any combination thereof, and any publication by the board must so specify.

56. Subsection 456.50(1)(g), Florida Statutes (2005), defines medical malpractice as follows:

"Medical malpractice" means the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure. Only for the purpose of finding repeated medical malpractice pursuant to this section, any similar wrongful act, neglect, or default committed in another state or country which, if

committed in this state, would have been considered medical malpractice as defined in this paragraph, shall be considered medical malpractice if the standard of care and burden of proof applied in the other state or country equaled or exceeded that used in this state.

57. Subsection 458.305(3), Florida Statutes (2005), defines the "practice of medicine" as "the diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition."

58. The Petitioner has the burden of proving by clear and convincing evidence the allegations set forth in the Administrative Complaint against the Respondent. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

59. Clear and convincing evidence is that which is credible, precise, explicit, and lacking confusion as to the facts at issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

60. Count I of the Administrative Complaint alleged various violations of Subsection 458.331(1)(m), Florida Statutes

(2005), which essentially requires a physician to keep medical records documenting and justifying the course of treatment.

61. The evidence established that, by failing to document the removal of a portion of a fetal limb, the Respondent clearly failed to keep legible medical records justifying the course of treatment in violation of Subsection 458.331(1)(m), Florida Statutes (2005).

62. The Administrative Complaint alleged that the Respondent's failure to document a D&E constitutes a violation of Subsection 458.331(1)(m), Florida Statutes (2005). The evidence failed to establish that the Respondent attempted to perform a D&E; accordingly, the Respondent had no obligation to document such a procedure.

63. The Administrative Complaint alleged that the medical records were insufficient to set forth a rationale and justification for the increased frequency of Cytotec administration thereby violating Subsection 458.331(1)(m), Florida Statutes (2005). The evidence establishes that the patient's medical records sufficiently indicated that the increased frequency of administration was based on a lack of cervical dilation 24 hours after initial commencement of drug therapy.

64. Count II of the Administrative Complaint alleged that the Respondent committed medical malpractice in violation of

Subsection 458.331(1)(t)1., Florida Statutes (2005), by failing to practice medicine in accordance with the level of care, skill, and treatment that, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers. Specifically, the Petitioner alleged that the Respondent committed medical malpractice in violation of Subsection 458.331(1)(t)1., Florida Statutes (2005), as follows:

> A. By having prescribed, ordered or administered controlled substances to patient S.B. when he did not possess a current, valid DEA number;
>
> B. By ordering or administering one additional dosage of Cytotec two hours after a prior dosage;
>
> C. By ordering or administering an excessive amount of Cytotec;
>
> D. By apparently attempting a D&E without sufficient dilation of the cervix;
>
> E. By causing a cervical laceration that may have lead to a uterine rupture;
>
> F. By removal of a portion of the fetal limb;
>
> G. By not advising the hospital that part of the fetus' lower limb had been removed causing unnecessary delays during surgery trying to find the missing extremity and the taking of an additional x-ray to confirm that it was not inside the abdomen;
>
> H. By the lack of adequate documentation of the removal of a portion of the fetal limb.

65. The federal Controlled Substances Act obligates practitioners engaged in prescribing, ordering, administering or dispensing controlled substances to be registered with the DEA. The Respondent was not registered with the DEA on February 6 or 7, 2006.

66. The Respondent offered the testimony of Pharmacist Jose Rey, who asserted that there was no proper order issued for Demerol in this case. The evidence established that the Respondent ordered the Demerol that was administered to the patient and that the Respondent was not properly registered with the DEA to order the medication. Mr. Rey's testimony has been rejected.

67. The Petitioner presented the expert testimony of Dr. Jorge Gomez, who opined that a physician who was not properly registered with the DEA would breach the standard of care and commit medical malpractice by ordering the administration of a controlled substance in violation of Subsection 458.331(1)(t)1., Florida Statutes (2005).

68. The Respondent asserted that such a practice would not constitute medical malpractice and offered the expert testimony of Dr. Steven Warsof, who opined that a physician who failed to provide pain-relieving medication to a patient in need would have breached the standard of care.

69. As referenced in the Preliminary Statement to this Recommended Order, the Respondent filed a Motion to Dismiss immediately prior to commencement of the hearing, wherein the Respondent asserted that the charge of medical malpractice under Subsection 458.331(1)(t)1., Florida Statutes (2005), was improper. The Respondent observed that the Petitioner did not charge the Respondent with a violation of Subsection 458.331(1)(g), Florida Statutes (2005), which provides that a failure "to perform any statutory or legal obligation placed upon a licensed physician" is grounds for discipline. The argument was further addressed in the Respondent's Proposed Recommended Order.

70. As noted by the Respondent, in Barr v. Dep't of Health, Bd. of Dentistry, 954 So. 2d 668 (Fla. Dist. Ct. App. 1st Dist. 2007), the court rejected the Department of Health position that a "particularly egregious" recordkeeping violation could also constitute a breach of a standard of care for purposes of disciplinary proceedings, stating that to do so would render the statutory recordkeeping requirement "useless" as grounds for discipline. The same reasoning would suggest that an allegation that a licensee's failure to comply with a legal obligation (in this case, the Respondent's lack of DEA registration) could constitute medical malpractice.

71. The Petitioner has filed no response to the Motion to Dismiss and did not directly address the matter in its Proposed Recommended Order.

72. The Motion to Dismiss is hereby granted, as to the allegation that the Respondent's ordering Demerol for the patient without proper DEA registration constituted a violation of Subsection 458.331(1)(t), Florida Statutes (2005).

73. The Petitioner alleged that the Respondent's use of Cytotec was a breach of the applicable standard of care. Dr. Gomez opined that the administration of Cytotec every two hours, as occurred twice in this case, was excessive and a breach of the standard of care for this patient. Dr. Gomez also uses Cytotec but prescribes a dosage of 400 micrograms at six-hour intervals administered vaginally. Dr. Warsof testified that the progress of labor was very slow in this case and that it was not inappropriate to increase the frequency of Cytotec to induce labor. Dr. Warsof's testimony has been credited.

74. The evidence failed to establish that the Respondent's use of Cytotec in this case, either by dosage or frequency, was inappropriate or was a breach of the standard of care.

75. The evidence failed to establish that the Respondent attempted to terminate the pregnancy through a D&E.

76. The evidence failed to establish that the Respondent caused a cervical laceration.

77. The evidence failed to establish that the Respondent's removal of the portion of the fetal limb constituted medical malpractice.

78. As charged in the Administrative Complaint, the Respondent's failure to advise the hospital's physicians during the telephone conversations that a portion of the patient's fetus had been removed at the Respondent's clinic breached the standard of care and constituted medical malpractice.

79. The Respondent asserted that the missing part did not pose a serious risk to the patient. Dr. Warsof opined that the risk of infection would have been addressed through the use of antibiotics that would have been administered to the patient. He testified that the hospital's inability to locate the missing part was of little consequence and should not have impacted the management of the patient in the hospital. Dr. Gomez opined that the Respondent's failure to inform the receiving hospital to which the patient was transferred that a fetal part had been removed at the clinic was a breach of the standard of care as set forth herein. Dr. Gomez's testimony was persuasive and has been credited. Dr. Warsof's testimony was not persuasive and has been rejected.

80. The evidence established that the medical care provided to the patient at the hospital was directly affected by the Respondent's failure to advise the hospital that the missing

part had been removed at the clinic. Had the hospital been advised that a fetal part had been removed at the clinic, the radiological tests performed during the attempt to locate the part would have been unnecessary, although other tests directly related to the sutured drain and second surgery would have been required.

81. The hospital eventually discovered that the Respondent had removed the fetal part at the clinic when the hospital contacted the clinic on February 10, 2006. The Respondent asserted that, had the hospital inquired of the clinic at an earlier time, the hospital would have learned that the missing part had been removed from the patient's vagina while she was at the clinic.

82. It was the Respondent's obligation to advise the hospital of the events occurring at the clinic, and the implication that the hospital should have contacted the clinic to track down the missing part has been rejected. There is no credible evidence that the hospital personnel erred in their attempt to locate the missing fetal part.

83. In the Motion to Dismiss, the Respondent asserted that the alleged failure to adequately document the removal of the portion of the fetal limb, charged as a recordkeeping violation under Subsection 458.331(1)(m), Florida Statutes (2005), was inappropriately charged as medical malpractice under Subsection

458.331(1)(t), Florida Statutes (2005). The assertion was re-addressed in the Respondent's Proposed Recommended Order.

84. As stated previously, in the Barr decision, the court rejected the position that the "particularly egregious" recordkeeping violation could also constitute a breach of a standard of care in a disciplinary proceeding. This was specifically what was charged in the Administrative Complaint in this case. The Petitioner filed no response to the Motion to Dismiss and did not directly address the matter in its Proposed Recommended Order. The Motion to Dismiss is hereby granted as to the allegation that the Respondent's recordkeeping constituted a violation of Subsection 458.331(1)(t), Florida Statutes (2005).

85. Count III of the Administrative Complaint alleged that the Respondent committed medical malpractice in violation of Subsection 458.331(1)(q), Florida Statutes (2005), by "prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice." Specifically, the Petitioner alleged that the Respondent violated Subsection 458.331(1)(q), Florida Statutes (2005), by ordering Demerol without proper DEA registration and through the administration of "excessive" Cytotec.

86. The evidence failed to establish that the Respondent's use of Cytotec and Demerol occurred "other than in the course of" the Respondent's professional practice, or that such use otherwise constituted medical malpractice under Subsection 458.331(1)(q), Florida Statutes (2005).

87. Florida Administrative Code Rule 64B8-8.001 sets forth the disciplinary guidelines applicable to the statutory violations relevant to this proceeding.

88. Florida Administrative Code Rule 64B8-8.001(2) provides that the penalty for a first offense of Subsection 458.331(1)(m), Florida Statutes, ranges from a reprimand to denial or two years' suspension followed by probation, and an administrative fine from $1,000.00 to $10,000.00.

89. Florida Administrative Code Rule 64B8-8.001(2) provides that the penalty for a first offense of Subsection 458.331(1)(t), Florida Statutes, ranges from a two-year probation to revocation or denial and an administrative fine from $1,000.00 to $10,000.00.

90. Florida Administrative Code Rule 64B8-8.001(3) provides as follows:

> Aggravating and Mitigating Circumstances.
>
> Based upon consideration of aggravating and mitigating factors present in an individual case, the Board may deviate from the penalties recommended above. The Board

shall consider as aggravating or mitigating factors the following:

(a) Exposure of patient or public to injury or potential injury, physical or otherwise: none, slight, severe, or death;

(b) Legal status at the time of the offense: no restraints, or legal constraints;

(c) The number of counts or separate offenses established;

(d) The number of times the same offense or offenses have previously been committed by the licensee or applicant;

(e) The disciplinary history of the applicant or licensee in any jurisdiction and the length of practice;

(f) Pecuniary benefit or self-gain inuring to the applicant or licensee;

(g) The involvement in any violation of Section 458.331, F.S., of the provision of controlled substances for trade, barter or sale, by a licensee. In such cases, the Board will deviate from the penalties recommended above and impose suspension or revocation of licensure.

(h) Where a licensee has been charged with violating the standard of care pursuant to Section 458.331(1)(t), F.S., but the licensee, who is also the records owner pursuant to Section 456.057(1), F.S., fails to keep and/or produce the medical records.

(i) Any other relevant mitigating factors. (Emphasis supplied)

91. The failure to notify hospital personnel that a fetal part was removed while the patient was at the clinic adversely

impacted the medical care the patient received at the hospital and has been considered as an aggravating factor.

92. The Respondent was the subject of a prior disciplinary proceeding which resulted in an imposition of discipline against the Respondent's license; however, the Final Order entered in that case has been appealed and is not yet final. The prior disciplinary case has not been considered in rendering the recommended penalty set forth herein.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health enter a final order finding James S. Pendergraft IV, M.D., in violation of Subsections 458.331(1)(m) and 458.331(1)(t), Florida Statutes (2005), and imposing a penalty as follows: a two-year period of suspension followed by a three-year period of probation and an administrative fine of $20,000.00.

DONE AND ENTERED this 21st day of September, 2009, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of September, 2009.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK: Angela Barton
DATE 10/16/09

STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,

PETITIONER,

v. **CASE NO.: 2006-05930**

JAMES S. PENDERGRAFT, IV, M.D.,

RESPONDENT.
_____/

PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

Petitioner, Department of Health (Department), pursuant to section 120.57(1), Florida Statutes, and Florida Administrative Code Rule 28-106.217, files the following Exceptions to the Recommended Order issued by Administrative Law Judge (ALJ) William F. Quattlebaum on September 21, 2009, and in support thereof, states as follows:

STANDARD OF REVIEW

Section 120.57(1)(l), Florida Statutes (2009), outlines the reviewing authority of a professional licensing board when reviewing an ALJ's recommended order:

> The agency may adopt the recommended order as the final order of the

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

Id. (emphasis added).

The Department takes exception to four conclusions of law. Therefore, in reviewing the ALJ's conclusion of law the Board of

Medicine (Board) may reject or modify the conclusion of law over which it has substantive jurisdiction. The Board's substituted conclusion of law must be as or more reasonable than the ALJ's conclusion of law. See § 120.57(1)(l), Fla. Stat. (2009); Miles v. Florida A and M University, 813 So. 2d 242, 245 (Fla. 1st DCA 2002); Barfield v. Dep't of Health, 805 So. 2d 1008, 1010-11 (Fla. 1st DCA 2001).

FIRST EXCEPTION TO CONCLUSION OF LAW

1. The Department takes exception to the Conclusion of Law in paragraph 70 on page 18 of the Recommended Order. Paragraph 70 reads as follows:

> 70. As noted by the Respondent, in Barr v. Dep't of Health, Bd. of Dentistry, 954 So. 2d 668 (Fla. Dist. Ct. App. 1st Dist. 2007), the court rejected the Department of Health['s] position that a "particularly egregious" recordkeeping violation could also constitute a breach of a standard of care for purposes of disciplinary proceedings, stating that to do so would render the statutory recordkeeping requirement "useless" as grounds for discipline. The same reasoning would suggest that an allegation that a licensee's failure to comply with a legal obligation (in this case, the Respondent's lack of a DEA registration) could constitute medical malpractice.

(Recommended Order.18)

2. The following language should be substituted for paragraph 70 of the Recommended Order in its entirety:

> 70. In Barr v. Dep't of Health, Bd. of Dentistry, 954 So. 2d 668 (Fla. 1st DCA 2007), the court rejected the Department of Health's position that a "particularly egregious" recordkeeping violation could also constitute a breach of a standard of care for purposes of disciplinary proceedings, stating that to do so would render the statutory recordkeeping requirement "useless" as grounds for discipline. Respondent argues that the same reasoning would suggest that an allegation that a licensee's failure to comply with a legal obligation (in this case, the Respondent's lack of a DEA registration) could constitute medical malpractice. The Board rejects this interpretation as a matter of law. Ordering a controlled substance without proper DEA registration is not similar to a recordkeeping violation.

SECOND EXCEPTION TO CONCLUSION OF LAW

3. The Department takes exception to the Conclusion of Law in paragraph 72 on page 19 of the Recommended Order. Paragraph 72 reads as follows:

> 72. The Motion to Dismiss is hereby granted, as to the allegation that the Respondent's ordering Demerol for the patient

without proper DEA registration constituted a violation of subsection 458.331(1)(t), Florida Statutes (2005).

(Recommended Order.19)

4. The following language should be substituted for paragraph 72 of the Recommended Order in its entirety:

> 72. The Motion to Dismiss is hereby denied, as to the allegation that the Respondent's ordering Demerol for the patient without proper DEA registration constituted a violation of subsection 458.331(1)(t), Florida Statutes (2005). As a matter of law, the Board finds that ordering Demerol without a valid DEA registration is a violation of section 458.331(1)(t)(1.), Florida Statutes. As a matter of law, a physician can never order a controlled substance in his or her professional practice without the proper DEA registration. The reasoning in Barr is not applicable here. Including this violation in subsection 458.331(1)(t), Florida Statutes, does not render subsection 458.331(1)(g) useless.

Facts and law supporting first and second exceptions [1]

5. The ALJ made the following findings of fact regarding Respondent ordering Demerol for the patient:

> 15. Demerol, a controlled substance, is routinely used to relieve pain during

[1] These exceptions are addressed together because they address the same substantive issue and the same facts and law support the change for both paragraphs.

medical procedures, including pregnancy terminations.

16. The medical assistant relayed S.B.'s reports of discomfort to the Respondent.

17. The Respondent ordered Demerol on both occasions to relieve S.B.'s pain.

18. A physician must be properly registered with the U.S. Drug Enforcement Administration (DEA) to order the administration of Demerol to a patient.

19. The Respondent was not properly registered with the DEA on February 6 or 7, 2006.

20. At the hearing, the Respondent denied that he ordered the Demerol. He testified that he was serving as a conduit between his medical assistant and another physician, Dr. Harry Perper, who also worked at the clinic and who was apparently properly registered with the DEA. The Respondent's testimony on this issue is not persuasive and has been rejected.

21. The evidence failed to establish that Dr. Perper ordered the administration of Demerol to the patient or that the Respondent merely relayed such orders from Dr. Perper to the medical assistant.

22. The Respondent asserted that he had not been registered with the DEA since

2002 and that everyone at the clinic knew he could not order controlled substances.

23. The patient's progress notes, created contemporaneously with the patient's treatment at the clinic, explicitly state that the orders for Demerol came from the Respondent.

24. The medical assistant who created the progress notes testified that she preferred talking to the Respondent rather than Dr. Perper and that the directions she received for the patient's Demerol came from the Respondent.

25. The Respondent's assertion that he did not order the Demerol was not credible and has been rejected.

26. The Demerol was administered by the medical assistant through injection of the medication into S.B.'s buttocks, and the patient's pain was reduced.

27. The medical assistant denied that she personally administered the Demerol to the patient. Her denial was not credible and has been rejected.

(Recommended Order.5-7)

6. The ALJ made the following conclusions of law regarding the Respondent ordering Demerol:

65. The federal Controlled Substances Act obligates practitioners engaged in

prescribing, ordering, administering or dispensing controlled substances to be registered with the DEA. The Respondent was not registered with the DEA on February 6 or 7, 2006.

66. The Respondent offered the testimony of Pharmacist Jose Rey, who asserted that there was no proper order issued for Demerol in this case. The evidence established that the Respondent ordered the Demerol that was administered to the patient and that the Respondent was not properly registered with the DEA to order the medication. Mr. Rey's testimony has been rejected.

67. The Petitioner presented the expert testimony of Dr. Jorge Gomez, who opined that a physician who was not properly registered with the DEA would breach the standard of care and commit medical malpractice by ordering the administration of a controlled substance in violation of Subsection 458.331(1)(t)(1.), Florida Statutes (2005).

68. The Respondent asserted that such a practice would not constitute medical malpractice and offered the expert testimony of Dr. Steven Warsof, who opined that a physician who failed to provide pain-relieving medication to a patient in need would have breached the standard of care.

69. As referenced in the Preliminary Statement to this Recommended Order, the Respondent filed a Motion to Dismiss

immediately prior to the commencement of the hearing, wherein the Respondent asserted that the charge of medical malpractice under subsection 458.331(1)(t)(1.), Florida Statutes (2005), was improper. The Respondent observed that the Petitioner did not charge the Respondent with a violation of Subsection 458.331(1)(g), Florida Statutes (2005), which provides that a failure "to perform any statutory or legal obligation placed upon a licensed physician" is grounds for discipline. The argument was further addressed in the Respondent's Proposed Recommended Order.

70. As noted by the Respondent, in Barr v. Dep't of Health, Bd. of Dentistry, 954 So. 2d 668 (Fla. Dist. Ct. App. 1st Dist. 2007), the court rejected the Department of Health['s] position that a "particularly egregious" recordkeeping violation could also constitute a breach of a standard of care for purposes of disciplinary proceedings, stating that to do so would render the statutory recordkeeping requirement "useless" as grounds for discipline. The same reasoning would suggest that an allegation that a licensee's failure to comply with a legal obligation (in this case, the Respondent's lack of a DEA registration) could constitute medical malpractice.

71. The Petitioner has filed no response to the Motion to Dismiss and did not directly address the matter in its Proposed Recommended Order.

72. The Motion to Dismiss is hereby granted, as to the allegation that the

> Respondent's ordering Demerol for the patient without proper DEA registration constituted a violation of subsection 458.331(1)(t), Florida Statutes (2005).

(Recommended Order.17-19)

7. The relevant statute at issue here is section 458.331(1)(t)(1.), Florida Statutes, which provides the following ground for discipline:

> Notwithstanding s. 456.072(2) but as specified in s. 456.50(2):
>
> 1. Committing medical malpractice as defined in s. 456.50. The board shall give great weight to the provisions of s. 766.102 when enforcing this paragraph. Medical malpractice shall not be construed to require more than one instance, event, or act.

8. Section 456.50(1), Florida Statutes (2005), defines "level of care, skill and treatment recognized in general law related to health care licensure" and "medical malpractice":

> (e) "Level of care, skill, and treatment recognized in general law related to health care licensure" means the standard of care specified in s. 766.102.
>
> . . . .
>
> (g) "Medical malpractice" means the failure to practice medicine in accordance with the level of care, skill,

and treatment recognized in general law related to health care licensure. . .

9. Section 766.102(1), Florida Statutes (2005), defines the level of level of care, skill and treatment recognized in general law related to health care licensure as follows:

> The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

10. The Administrative Complaint alleged that Respondent violated section 458.331(1)(t), Florida Statutes, by, inter alia, the following:

> A. By having prescribed, ordered or administered controlled substances to Patient S.B. when he did not possess a current, valid DEA number;

(Administrative Complaint.7)

11. The ALJ found that a physician must be properly registered with the DEA to order the administration of Demerol to a patient, the Respondent did not have a valid DEA registration, the Respondent ordered Demerol be administered to the patient, and the

Demerol was administered to the patient. (Recommended Order.5-7) Despite these findings, the ALJ found that these actions did not constitute medical malpractice in violation of section 458.331(1)(t), Florida Statutes, relying on the ruling in Barr v. Department of Health, Board of Dentistry, 954 So. 2d 668 (Fla. 1st DCA 2007).

12. In Barr, however, the issue was significantly different. In Barr, a dentist had been charged with violating the relevant standard of care provision by falling below the standard of care in his treatment of a root canal and in his documentation of the care he provided. Id. at 668. The ALJ found that the dentist met or exceeded the standard of care in the treatment of his root canal; however, he violated the applicable standard of care statute by failing to maintain adequate records associated with the treatment. See id. In reversing a final order accepting this finding, the court pointed out that although the agency's construction of a statute it is charged with administering is entitled to great weight and will not be overturned unless clearly erroneous, the principles of statutory construction also require reconciliation among seemingly disparate provisions of law in

order to give effect to all parts of the law. See id. at 669. The court held as follows:

> The Board argues that particularly egregious recordkeeping violations could rise to the level of a "standard of care" violation. Because this interpretation renders subsection (m) useless, it is clearly erroneous. We believe there is a significant difference between improperly diagnosing a patient, which constitutes a subsection (x) violation, and properly diagnosing a patient, yet failing to properly document the actions taken on the patient's chart, which constitutes a subsection (m) violation. We hold that the ALJ erred in finding Appellant guilty of violating section 466.028(1)(x), Florida Statutes (2005). Accordingly, we reverse the final order.

Id. at 669. The court also emphasized that the statute allowed discipline for "'failing to meet the minimum standards of performance in diagnosis and treatment.'" Id. at 668 (emphasis in original) (quoting section 466.028(1)(x), Fla. Stat. (2005)).

13. Here, unlike in Barr, interpreting section 458.331(1)(t) to include the situation where a doctor orders the administration of a controlled substances when he does not have a valid DEA registration does not render subsection 458.331(1)(q) (or subsection 458.331(1)(g)) useless. Subsection 458.331(1)(q) encompasses

many different instances when a physician prescribes, administers or dispenses any legend drug, including controlled substances. For example, there may be a violation when a doctor prescribes medication to a non-patient for money or when a physician prescribes excessive quantities in a negligent manner. See Waters v. Dep't of Health, Bd. of Med., 962 So. 2d 1011, 1012-13 (Fla. 3d DCA 2007) (holding "that the Department's rejection of the law judge's interpretation of the requirements of subsection (q) is within the agency's delegated range of discretion" when the Board found that a doctor prescribed drugs in violation of subsection (q) when his actions did not involve illicit activity). Interpreting subsection 458.331(1)(t) to include the acts at issue here does not render subsection 458.331(1)(q) useless.

14. This same argument holds true for subsection 458.331(1)(g), Florida Statutes (2005), which provides as a ground for discipline, "[f]ailing to perform any statutory or legal obligation placed upon a licensed physician." Although that statute was not charged here, the ALJ appears to have believed that the Respondent's conduct fell under this statute as opposed to section

458.331(1)(t). See Recommended Order, p. 18 ("The same reasoning would suggest that an allegation that a licensee's failure to comply with a legal obligation (in this case, the Respondent's lack of DEA registration) could constitute medical malpractice."). Again, many "legal obligations" exist that a physician must follow; therefore, section 458.331(1)(g), is not rendered useless if the conduct described here is included as a violation under subsection (t).

15. In addition, a licensee's conduct may violate more than one subsection of the Medical Practice Act. The fact that Appellant's conduct may have been a failure to perform a legal obligation does not mean that it may not also fall below the standard or care.

16. This case is also distinguishable from Barr, because in that case, a recordkeeping violation was not part of the licensee's actual treatment or diagnosis of the patient. Here, however, ordering the administration of Demerol is part of a physician's treatment of a patient. This is not a simple failure to document adequate care; the Respondent was not permitted to order the administration of Demerol to any patient. The Respondent ordered the administration of a medication when he had no authority to do so. No physician may

order the administration of Demerol without a valid DEA registration. This action falls below the standard of care as a matter of law.

17. Section 458.331(1)(t), Florida Statutes (2005), is a statute over which the Board has substantive jurisdiction. The interpretation that the Respondent violated section 458.331(1)(t), by ordering Demerol without a valid DEA registration is as or more reasonable than the ALJ's conclusion that it was not a violation of section 458.331(1)(t), Florida Statutes, because this case is distinguishable from Barr in that it deals with the Respondent's conduct in his practice of treating a patient and this interpretation does not render any other statute useless.

THIRD EXCEPTION TO CONCLUSION OF LAW

18. The Department takes exception to the Conclusion of Law in paragraph 85 on page 22 of the Recommended Order, which reads as follows:

> 85. Count III of the Administrative Complaint alleged that the Respondent committed medical malpractice in violation of Subsection 458.331 (1) (q), Florida Statutes (2005), by "prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the

physician's professional practice." Specifically, the Petitioner alleged that the Respondent violated Subsection 458.331 (1) (q), Florida Statutes (2005), by ordering Demerol without proper DEA registration and through the administration of "excessive" Cytotec.

19. The following language should be substituted for paragraph 85 of the Recommended Order in its entirety:

> 85. Count III of the Administrative Complaint alleged that the Respondent violated Subsection 458.331 (1) (q), Florida Statutes (2005), by "prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice." Specifically, the Petitioner alleged that the Respondent violated Subsection 458.331 (1) (q), Florida Statutes (2005), by ordering Demerol without proper DEA registration and through the administration of "excessive" Cytotec.

20. The Administrative Complaint in Count III alleged as follows:

> 27. Respondent prescribed, dispensed, administered, mixed, or otherwise prepared a legend drug, including any controlled substance, other than in the course of the physician's professional practice in one or more of the following ways:
>
> A. By having prescribed, ordered or administered controlled substances to Patient

S.B. when he did not possess a current, valid DEA number;

B. By ordering or administering one additional dosage Cytotec-200 ug two hours after a prior dosage;

C. By ordering or administering an excessive amount of Cytotec.

28. Based on the foregoing, Respondent violated Section 458.331(1)(q), Florida Statutes (2005), by prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice. For the purposes of paragraph 458.331(1)(q), it shall be legally presumed that prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including all controlled substances, inappropriately or in excessive or inappropriate quantities is not in the best interest of the patient and not in the course of the physician's professional practice, without regard to his or her intent.

21. The ALJ stated in Paragraph 85 that the Administrative Complaint alleges that Respondent committed medical malpractice in violation of section 458.331(1)(q). However, the Administrative Complaint does not allege "medical malpractice" in relation to section 458.331(1)(q). (Medical malpractice relates to Count II in the Administrative Complaint, not Count III.) Accordingly, this error is remedied with the substitute language.

FORTH EXCEPTION TO CONCLUSION OF LAW

22. The Department takes exception to the Conclusion of Law in paragraph 86 on page 23 of the Recommended Order, which reads as follows:

> 86. The evidence failed to establish that the Respondent's use of Cytotec and Demerol occurred "other than in the course of" Respondent's professional practice, or that such use otherwise constituted medical malpractice under Subsection 458.331(1)(q), Florida Statutes (2005).

(Recommended Order.23)

23. The Department requests that this conclusion of law be modified to read as follows:

> 86. The evidence established that Respondent's use of Demerol without proper DEA registration constitutes a violation of section 458.331(1)(q). The evidence failed to establish that the Respondent's use of Cytotec constituted a violation of subsection 458.331(1)(q), Florida Statutes (2005).

24. The Department does not take exception to the conclusions of law regarding the Respondent's use of Cytotec in light of the ALJ's findings of fact on that issue, but does take exception to the conclusion of law regarding Demerol.

25. This interpretation of section 458.331(1)(q), Florida Statutes—a statute over which the Board has substantive jurisdiction--is as or more reasonable than that of the ALJ because the definition of prescribe includes ordering, and the Waters case controls the Board's interpretation of section 458.331(1)(q), and it does not include a requirement of illicit conduct.

26. The facts relating to the Respondent's ordering of Demerol are delineated in paragraph 5 above.

27. Section 458.331(1)(q), Florida Statutes (2005), provides as a ground for discipline the following:

> Prescribing, dispensing, administering, mixing or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice. For the purposes of this paragraph, it shall be legally presumed that prescribing, dispensing administering mixing, or otherwise preparing legend drugs, including all controlled substances, inappropriately or in excessive or inappropriate quantities is not in the best interest of the patient and is not in the course of the physician's professional practice, without regard to his or her intent.

28. In the administrative complaint, the Department alleged that Respondent violated section 458.331(1)(q), Fla. Stat., by the following actions:

> A. By having prescribed, ordered or administered controlled substances to Patient S.B. when he did not possess a current, valid DEA number;
>
> B. By ordering or administering one additional dosage of Cytotec-200 mg two hours after a prior dosage;
>
> C. By ordering or administering an excessive amount of Cytotec.

29. The Department first objects to the reference in paragraph 86 to "medical malpractice." Medical malpractice is a term used in section 458.331(1)(t), not section 458.331(1)(q).

30. The Department also points out that paragraph 86 is extremely vague and does not explain the ALJ's reasons for concluding that ordering Demerol to be administered without a valid DEA registration was not a violation of section 458.331(1)(q), in light of his factual findings on the issue.

31. As explained above, the ALJ found that a physician must be properly registered with the DEA to order the administration of

Demerol to a patient, the Respondent did not have a valid DEA registration, the Respondent ordered Demerol be administered to the patient, and the Demerol was administered to the patient. (Recommended Order.5-7) Despite these facts, the ALJ concluded that the Department failed to establish that the Respondent's use of Demerol occurred other than in the course of his professional practice.

32. The ALJ may have based this finding on one of three arguments raised in the Respondent's Proposed Recommended Order: a) it is possible that the ALJ thought that the conduct should have been charged under section 458.331(1)(g) as the failure to perform a legal obligation (this is evidenced by the ALJ's comments in paragraph 70); b) the ALJ may have believed Respondent's actions did not qualify as "other than in the course of the professional practice" because Respondent was not engaged in an illicit activity (this may be evidenced by his quotation of such language in paragraph 86; or, c) the ALJ may have believed that ordering the administration of Demerol was not included as a violation under section 458.331(1)(q) because the term "ordering" is not specifically

in the statute (which was argued in the Proposed Recommended Order).

33. Regarding the argument listed in subsection "a" above, the fact that these facts may constitute a violation of another statute, i.e., section 458.331(1)(g), does not preclude the facts from also being a violation of section 458.331(1)(q).

34. Regarding the argument in issue "b" above, the Board has previously found, and the Board's interpretation was upheld on appeal as within the agency's delegated range of discretion, that in order to find a violation of section 458.331(1)(q), a doctor is not required to be engaged in illicit activity when prescribing drugs; it is a violation of the statute if the doctor prescribed drugs inappropriately or in excessive or inappropriate quantities. See Waters, 962 So. 2d at 1012-13.

35. The Respondent argued in the Proposed Recommended Order that an older interpretation of section 458.331(1)(q) should apply. In 2001, an ALJ issued a Recommended Order in Department of Health, Board of Medicine v. Heller, DOAH Case # 00-474PL, 2001 WL 666972, (2001), which included an interpretation of section

458.331(1)(q), that found that to establish guilt under this section, the Department must prove that the accused doctor was not practicing medicine, but instead was engaged in an illicit (and probably criminal) activity. The ALJ found that it was not a violation when there was mere negligence by prescribing inappropriately or excessively. See id. at 10-11. The Final Order was adopted by the Board and not appealed.

36. In 2003, in the Department of Health, Board of Medicine v. Rogers, DOAH Case # 02-0080PL, 2003 WL 548861, (2003), an ALJ entered a Recommended Order recommending dismissal of a charge of violating section 458.331(1)(q), for the same reasons enunciated in Heller and because there was not clear and convincing evidence to support the Department's claims that the Respondent in that case failed to document patient history and the Department did not prove that the Respondent failed to conduct a physical examination before prescribing narcotics. See id. at 10. This time, however, the Board rejected the ALJ's interpretation of section 458.331(1)(q), Florida Statutes. The case was reversed on appeal. See Rogers v. Dep't of Health, 920 So. 2d 27, 31-32 (Fla. 1st DCA

2005). However, the case was not reversed because of the agency's interpretation of section 458.331(1)(q), as the Respondent in the present case claims. Instead, the case was reversed because the court found that the Board reweighed the evidence presented to the ALJ and came to a different result, which was reversible error. See id. at 31. The court specifically stated as follows:

> The Department argues on appeal that the prescriptions were inappropriate because they were not preceded by focused medical examinations. Without affirming the Department's view of subsection (q) that inappropriate dispensing occurs when a prescription is given without a physical examination, we find the Department's argument to be without evidentiary support. As noted previously, the ALJ did not find that Dr. Rogers failed to undertake an appropriate examination before prescribing medication. Such a finding was supplied by the Board when it rejected the ALJ's findings and conclusions regarding count I, and we have already found the Board's action in reweighing the evidence relating to count I to be reversible error. Accordingly, the Board may *not premise a violation of count III on its* erroneous ruling as to count I.

Id. (emphasis added). Thus, the reversal in Rogers was because of a lack of evidence, not because of the interpretation of the Board.

37. The issue was raised again in Department of Health, Board of Medicine v. Waters, DOAH Case # 04-0401PL 2005, WL 2100670 (2005). In Waters, again in a Recommended Order, an ALJ interpreted 458.331(1)(q), Florida Statutes, as was done in Heller. The ALJ in Waters acknowledged the Board's interpretation in Rogers, but at that time, Rogers was on appeal, so the ALJ decided to follow the interpretation in Heller. Again, the Board disagreed with that interpretation. In the Final Order in Waters, the Board rejected the ALJ's conclusion of law on that issue.

> 2. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated herein by reference with the following amendment: Paragraph 190 of the Recommended Order shall be rejected and the following language shall be substituted:
>
> 190. The Board is of the opinion that the ALJ erred in his interpretation of Section 458.331(1)(q), Florida Statutes. The Board holds that the interpretation that is adopted in the Rogers final order is correct and specifically recedes from the holding in the Heller case. Instead the Board relies on the rulings in Scheininger v. Department of Professional Regulation, Board of Medical Examiners, 443 So. 2d 387 (Fla. 1st DCA 1983) and Department of Health v. Jeri-Lin Furlow Burton, M.D., DOAH Case No. 98-

> 1221. Since the ALJ found, factually, that Petitioner proved, clearly and convincingly, that Respondent inappropriately prescribed drugs . . . Respondent is found to have violated Section 458.331(1)(q), Florida Statutes, for each of the patients. . . .

(Waters Final Order. 2-3)

38. In upholding the Board's final order, the Third District Court of Appeal held as follows: "Further, we hold that the Department's rejection of the law judge's interpretation of the requirements of subsection (q) is within the agency's delegated range of discretion." Waters, 962 So. 2d at 1013. Thus, the court specifically held that this interpretation was within the discretion of the Board.

39. The Board's ruling Waters is controlling. A physician violates section 458.331(1)(q), Florida Statutes, if the physician prescribes inappropriately or excessively, and the conduct does not have to include illicit activity. In the present case, the Respondent prescribed inappropriately because he did not have a valid DEA registration which allowed him to prescribe or order controlled substances. He had no authority, whatsoever, to prescribe Demerol to this (or any) patient. There was no situation in which he could

have appropriately prescribed Demerol to this patient without a DEA registration.

40. In regards to the third argument, argument "c," the Respondent argues in his Proposed Recommended Order that "ordering" a controlled substance is not a violation under section 458.331(1)(q), Florida Statutes, because that particular term is not listed in the statute, which provides as a ground for discipline, "Prescribing, dispensing, administering, mixing or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice." § 458.331(1)(q), Fla. Stat. (2005). However, a physician "prescribes" medication when he "orders" the medication be given to a patient. According to the Merriam-Webster dictionary online, prescribe is defined as follows: "to designate or order the use of as a remedy <*prescribed* a painkiller>" or "to write or give medical prescriptions." http://www.merriam-webster.com/dictionary/prescribe (emphasis added).

41. By the plain definition of "prescribe," to prescribe includes "to order." Thus, section 458.331(1)(q), Florida Statutes (2005),

should be interpreted to include ordering a controlled substance without a DEA registration.

42. This interpretation of section 458.331(1)(q), Florida Statutes—a statute over which the Board has substantive jurisdiction--is as or more reasonable than that of the ALJ because the definition of prescribe includes ordering, and the Waters case controls the Board's interpretation of section 458.331(1)(q), and it does not include a requirement of illicit conduct.

Respectfully submitted this 6th day of October, 2008.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been furnished as a PDF document by electronic mail (k.metzger@mgfblaw.com), and by U.S. Mail to Kenneth J. Metzger, Metzger, Grossman, Furlow & Bayó, LLC, 1408 North Piedmont Way, Tallahassee, FL 32308, Counsel for Respondent, this 6th day of October, 2009.

GREG S. MARR

STATE OF FLORIDA
DEPARTMENT OF HEALTH
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

Petitioner,

v.

DOAH CASE NO. 08-4197PL
DOH CASE NO. 2006-05930

JAMES S. PENDERGRAFT, IV, M.D.,

Respondent.
_____/

RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER

Respondent, James S. Pendergraft, IV, M.D. ("Respondent" or "Dr. Pendergraft"), by and through his undersigned counsel, and pursuant to Section 120.57(1)(k), Florida Statutes, and Rule 28-106.217(1), Florida Administrative Code, files his written Exceptions to the Recommended Order of the Administrative Law Judge issued on September 21, 2009, as follows:

The Board's Review Requirements Under Chapter 120, Florida Statutes

In considering the Recommended Order and penalty recommendations of the Administrative Law Judge herein, the Board of Medicine is confined solely to the review of the record as established at the formal hearing. *Ong v. Department of Professional Regulation*, 565 So. 2d 1384, 1387 (Fla. 5th DCA 1990). Thus, the Board is not authorized to receive additional evidence other than that already presented and considered by the Administrative Law Judge. *Id.* Nor can the Board discipline a licensee for matters not charged in the Administrative Complaint. See *Trevisani v. Dep't of Health*, 936 So. 2d 790, 795 (Fla. 1st DCA 2006); *Ghani v. Dep't of Health*, 714 So. 2d 1113, 1114 (Fla. 1st DCA 1998).

Standard of Review of a Recommended Order

In reviewing a Recommended Order of an Administrative Law Judge, the Board of Medicine ("the Board") must evaluate the individual findings of fact and conclusions of law under a "competent, substantial evidence" standard. §120.57(1)(l), Florida Statutes. Competent substantial evidence is defined as that evidence supporting an ultimate finding which is sufficiently relevant and material such that a reasonable mind would accept as adequate to support the conclusions reached. *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1959).

In keeping with the requirement of a "competent substantial evidence" review, the Legislature has authorized the Board to reject any finding of fact set forth in a Recommended Order, when upon its review of the entire record before the Administrative Law Judge, the Board determines that there is a lack of competent, substantial evidence upon which to base the particular finding of fact. *Id.*; see also *Heifetz v. Department of Business Regulation*, 475 So. 2d 1277, 1281-1282 (Fla. 1st DCA 1985); *Gross v. Department of Health*, 819 So. 2d 997, 1000-1001 (Fla. 1st DCA 2002). In so doing, however, the Board may not reweigh the evidence presented, may not judge the credibility of the witnesses, and may not otherwise interpret the evidence to fit its desired ultimate conclusion. *Heifetz, supra; Gross, supra.*

In addition, the Board is authorized to reject or modify the conclusions of law over which it has substantive jurisdiction and to reject or modify interpretation of administrative rules over which it has substantive jurisdiction. §120.57(1)(l), Florida Statutes.

> When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusions of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of

> conclusions of law may not form the basis for rejection or modification of findings of fact.

Id. (Emphasis added).

Respondent's Exceptions To Findings Of Fact

Respondent takes exception to the following findings of fact, and for the reasons stated in each Exception, requests that they be either stricken from the Recommended Order or modified to reflect the competent substantial evidence in the record.

Finding of Fact Exception 1: Respondent takes exception to Finding of Fact 41 at page 9 of the Recommended Order because that finding is not supported by competent, substantial evidence.

Respondent takes exception to paragraph 41 of the Recommended Order in which the Administrative Law Judge states: "The Respondent failed to inform either Dr. Cates or Dr. Lamberty that he had removed a portion of the fetus from the patient at the clinic." The finding of fact at paragraph 41 is not supported by clear and convincing evidence in the record. There is no documentary evidence on this issue. The only witnesses to testify on this issue were the Respondent, Dr. Lamberty, and Dr. Cates-Smith. The essence of the Respondent's testimony on this issue is that when he spoke by telephone to Dr. Cates-Smith and then to Dr. Lamberty he "believes" he told each of them about the removal of the fetal foot. (Hearing transcript pp. 353-355). It is the Petitioner's burden to prove by clear and convincing evidence that the Respondent did not tell them, which is a burden the Petitioner did not meet in this case. While it is true that in response to leading questions both Dr. Cates-Smith and Dr. Lamberty answered in the affirmative when asked a question to the effect of "if the Respondent had mentioned removing the foot we would have remembered him saying that" such answers are more in the nature of conjecture and speculation than in the nature of reliable fact because they were being asked to express an opinion about the reliability of their own memory in a hypothetical circumstance.

The conjectural, speculative, and unreliable nature of their answers is especially evident when note is taken of how many times each of these doctors answered "I don't remember," or "I don't recall" whenever they were asked what was said in their respective conversations with the Respondent. (The litany of all the things Dr. Cates-Smith does not remember about the telephone conversation can be found at pages 121-123 of the hearing transcript. The litany of what Dr. Lamberty does not remember is at pages 146-147, 159-160, and 167 of the hearing transcript) If neither of them can remember what was said, it seems most unlikely that either of them would have any reliable recollection of what was not said. Because of their inability to recall any of the details of their respective conversations with the Respondent their memory of those conversations is simply unreliable. It is contrary to logic and human experience for a person to have no memory at all about what was said in a telephone conversation, but to at the same time purport to remember what was not said in the conversation.

The testimony of the two hospital doctors about the two telephone calls is too full of their admissions of their own memory failures to qualify as clear and convincing evidence. In this regard attention is directed to *Fox v. Department of Health*, 994 So. 2d 416, 418 (Fla. 1st DCA 2008), which holds that testimony to the effect that a witness does not remember having a discussion about a specific detail does not constitute competent, substantial evidence that the discussion of that specific detail did not take place. And it follows naturally that if it does not constitute competent, substantial evidence, it surely does not meet the"clear and convincing evidence" burden of proof. Such testimony may fairly be described as the opposite of clear and convincing evidence. Because of lack of clear and convincing evidence, the facts stated at paragraph 41 of the Recommended Order should be stricken.

Finding of Fact Exception 2: Respondent takes exception to the second sentence of Finding of Fact 48 at page 10 because it contains both a fact and an opinion about that fact, neither of which is warranted by the evidence.

Respondent takes exception to a portion of the second sentence of paragraph 48 of the Recommended Order. The exception is addressed to the underscored portion of the Administrative law Judge's statement reading as follows: "Dr. Lamberty began efforts to locate the missing part, which he reasonably presumed remained in the patient." The basis for this exception is twofold: (1) there is no evidence in the record that Dr. Lamberty had any presumption about the whereabouts of the missing fetal part, and (2) if Dr. Lamberty did have such a presumption, the presumption would not have been reasonable. Among the reasons for which such a presumption would be unreasonable is that the presumption would overlook the *most obvious probable location for the missing fetal part – Dr. Pendergraft's clinic*. Dr. Lamberty knew the numbers of the clinic telephone and of the Respondent's cell phone and also knew that the Respondent had asked to be called when the surgery on Patient SB was finished; a call that Dr. Lamberty never made. Under these circumstances common sense and logic leads to the conclusion that there was a high probability that the missing part was removed in the termination of pregnancy clinic, and the first effort to locate the missing fetal part would have been to call the clinic or call the Respondent and inquire. In was not until February 10 (the third day following surgery) that one of the hospital doctors finally made the telephone call that they should have made on the night of February 7. Because the underscored portion of the Administrative Law Judge's statement in the last sentence of paragraph 48 is not supported by competent, substantial evidence and is not consistent with reason, it should be stricken.

Respondent's Exceptions To Conclusions Of Law

Respondent takes exception to the following conclusions of law in the Recommended Order, and for the reasons stated in each Exception, requests that they be rejected and be replaced or modified to reflect the correct legal conclusions as articulated in each Exception.

Conclusion of Law Exception 1: Respondent takes exception to Conclusion of Law 61 on page 15 of the Recommended Order, because the incidental documentation omission in this case is not the type of conduct for which the Legislature sought to impose disciplinary action when it enacted Section 458.331(1)(m), Florida Statutes.

Respondent takes exception to paragraph 61 of the Recommended Order in which the Administrative Law Judge states the following conclusion: "The evidence established that, by failing to document the removal of a portion of a fetal limb, the Respondent clearly failed to keep legible medical records justifying the course of treatment in violation of Subsection 458.331(1)(m), Florida Statutes (2005), because such a conclusion, which technically correct within the very letter of the law as written, does not appear to be within the spirit of what the Legislature intended when it enacted Subsection 458.331(1)(m). It is a well established that rule of statutory construction that when numerous statutory provisions address the same subject matter the statutes are to be read together in pari materia, and each statutory provision is to be read in context with other statutes on the same subject matter. In Subsection 766.102(1), Florida Statutes, the Legislature has defined the term "prevailing standard of professional care" as follows:

> The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers. (Emphasis added.)

As is clear from the underscored portion of the foregoing definition, the Legislature has not sought to require physicians to be perfect, or even to be "exceptionally" or "especially"

prudent. It is quite enough for physicians to be "reasonably" prudent. Similarly, the statutory language quoted above does not require that the care and treatment provided be perfect, or even to be "exceptional" or "above average." It is quite enough for the care and treatment to be "acceptable and appropriate."

Reading Section 458.331(1)(m), Florida Statutes, with the foregoing in mind, it is reasonable to conclude that when 458.331(1)(m) was enacted the legislature had that same concept of the standards it expected of a physician and while, no doubt, hoping that all physicians would maintain excellent medical records, they were requiring no more of physicians than that they make a reasonable effort to maintain reasonable medical records. When Section 458.331(1)(m) is interpreted in this manner, while the facts established in this case are encompassed by the letter of the statutory language, the facts in this case do not appear to be an event of the type the statute was intended to apply to, especially in view of the following factual circumstances, none of which are disputed by the Petitioner: (a) the removal of the fetal part occurred just seconds before the Respondent discovered that the patient was suffering from a life-threatening condition that required urgent emergency treatment in a hospital, (b) upon discovery of the life-threatening condition, all of the Respondent's thoughts and activities were focused on arranging for the transfer and emergency hospital treatment needed by the patient, (c) the presence or absence of the removed fetal part was of little, if any, significance to planning for and implementing the emergency treatment needed by the patient, (d) the Respondent was working quickly to gather and copy the patient's clinic records and to write additional notes about events leading up to the emergency to send to the hospital with the patient, (e) the Respondent told the hospital doctors his telephone numbers and asked them to call him when they finished the surgery, (f) the patient suffered no consequential injury as a result of the

omission of information about the removal of the fetal part, and (g) any concerns Dr. Lamberty had about the whereabouts of the missing fetal part could have been promptly resolved had he but called the Respondent or the clinic. This was no careless or indifferent approach to medical record-keeping. Rather, this was the accidental omission from the records in the heat of an emergency – the type of accidental omission that many a reasonably prudent physician might make. This is not a case of bad record-keeping: it is a case of a single minor inadvertent oversight – a *de minimus* mistake that is not likely to ever occur again, one not within the type of conduct Section 458.331(1)(m) is intended to regulate.

Conclusion of Law Exception 2: Respondent takes exception to Conclusion of Law 78 on page 20 of the Recommended Order because the conclusion is predicated on a fact that was not proved by clear and convincing evidence.

Respondent takes exception to paragraph 78 of the Recommended Order in which the Administrative Law states: "As charged in the Administrative Complaint, the Respondent's failure to advise the hospital's physicians during the telephone conversations that a portion of the patient's fetus had been removed at the Respondent's clinic breached the standard of care and constituted malpractice." The quoted statement is excepted to because it is predicated on a fact which was not proved by clear and convincing evidence. This Conclusion of Law is based on an assumption that when the Respondent spoke by telephone with the hospital's physicians on February 7 the Respondent failed to tell them that he had removed a fetal part. For the reasons stated in the Respondent's Finding of Fact Exception 3 regarding the finding of fact at paragraph 41 of the Recommended Order, there is no clear and convincing evidence that the Respondent failed to advise the hospital doctors that he had removed a fetal part, and thus, this Conclusion of Law is not supported by competent, substantial evidence in the record.

Conclusion of Law Exception 3: Respondent takes further exception to Conclusion of Law 78 on page 20 of the Recommended Order on the additional grounds that in this case the Petitioner did not allege and did not prove all of the elements that are necessary to prove malpractice in the manner required by Subsection 766.102, Florida Statutes.

Respondent takes further exception to paragraph 78 of the Recommended Order in which the Administrative Law Judge concludes that the Respondent is guilty of malpractice, for the additional reason that the allegations and proof in this case do not establish all of the elements which are necessary to prove malpractice in an administrative license discipline proceeding since the amendments to Subsection 458.331(1)(t), Florida Statutes which went into effect shortly before the events that are alleged in the Administrative Complaint in this case. Since the effective date of the amendments to Subsection 458.331(1)(t), Florida Statutes, which took effect shortly before the events in this case, in order for the Petitioner in an administrative license discipline case to prevail when it charges a physician with malpractice under Subsection 458.331(1)(t)1, Florida Statutes, the Petitioner must allege and prove all of the same elements of malpractice that Subsection 766.102, Florida Statutes, requires be alleged and proved in a civil action seeking damages for malpractice. The Administrative Law Judge did not discuss any of the Respondent's arguments on this issue set forth in the Respondent's Proposed Recommended Order at paragraphs 74 through 91 of that document. To facilitate the Board's consideration of this issue, the relevant portions of those arguments are set forth immediately below and incorporated into this exception.

> 74. In Count II of the Administrative Complaint, at paragraphs 22, 23, and 24, it is alleged that the Respondent has violated Section 458.331(1)(t)1, Florida Statutes, by failing to practice medicine within the prevailing professional standard of care in eight different ways set forth in eight separate subparagraphs identified by the letters A through H. Before addressing the individual allegations of malpractice in each of the eight subparagraphs of Count II, the Respondent wishes to argue that all of the alleged violations in Count II should be dismissed because of certain legal insufficiencies in both the allegations and in the evidence regarding the

malpractice allegations in this case. Simply stated, it is the Respondent's position that the Petitioner neither alleged enough nor proved enough to establish that the Respondent committed any malpractice within the meaning of the definitions in Section 766.102, Florida Statutes. Section 458.331(1)(t) 1, Florida Statutes, authorizes disciplinary action for committing medical malpractice in the following words:

> (t) Notwithstanding s.456.072(2) but as specified in s. 456.50(2):
>
> 1. Committing medical malpractice as defined in s.456.50. The board shall give great weight to the provisions of s. 766.102 when enforcing this paragraph. Medical malpractice shall not be construed to require more than one instance, event, or act.

75. Section 456.50(1), Florida Statues, provides us with some helpful definitions, including the following language:

> (e) "Level of care, skill, and treatment recognized in general law related to health care licensure" means the standard of care specified in s. 766.102.
>
> (g) "Medical malpractice" means the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure.

76. And Section 766.102, Florida Statues, contains the following pertinent language:

> (1) In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in s.766.202 (4), the claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers. (Emphasis added.)
>
> (2)(a) If the injury is claimed to have resulted from the negligent affirmative medical intervention of the health care provider, the claimant must, in order to prove a breach of the prevailing professional standard of care, show that the injury was not within the necessary or reasonably foreseeable results of the surgical,

medicinal, or diagnostic procedure constituting the medical intervention, if the intervention from which the injury is alleged to have resulted was carried out in accordance with the prevailing professional standard of care by a reasonably prudent similar health care provider.

(b) The provisions of this subsection shall apply only when the medical intervention was undertaken with the informed consent of the patient in compliance with the provisions of s. 766.103.

(3) The existence of a medical injury shall not create any inference or presumption of negligence against a health care provider, and the claimant must maintain the burden of proving that an injury was proximately caused by a breach of the prevailing professional standard of care by the health care provider.

77. Reading all of the foregoing together, Section 458.331(1)(t)1, Florida Statutes, provides for disciplinary action against those who commit malpractice as defined in Section 456.50; Section 456.50 defines "malpractice" as "the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure," and another part of Section 456.50 tells us the level of care referred to in Section 456.50 is " the standard of care specified in s.766.102." And Section 766.102 is, of course, the same provision the Board of Medicine is directed to "give great weight to." From all of the foregoing it seems quite clear that Section 766.102, Florida Statutes, and the cases interpreting it, are where we should look to determine what the term "medical malpractice" means in the context of a disciplinary action under 458.331(1)(t)1.

78. Prior to discussing the meaning of the language in Section 766.102, it is helpful to consider the constructions that some of the Florida courts have placed on that language, as well as on earlier language to the same effect. Haas v. Zaccaria, 659 So.2d 1130 (Fla. 4th DCA 1130) states at pages 1132-1133:

Section 766.102(1), Florida Statutes (1993), places on the claimant in a medical malpractice action the burden of "proving by the greater weight of the evidence that the alleged actions of the [physician] represented a breach of the prevailing professional standard of care for that [physician]." In addition, subsection (3) of the statute provides that, in order to prove a breach of the applicable standard of care, the claimant must show "that the injury was not within the necessary or reasonably foreseeable results of the surgical * * * procedure" in question. Finally, subsection (4) of the statute declares that "[t]he existence of a medical injury shall

not create any inference or presumption of negligence against a health care provider, and the claimant must maintain the burden of proving" an injury resulting from a breach of the standard of care. With these statutory requirements in mind, we turn to the matters at hand.

***

As we have just seen, subsection (3) of section 766.102 explicitly provides that the claimant must show that the injury resulted from a departure from the applicable standard of care and that it was not within the expected or foreseeable results of the procedure. [The subsections of Section 766.102 were numbered differently at the time of the Haas opinion.]

79. Similarly, Torres v. Sullivan, Jr., M.D., 903 So.2d 1064 (Fla. 2nd DCA 2005), states:

To prevail in a medical malpractice action, a plaintiff must identify the standard of care owed by the physician, produce evidence that the physician breached the duty to render medical care in accordance with the requisite standard of care, and establish that the breach proximately caused the injury alleged. Moisan v. Frank K. Kriz, Jr., M.D., P.A., 531 So. 2d 398, 399 (Fla. 2d DCA 1988). The prevailing professional standard of care is that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers. See § 766.102(1), Fla. Stat. (1997).

80. More recently, in Hancock v. Schorr, 941 So.2d 409 (Fla.4th DCA 2006), the court reiterated:

To prevail in a medical malpractice case, a plaintiff must establish the following: the standard of care owed by the defendant, the defendant's breach of the standard of care, and that said breach proximately caused the damages claimed. See Gooding v. Univ. Hosp. Bldg. Inc., 445 So.2d 1015, 1018 (Fla.1984). With respect to causation, the Court held that in negligence actions Florida courts follow the "more likely than not" standard of causation and require proof that the negligence probably caused the plaintiff's injury.

81. Some older cases reaching some of the same conclusions regarding what is necessary to prevail in a civil action for malpractice include Zobac. v. Southeastern Hospital District, 382 So.2d 829 (Fla. 4th DCA 1980), Purvis v. Dept. of Professional Regulation v. Bd. of Veterinary Medicine,

461 So.2d 134 (Fla. 1st DCA 1984), and Gooding v. University Hospital Building, Inc., 445 So.2d 1015 (Fla. 1984). In Gooding the court stated:

> To prevail in a medical malpractice case a plaintiff must establish the following: the standard of care owed by the defendant, the defendant's breach of the standard of care, and that said breach proximately caused the damages claimed. Wale v. Barnes, 278 So.2d 601, 603 (Fla. 1973). (Emphasis added.)

82. Reviewing the allegations in Count II of the Administrative Complaint in this case in light of the statutory language in Section 766.102 and the court decisions referenced above, the first insufficiency is that there is no allegation that describes what conduct would be "recognized as acceptable and appropriate by reasonably prudent similar health care providers" in each of the eight scenarios in which the Respondent is alleged to have committed malpractice. Stated otherwise, there is no statement in Count II that states what a reasonably prudent similar health care provider would have done, or would have avoided, in each of the eight alleged scenarios. Yet it is clear from the case law that the claimant (in this case the Department which "claims" the Respondent committed malpractice) must allege and establish what the standard is. See especially, Torres, Hancock, and Gooding, above.

83. In addition to the absence of allegation, the evidence to prove the nature of the applicable standard of care in each of the eight subparagraphs ranges from thin to nonexistent, with nothing even close to "clear and convincing evidence." (As discussed elsewhere in this document, in much of his criticism of the Respondent's conduct it appears that Dr. Gomez is more often testifying on the basis of his personal preferences, rather than on the basis of what might be found acceptable by a reasonably prudent physician.)

84. The next insufficiency in both the allegation and the evidence is the absence of any allegation and the absence of any evidence that Patient SB suffered any medical injury as a result of any act or failure to act on the part of the Respondent. In a medical malpractice case, Section 766.102 requires that in every medical malpractice case an injury to the patient caused by the negligence of the physician must be alleged and proved. See subsections (1) and (3) of Section 766.102, Florida Statutes, both quoted above. The need for such allegation and proof is also confirmed in the case law. See especially Torres and Hancock, above.

85. In Count II of the Administrative Complaint there is no allegation that anything the Respondent did or failed to do caused any relevant injury to Patient SB.

*** *** ***

88. In sum: Because the Department failed to allege or prove any relevant injury to the patient, Count II and all of its subparagraphs should be dismissed. This dismissal is required not only by the language of Section 766.102, but also by the case law. See: Torres, Hancock, and Gooding, above.

89. The last issue regarding the insufficiencies of Count II to allege and prove an act of medical malpractice arises from the language of Section 766.201(2)(a), Florida Statutes, which reads as follows:

> (2)(a) If the injury is claimed to have resulted from the negligent affirmative medical intervention of the health care provider, the claimant must, in order to prove a breach of the prevailing professional standard of care, show that the injury was not within the necessary or reasonably foreseeable results of the surgical, medicinal, or diagnostic procedure constituting the medical intervention, if the intervention from which the injury is alleged to have resulted was carried out in accordance with the prevailing professional standard of care by a reasonably prudent similar health care provider.

90. Reduced to its most simple terms, Section 766.102(2)(a) provides that, even if a physician is negligent and his negligence causes injury to the patient, in order to prove a breach of the prevailing professional care standard, the claimant must show that the injury suffered was not "within the necessary or reasonably foreseeable results of the" medical intervention. Stated otherwise, if the injury suffered by the patient is an injury of the type that is a known necessary or reasonably foreseeable consequence of the medical services being provided even in the absence of negligence, the physician cannot be found to have committed malpractice regardless of whether he was negligent. In even more simple terms, if a certain type of injury is a known risk of the medical treatment being sought, under the terms of the statute a patient who suffers an injury in the "known risk" category may not prove a case of medical malpractice regardless of whether the physician was negligent. Viewed another way, Section 766.102(2)(a) seems to create a non-rebuttable presumption in favor of the physicians to the effect that when medical injuries occur which are injuries that are known risks of a specific treatment even in the absence of negligence, it will be presumed that those injuries did in fact occur in the absence of negligence.

91. And it is also a basic fundamental principle of American law that, unless otherwise expressly stated by the Legislature, a law should be applied equally to all who are affected by it. With this in mind, it is

significant to note that the only statutory provision changing the manner in which Section 766.102 shall be construed and applied in administrative disciplinary cases is the language in Section 458.331(3), Florida Statutes, which requires proof by "clear and convincing evidence" in all disciplinary cases seeking revocation or suspension of a license.

For all of the foregoing reasons paragraph 78 of the Conclusions of Law should be rejected and the Board should conclude that the allegation and evidence in this case are insufficient to prove a violation of Section 458.331(1)(t)1., Florida Statutes.

Conclusion of Law Exception 4: Respondent takes exception to Conclusion of Law 80 on pages 20 and 21 of the Recommended Order because it is not a conclusion of law, it is irrelevant to any legal issue remaining in the case, and it is not supported by clear and convincing evidence.

Respondent takes exception to paragraph 80 of the Recommended Order because it is not a Conclusion of Law, because it consists only of Findings of Fact which belong, if anywhere, in the Findings of Fact, and because all of the facts in paragraph are irrelevant to any issue to be decided in this case.

Further, the statement in paragraph 80 is excepted to because it is predicated on a fact which was not proved by clear and convincing evidence, and thus, not supported by competent, substantial evidence. This Conclusion of Law is dependent upon a finding that when the Respondent spoke by telephone with the hospital's physicians on February 7 the Respondent failed to tell them that he had removed a fetal part. However, for the reasons stated in the Respondent's Finding of Fact Exception 1 regarding the finding of fact at paragraph 41 of the Recommended Order, there is no clear and convincing evidence that the Respondent failed to advise the hospital doctors that he had removed a fetal part, and thus this Conclusion of Law is not supported by competent, substantial evidence in the record.

Conclusion of Law Exception 5: Respondent takes exception to Conclusion of Law 82 on page 21 of the Recommended Order because it contains assumptions, inferences, and conclusions that are not warranted by or supported by the evidence.

Respondent takes exception to paragraph 82 of the Recommended Order in which the Administrative Law Judge states: "It was the Respondent's obligation to advise the hospital of the events occurring at the clinic, and the implication that the hospital should have contacted the clinic to track down the missing part has been rejected. There is no credible evidence that the hospital personnel erred in their attempt to locate the missing fetal part." Assuming that the Respondent was obligated to advise the hospital doctors "of the events occurring at the clinic," it is first noted that, as stated in Respondent's Finding of Fact Exception 1 regarding paragraph 41 of the Recommended Order, there is no clear and convincing evidence that the Respondent failed to fulfill that obligation. While it might be argued that there is no persuasive affirmative evidence that the Respondent told the hospital doctors about the removal of the fetal part, it must be remembered that the Respondent does not bear the burden of coming forward with such proof. Rather, the Department must prove the alleged failure to communicate with clear and convincing evidence. For the reasons state previously, the Department did not do so in this case.

With regard to the Administrative Law Judge's rejection of "the implication that the hospital should have contacted the clinic to track down the missing part," the Administrative Law Judge appears to have overlooked the fact that, regardless of whether the Respondent told the hospital doctors about the removal of the fetal foot, once they discovered that a fetal part was missing and they did not know the whereabouts of that part, the hospital doctors, like every doctor in Florida, were required to act with "that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers." And under such circumstances the efforts of a reasonably prudent doctor to locate the missing fetal part would have included a telephone call to

the Respondent or to the clinic, which was eventually done some three days later than it should have been done.

Conclusion of Law Exception 6: Respondent takes exception to Conclusion of Law 91 on pages 24 and 25 of the Recommended Order because part of this conclusion is a Finding of Fact, part of that Finding of Fact is not supported by clear and convincing evidence, and part of this conclusion is an incorrect legal conclusion regarding an aggravating factor.

Respondent takes exception to paragraph 91 of the Recommended Order in which the Administrative Law Judge states: "The failure to notify hospital personnel that a fetal part was removed while the patient was at the clinic adversely impacted the medical care the patient received at the hospital and has been considered as an aggravating factor." (Emphasis added.) The underscored portion of paragraph 91 is excepted to because it is a Finding of Fact and not a Conclusion of Law, as well as because that finding is based on an inference that is inconsistent with credible evidence in the record. The remaining part of paragraph 91 is excepted to because it purports to treat as an aggravating factor a factor that is not mentioned in Florida Administrative Code Rule 64B8-8.001(3).

First, an act or failure to act that "adversely impacted the care the patient received at the hospital" cannot be an aggravating factor within the meaning of Florida Administrative Rule 64B8-8.001(3), because such an adverse impact is not mentioned in subparagraph (a) of that rule or in any other subparagraph of that rule. Such being the case, there is no basis for applying any aggravating factor when determining the appropriate penalty in this case. Further, as argued below in the exceptions to the excessive penalty recommended by the Administrative Law Judge, there are a number of mitigating factors that should be considered by the Board during its deliberations regarding the appropriate penalty.

Second, while it may be argued that a failure to advise the hospital doctors that a fetal part had been removed created the possibility of an adverse impact on the patient's hospital care,

the primary cause of any such adverse impact in this case was the failure of the hospital doctors to promptly make a telephone call to the clinic or to the Respondent to inquire about the missing part. Such a telephone call was the most logical and obvious first step, especially when the patient was transferred from a termination of pregnancy clinic. In the record of this case there is no logical explanation for why it took three days for one of the hospital doctors to realize that a telephone call should have been made.

Third, as the Respondent has stated above in Respondent's Finding of Fact Exception 3 regarding paragraph 41 of the Recommended Order, as well as in other places in these exceptions, there is no clear and convincing evidence that the Respondent failed to advise the hospital doctors of the removal of a fetal part during his telephone conversations with Dr. Cates-Smith and Dr. Lamberty during the evening of February 7, 2006.

Exceptions To The Proposed Penalty
And Request For Downward Departure

In light of the foregoing Exceptions and the resultant modifications to the Findings of Fact and Conclusions of Law of the Administrative Law Judge, this Board should reject the recommended penalty and dismiss this case. In the alternative, this Board should decline to follow the Administrative Law Judge's recommendation as to penalty and impose a penalty modified and reduced for the reasons that are set forth below.

Penalty Exception 1. Respondent takes exception to the recommended penalty because it is excessive and violates principles of equal protection and administrative *stare decisis*, in that it exceeds the penalties imposed by the Board of Medicine on other licensees who were found to have violated sections 458.331(1)(t) and (m), Florida Statutes, together.

The Administrative Law Judge found that Respondent violated sections 458.331(1)(t) and (m), Florida Statutes. On the basis of his findings, the Administrative Law Judge recommended that the Board impose a penalty of a two-year period of suspension followed by a three-year

period of probation and an administrative fine of $20,000. This recommendation exceeded the penalty proposed by the Department in its Proposed Recommended Order, which called for a reprimand, a two-year suspension followed by two years of probation, a fine of $15,000 and community service and continuing education requirements as the Board determines necessary. It is noteworthy that the Department recommended this penalty based on the assumption that Respondent would be found in violation of three violations – subsections (t), (m), and (q) of 458.331(1), Florida Statutes. In fact, only the (t) and (m) violations were found by the Administrative Law Judge, and thus, even the Department's recommended penalty, had it been imposed, would have been excessive and would have warranted reduction.

The recommended penalty violates Dr. Pendergraft's constitutional right to equal protection under the law and the doctrine of *stare decisis*. *Stare decisis* is a core principle of our system of justice that requires that like cases be treated alike and that decisions rendered previously involving similar circumstances be followed. *See Gessler v. Dep't of Bus. and Prof'l Regulation*, 627 So. 2d 501 (Fla. 4th DCA 1993), *superseded on other grounds, Caserta v. Dep't of Bus. and Prof'l Regulation*, 686 So. 2d 651 (Fla. 5th DCA 1996). The principle of *stare decisis* applies in administrative proceedings such as the one before the Board. *Gessler*, at 504. Two cases that have relied on the *Gessler* decision to reverse orders of administrative bodies such as the Board both involved the agency's clear refusal to consider agency precedent in reaching a decision. *See Plante v. Dep't of Bus. and Prof'l Regulation*, 716 So. 2d 790, 791-92 (Fla. 4th DCA 1998) (agency refused to follow its own precedents at penalty hearing); *Nordheim v. Dep't of Env. Protection*, 719 So. 2d 1212, 1214 (Fla. 3d DCA 1998)(failure to consider own precedent not explained by agency).

In this case, the ALJ found two violations: a medical records violation under section 458.331(1)(m), and a violation of the standard of care under section 458.331(1)(t), Florida Statutes. A review of the Board's prior final orders shows many examples of the imposition of disciplinary penalties for a sole (m) count and a sole (t) count. Diligent search of the Board's final orders failed to uncover a case in which the Board imposed a penalty as excessive as the one recommended herein on the relatively minor factual violations found by the ALJ. A representative sampling of five of this Board's orders follows, and demonstrates that the ALJ's recommended penalty must be reduced to comport with the constitutional right to equal protection and the principle of *stare decisis*.

In *Department of Health v. Gerard Romain, M.D.*, (Bd. of Med. December 19, 2008) (DOH Case No. 2006-39858; DOAH Case No. 08-1074PL), the Board considered violations arising from internet prescription of controlled substances to a patient the physician had never spoken to or seen. The ALJ and the Board found all three violations that were originally charged in the current case: sections 458.331(1)(t), (m), and (q), Florida Statutes. The ALJ found aggravating factors as the number of times the licensee committed the infraction (two) and the exposure of the patient and public to potential injury. Yet even with three violations found, this Board imposed a penalty of only a reprimand, three years of probation with conditions, a restriction on prescribing and a fine of $20,000.00. There was no suspension imposed. In Dr. Pendergraft's case, there were only <u>two</u> violations found by the ALJ -- one (t) violation and one (m) violation, and both were essentially the same infraction: failing to communicate one aspect of the patient's course to the subsequent treating hospital.

Similarly, in *Department of Health v. James C. Dozier, M.D.* (Bd. of Med. December 19, 2007) (DOH Case No. 2005-61833, DOAH Case No. 07-1962PL), the ALJ found violations of

sections 458.331(1)(t) and (m), Florida Statutes, based on the physician's failure to consider and "work up" a differential diagnosis of pulmonary embolism and failure to document an adequate history, in a case in which the patient died of pulmonary embolism two days after the physician treated the patient. The ALJ found two aggravating factors: the exposure of the patient to and his surviving family members to "great physicial, emotional and financial injury or potential injury" and prior disciplinary action. The ALJ recommended and the Board imposed a penalty of a reprimand, a fine of $10,000.00, the FMA record-keeping course, and five hours of CME in diagnosis and treatment of pulmonary embolus. Despite the death of the patient and the existence of prior disciplinary action against this physician, the Board imposed no suspension, no probation, and no community service.

In *Department of Health v. Samuel Cox, M.D.* (Bd. of Med. August 29, 2007) (DOH Case No. 2005-6716, DOAH Case No. 07-0503PL), the ALJ found two violations of section 458.331(1)(t) for failing to recognize signs and symptoms of a post-operative leak in the bowel in his care and treatment of two patients. A sole (m) violation was also found for the physician's failure to document why surgical repair for one of the patients was delayed for two days. The ALJ found two aggravating factors, but did not specify them in his Recommended Order. The ALJ recommended, and the Board imposed a penalty of a reprimand, two years probation with terms, and a fine of $15,000.00. Thus, despite finding two (t) violations and one (m) violation in Dr. Cox's case, with two aggravating factors and the life-threatening circumstances of both, the Board imposed a significantly lower penalty than that which is recommended for Dr. Pendergraft in the pending case.

In *Department of Health v. Bill Byrd, M.D.* (Bd. of Med. August 26(?), 2006) (DOH Case No. 2002-27864, DOAH Case No. 05-4124PL), the ALJ found one (t) violation and one (m)

violation where the physician failed to refer a patient to a surgeon when it was warranted by clinical evidence and failed to include sufficient information in the medical record to assess the patient's clinical course. The ALJ recommended, and the Board imposed a penalty of a reprimand, a fine of $12,000.00, a two-year probationary period with conditions, and a medical records course. Thus, in a case in which a sole (t) and a sole (m) violation were found, the Board imposed no suspension. By contrast, the ALJ's recommendation of two years of suspension for a sole (t) and (m) in Dr. Pendergraft's case is clearly excessive.

Even where the Board has imposed suspension for a (t) and (m) combination of violations, the suspension imposed has been relatively brief. In *Department of Health v. Richard B. Edison, M.D.* (Bd. of Med. April 29, 2008) (DOH Case No. 2005-57892, DOAH Case No. 2006-3707PL), the ALJ found the physician violated section 458.331(1)(t), (m), and (q), Florida Statutes, in the erroneous administration of Lidocaine to a patient during breast augmentation surgery. The ALJ found several aggravating factors: the physician's miscalculation exposed the patient to potential danger despite the fact that there was insufficient evidence to connect the patient's seizure with the Lidocaine; there were three violations; and the physician had practiced plastic surgery in Florida for 22 years and had two prior disciplinary actions filed against him (including one, *Department of Health v. Richard B. Edison, M.D.* (Bd. of Med. Jan. 5, 2007) (DOH Case No: 2004-0494, DOAH Case No. 2006-0598PL), in which the Board imposed a stayed 30-day suspension). Yet even with the egregious facts of the case, the additional violation found, the aggravating factors, and the physician's prior disciplinary history, the ALJ recommended and the Board imposed only a 180-day suspension, a four-year probationary period, a fine of $20,000.00. In light of this combination of facts in Dr. Edison's cases, the

penalty recommended by the ALJ in Dr. Pendergraft's case is excessive and must be reduced to bring it in line with prior Board precedent.

Penalty Exception 2. Respondent takes exception to the proposed penalty of the Administrative Law Judge as he used an "aggravating factor" that is not one of those listed in Rule 64B8-8.001(3), F.A.C.

In paragraph 91, the Administrative Law Judge found that Dr. Pendergraft's omission in the medical records "adversely impacted the medical care the patient received at the hospital and has been considered as an aggravating factor." The ALJ cited no provision of rule 64B8-8.001(3), F.A.C. that includes this "aggravating factor". An act or failure to act that "adversely impacted" the care given to the patient at the hospital cannot be an aggravating factor within the meaning of Rule 64B8-8.001(3), because such an adverse impact is not mentioned in subparagraph (a) of the Rule or in any other subparagraph. Even assuming that the omission created the possibility of an adverse impact in this case, the primary cause of any adverse impact on the patient's hospital care in the case was the failure of the hospital physicians to promptly make a telephone call to the Respondent regarding the missing fetal part. Such a telephone call would be the most logical and obvious first step, especially when the patient was emergently transferred from his clinic. There is no logical explanation in the record before this Board as to why it took three days for one of the hospital physicians to realize that a telephone call to Dr. Pendergraft was warranted. Furthermore, as previously argued there is no competent substantial evidence, that Dr. Pendergraft failed to advise the Drs. Cates-Smith and Lamberty of the removal during their telephone conversation the evening of February 7. None of the three physicians specifically recall whether this aspect of the case was discussed in their telephone conversation. This is not clear and convincing evidence that Dr. Pendergraft did not inform these physicians. For this

reason, the ALJ's specified aggravation on this point must be stricken and disregarded in reassessing the appropriate penalty herein.

Penalty Exception 3. Respondent takes exception to the proposed penalty of the Administrative Law Judge as he failed to acknowledge and consider the mitigating factors in the record before him.

This Board's Rule on disciplinary guidelines states, in pertinent part:

> Based upon consideration of ... mitigating factors present in an individual case, the Board may deviate from the penalties recommended [in the disciplinary ranges].

64B8-8.001(3), F.A.C. Respondent takes Exception to the proposed penalty because the Administrative Law Judge did not acknowledge, consider or address the mitigating factors in the record before him in formulating his proposed penalty. The Board should consider the following mitigating factors: Dr. Pendergraft has been continuously licensed since 1982, in other states and Florida, and he has never been before this Board, or any other licensing board for the same factual offenses that were alleged in this case. 64B8-8.001(3)(d) and (e), F.A.C. Thus his status "at the time of the offense" was that he had no disciplinary action against his license "at the time of the offense." 64B8-8.001(3)(b), F.A.C. In addition, in a three-count Administrative Complaint, in which the Department alleged four separate medical record ("m") infractions, eight separate standard of care infractions ("t") and three separate prescribing ("q") infractions, the Department only established two violations – one (t) and one (m). Both flow from one single act of omission, the failure to note in the patient's chart that a fetal part was removed prior to the patient being sent to the hospital. Thus, this was an isolated incident with unique facts unlikely to be repeated. 64B8-8.001(3)(d), F.A.C. Significantly, the event that Dr. Pendergraft failed to include in the patient's medical record occurred just seconds before the Respondent discovered that the patient's situation was life-threatening and required immediate emergency transport and

attention. With his attention appropriately focused on patient care first, the Respondent's omission in the medical record is placed in its proper context – that of dealing with an emergent patient.

For the foregoing reasons, should there be any penalty, the Board should decrease the penalty recommended by the Administrative Law Judge to a reprimand, a Board-approved medical records course, and a fine of $10,000.00.

WHEREFORE, Respondent respectfully requests that the foregoing Exceptions to the Recommended Order be granted and that modifications to the Findings of Fact, Conclusions of Law, and Recommended Penalty of the Administrative Law Judge be made in accordance with the arguments herein.

Respectfully submitted this 6th day of October, 2009.

Kenneth J. Metzger (FSB# 0341215)
Metzger, Grossman, Furlow & Bayó, LLC
1408 North Piedmont Way
Tallahassee, Florida 32308
Phone: 850.385.1314
Fax: 850.385.3953
k.metzger@mgfblaw.com

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Exceptions to Recommended Order was forwarded by hand delivery for filing to R. Sam Power, Clerk, Department of Health, 4052 Bald Cypress Way, Bin C-01, Tallahassee, Florida 32399-3201 and was served by electronic transmission to Claudia Llado, Clerk, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Fl 32399-3060 and to Greg Marr, Esquire, Assistant General Counsel, Department of Health, Prosecution Services Unit, 4052 Bald Cypress Way, Bin C-65, Tallahassee, Florida 32399-3265, with a hard copy to follow by United States mail delivery, this 6th day of October, 2009.

Kenneth J. Metzger

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK: Angela Barlow
DATE 10/27/09

STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,

Petitioner,

v. **CASE NO. 2006-05930**

JAMES S. PENDERGRAFT, IV, M.D.,

Respondent.
_____/

AMENDED MOTION TO ASSESS COSTS IN ACCORDANCE WITH SECTION 456.072(4)

COMES NOW the Department of Health, by and through undersigned counsel, and moves the Board of Medicine for the entry of a Final Order assessing costs against the Respondent for the investigation and prosecution of this case in accordance with Section 456.072(4), Florida Statutes (2003). As grounds therefore, the Petitioner states the following:

1. At its next regularly scheduled meeting, the Board of Medicine will take up for consideration the above-styled disciplinary action and will enter a Final Order therein.

2. Section 456.072(4), Florida Statutes (2003),[1] states as follows:

> In addition to any other discipline imposed through final order, or citation, entered on or after July 1, 2001, pursuant to this section or discipline imposed through final order, or citation, entered on or after July 1, 2001, for a violation of any practice act, the board, or the department when there is not board, shall assess costs related to the investigation and prosecution of the case. Such costs related to the investigation and prosecution include, but are not

[1] Ch. 2003-416, § 19, Laws of Fla., effective September 15, 2003, amended Section 456.072(4), Florida Statutes (2003), to include the underlined language.

limited to, salaries and benefits of personnel, costs related to the time spent by the attorney and other personnel working on the case, and any other expenses incurred by the department for the case. The board, or the department when there is no board, shall determine the amount of costs to be assessed after its consideration of an affidavit of itemized costs and any written objections thereto. . . . (emphasis added)

3. The investigation and prosecution of this case has resulted in costs in the total amount of $102,303.21, based on the following itemized statement of costs:

a. Total costs for Complaints $169.65
b. Total costs for Investigations $7,688.30
c. Total costs for Legal $66,455.99
d. Total costs for Expenses $27,989.27

Therefore, the Petitioner seeks an assessment of costs against the Respondent in the amount of $102,303.21, as evidenced in the attached affidavit. (Exhibit A).

4. Should the Respondent file written objections to the assessment of costs, within ten (10) days of the date of this motion, specifying the grounds for the objections and the specific elements of the costs to which the objections are made, the Petitioner requests that the Board determine the amount of costs to be assessed based upon its consideration of the affidavit attached as Exhibit A and any timely-filed written objections.

5. Petitioner requests that the Board grant this motion and assess costs in the amount of $102,303.21 as supported by competent, substantial evidence. This assessment of costs is in addition to any other discipline imposed by the Board and is in accordance with Section 456.072(4), Florida Statutes (2003).

WHEREFORE, the Department of Health requests that the Board of Medicine enter a Final Order assessing costs against the Respondent in the amount of $102,303.21.

DATED this 27th day of OCTOBER, 2009.

Respectfully submitted,

Greg S. Marr
Assistant General Counsel
DOH Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, FL 32399-3265
Florida Bar 131369
(850) 245-4640 Ext. 8136
(850) 245-4681 FAX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Motion to Assess Costs has been provided by U.S. Mail and email (k.metzger@mgfblaw.com) this 27th day of OCTOBER, 2009, to: Kenneth J. Metzger, Esq., Metzger, Grossman, Furlow & Bayo, LLC, 1408 N. Piedmont Way, Tallahassee, FL 32308.

Greg S. Marr
Assistant General Counsel

AFFIDAVIT OF FEES AND COSTS EXPENDED

STATE OF FLORIDA
COUNTY OF LEON:

BEFORE ME, the undersigned authority, personally appeared **JULIE M. WEEKS** who was sworn and states as follows:

1) My name is Julie M. Weeks.

2) I am over the age of 18, competent to testify, and make this affidavit upon my own personal knowledge and after review of the records at the Florida Department of Health (DOH).

3) I am the Operations and Management Consultant Manager (OMCM) for the Consumer Services and Compliance Management Unit for DOH. The Consumer Services Unit is where all complaints against Florida health care licensees (e.g., medical doctors, dentists, nurses, respiratory therapists) are officially filed. I have been in my current job position for more than one year. My business address is 4052 Bald Cypress Way, Bin C-75 Tallahassee, Florida 32399-3275.

4) As OMCM of the Consumer Services and Compliance Management Unit, my job duties include reviewing data in the Time Tracking System and verifying that the amounts correspond. The Time Tracking System is a computer program which records and tracks DOH's costs regarding the investigation and prosecution of cases against Florida health care licensees.

5) As of today, DOH's total costs for investigating and prosecuting DOH case number **2006-05930** (Department of Health v. **James Scott Pendergraft, M.D., IV**) are **ONE HUNDRED- TWO THOUSAND THREE HUNDRED-THREE DOLLARS AND TWENTY-THREE CENTS ($102,303.21)**.

6) The costs for DOH case number **2006-05930** (Department of Health v. **James Scott Pendergraft, M.D., IV**) are summarized in Exhibit 1 (Cost Summary Report), which is attached to this document.

7) The itemized costs and expenses for DOH case numbers **2006-05930** (Department of Health v **James Scott Pendergraft, M.D., IV)** are detailed in Exhibit 2 (Itemized Cost Report and Itemized Expense Report and receipts), which is attached to this document.

8) The itemized costs as reflected in Exhibit 2 are determined by the following method: DOH employees who work on cases daily are to

keep track of their time in six-minute increments (e.g., investigators and lawyers). A designated DOH employee in the Consumer Services Unit, Legal Department, and in each area office, inputs the time worked and expenses spent into the Time Tracking System. Time and expenses are charged against a state health care Board (e.g., Florida Board of Medicine, Florida Board of Dentistry, Florida Board of Osteopathic Medicine), and/or a case. If no Board or case can be charged, then the time and expenses are charged as administrative time. The hourly rate of each employee is calculated by formulas established by the Department. (See the Itemized Cost Report)

9) Julie M. Weeks, first being duly sworn, states that she has read the foregoing Affidavit and its attachments and the statements contained therein are true and correct to the best of her knowledge and belief.

FURTHER AFFIANT SAYETH NOT.

Julie M. Weeks

Julie M. Weeks, Affiant

State of Florida
County of Leon

Sworn to and subscribed before me this 27th day of October, 2009, by Julie M. Weeks, who is personally known to me.

Notary Signature

SHERRY D. WILSON
Commission # DD 906459
Expires August 19, 2013
Bonded Thru Troy Fain Insurance 800-385-7019

Name of Notary Printed

Stamp Commissioned Name of Notary Public:

Complaint Cost Summary

Complaint Number: 200605930

Complainant's Name: DOH (S.B.) 0004393

Subject's Name: PENDERGRAFT, JAMES SCOTT IV

	***** Cost to Date *****	
	Hours	**Costs**
Complaint:	3.30	$169.65
Investigation:	120.20	$7,688.30
Legal:	588.90	$66,455.99
Compliance:	0.00	$0.00
	**********	**********
Sub Total:	712.40	$74,313.94
Expenses to Date:		$27,989.27
Prior Amount:		$0.00
Total Costs to Date:		$102,303.21

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Division of
Medical Quality Assurance

MQA

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Time Tracking System
Itemized Cost by Complaint

Complaint 200605930

Report Date 10/27/2009

Staff Code	Activity Hours	Staff Rate	Cost	Activity Date	Activity Code	Activity Description
CONSUMER SERVICES UNIT						
HA78	0.40	$53.87	$21.55	03/31/2006	82	MQA REPORT ENTRY
HA78	0.30	$51.07	$15.32	06/05/2006	4	ROUTINE INVESTIGATIVE WORK
HA78	0.20	$51.07	$10.21	06/09/2006	4	ROUTINE INVESTIGATIVE WORK
HA78	0.60	$51.07	$30.64	07/17/2006	25	REVIEW CASE FILE
HA78	0.60	$51.07	$30.64	10/11/2006	25	REVIEW CASE FILE
HA78	0.60	$51.07	$30.64	11/03/2006	25	REVIEW CASE FILE
HA78	0.40	$51.07	$20.43	11/08/2006	25	REVIEW CASE FILE
HA78	0.70	$51.07	$35.75	01/10/2007	78	INITIAL REVIEW AND ANALYSIS OF COMPLAINT
Sub Total	**3.80**		**$195.18**			
INVESTIGATIVE SERVICES UNIT						
OI100	1.00	$64.58	$64.58	01/17/2007	4	ROUTINE INVESTIGATIVE WORK
OI100	1.00	$64.58	$64.58	01/25/2007	4	ROUTINE INVESTIGATIVE WORK
OI100	0.50	$64.58	$32.29	01/30/2007	4	ROUTINE INVESTIGATIVE WORK
OI100	0.50	$64.58	$32.29	02/12/2007	4	ROUTINE INVESTIGATIVE WORK
OI100	1.00	$64.58	$64.58	02/14/2007	4	ROUTINE INVESTIGATIVE WORK
OI100	1.00	$64.58	$64.58	02/26/2007	4	ROUTINE INVESTIGATIVE WORK
OI100	0.50	$64.58	$32.29	03/05/2007	4	ROUTINE INVESTIGATIVE WORK
OI100	1.00	$64.58	$64.58	03/06/2007	4	ROUTINE INVESTIGATIVE WORK
OI100	0.50	$64.58	$32.29	03/07/2007	4	ROUTINE INVESTIGATIVE WORK
OI100	0.50	$64.58	$32.29	03/07/2007	4	ROUTINE INVESTIGATIVE WORK
OI100	1.50	$64.58	$96.87	03/20/2007	4	ROUTINE INVESTIGATIVE WORK
OI100	1.00	$64.58	$64.58	03/20/2007	4	ROUTINE INVESTIGATIVE WORK
OI100	0.50	$64.58	$32.29	04/03/2007	4	ROUTINE INVESTIGATIVE WORK
OI100	0.50	$64.58	$32.29	04/05/2007	4	ROUTINE INVESTIGATIVE WORK
OI100	1.00	$64.58	$64.58	04/05/2007	4	ROUTINE INVESTIGATIVE WORK
OI100	0.50	$64.58	$32.29	04/06/2007	58	TRAVEL TIME
OI100	3.50	$64.58	$226.03	04/06/2007	4	ROUTINE INVESTIGATIVE WORK

[redacted]

Division of Medical Quality Assurance

MQA

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Time Tracking System
Itemized Cost by Complaint

Complaint 200605930

Report Date 10/27/2009

Staff Code	Activity Hours	Staff Rate	Cost	Activity Date	Activity Code	Activity Description
OI100	0.50	$64.58	$32.29	04/11/2007	4	ROUTINE INVESTIGATIVE WORK
OI100	0.50	$64.58	$32.29	04/11/2007	4	ROUTINE INVESTIGATIVE WORK
OI100	3.00	$64.58	$193.74	04/11/2007	76	REPORT PREPARATION
OI100	2.50	$64.58	$161.45	04/12/2007	76	REPORT PREPARATION
OI100	0.50	$64.58	$32.29	04/12/2007	4	ROUTINE INVESTIGATIVE WORK
OI100	0.80	$64.58	$51.66	05/23/2007	76	REPORT PREPARATION
OI100	1.00	$64.58	$64.58	09/18/2008	43	PREPARE FOR DEPOSITION
OI100	1.50	$64.58	$96.87	09/18/2008	43	PREPARE FOR DEPOSITION
OI100	1.00	$64.58	$64.58	09/19/2008	6	SUPPLEMENTAL INVESTIGATION
OI100	1.00	$64.58	$64.58	09/22/2008	6	SUPPLEMENTAL INVESTIGATION
OI98	0.50	$48.16	$24.08	09/25/2008	4	ROUTINE INVESTIGATIVE WORK
OI100	0.50	$64.58	$32.29	09/26/2008	6	SUPPLEMENTAL INVESTIGATION
OI100	1.00	$64.58	$64.58	09/29/2008	6	SUPPLEMENTAL INVESTIGATION
OI100	1.00	$64.58	$64.58	10/01/2008	6	SUPPLEMENTAL INVESTIGATION
OI100	1.00	$64.58	$64.58	10/01/2008	58	TRAVEL TIME
OI100	1.50	$64.58	$96.87	10/01/2008	6	SUPPLEMENTAL INVESTIGATION
OI100	0.50	$64.58	$32.29	10/21/2008	6	SUPPLEMENTAL INVESTIGATION
OI100	1.00	$64.58	$64.58	10/23/2008	6	SUPPLEMENTAL INVESTIGATION
OI100	0.50	$64.58	$32.29	10/23/2008	6	SUPPLEMENTAL INVESTIGATION
OI100	0.50	$64.58	$32.29	11/19/2008	6	SUPPLEMENTAL INVESTIGATION
OI100	1.00	$64.58	$64.58	11/24/2008	6	SUPPLEMENTAL INVESTIGATION
OI100	0.50	$64.58	$32.29	12/01/2008	6	SUPPLEMENTAL INVESTIGATION
OI100	0.30	$64.58	$19.37	12/04/2008	6	SUPPLEMENTAL INVESTIGATION
OI100	0.50	$64.58	$32.29	12/08/2008	4	ROUTINE INVESTIGATIVE WORK
OI100	1.00	$64.58	$64.58	12/17/2008	6	SUPPLEMENTAL INVESTIGATION
OI100	0.50	$64.58	$32.29	12/17/2008	76	REPORT PREPARATION
OI100	1.00	$64.58	$64.58	01/06/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	0.50	$64.58	$32.29	01/07/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	1.00	$64.58	$64.58	01/08/2009	6	SUPPLEMENTAL INVESTIGATION
OI98	0.50	$48.16	$24.08	01/08/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	2.00	$64.58	$129.16	01/13/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	1.50	$64.58	$96.87	01/14/2009	58	TRAVEL TIME
OI100	1.50	$64.58	$96.87	01/14/2009	6	SUPPLEMENTAL INVESTIGATION

Division of
Medical Quality Assurance

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Time Tracking System
Itemized Cost by Complaint

Complaint 200605930

Report Date 10/27/2009

Staff Code	Activity Hours	Staff Rate	Cost	Activity Date	Activity Code	Activity Description
OI100	1.00	$64.58	$64.58	01/15/2009	6	SUPPLEMENTAL INVESTIGATION
LI77	0.50	$73.99	$37.00	01/26/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	1.00	$64.58	$64.58	01/27/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	1.50	$64.58	$96.87	01/29/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	1.00	$64.58	$64.58	01/29/2009	58	TRAVEL TIME
OI100	0.50	$64.58	$32.29	01/29/2009	100	SERVICE OF ADMINISTRATIVE COMPLAINTS, SUBPOENAS, NOTICE TO CEASE
OI100	2.00	$64.58	$129.16	01/30/2009	6	SUPPLEMENTAL INVESTIGATION
LI77	1.00	$73.99	$73.99	02/02/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	2.50	$64.58	$161.45	02/02/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	1.00	$64.58	$64.58	02/03/2009	43	PREPARE FOR DEPOSITION
OI100	1.50	$64.58	$96.87	02/03/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	0.50	$64.58	$32.29	02/04/2009	15	PROFESSIONAL CONTACTS
OI100	0.80	$64.58	$51.66	02/11/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	0.50	$64.58	$32.29	02/12/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	1.00	$64.58	$64.58	02/13/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	1.00	$64.58	$64.58	02/13/2009	100	SERVICE OF ADMINISTRATIVE COMPLAINTS, SUBPOENAS, NOTICE TO CEASE
OI100	0.50	$64.58	$32.29	02/17/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	1.00	$64.58	$64.58	02/17/2009	58	TRAVEL TIME
OI100	0.50	$64.58	$32.29	02/17/2009	100	SERVICE OF ADMINISTRATIVE COMPLAINTS, SUBPOENAS, NOTICE TO CEASE
OI100	0.50	$64.58	$32.29	02/18/2009	100	SERVICE OF ADMINISTRATIVE COMPLAINTS, SUBPOENAS, NOTICE TO CEASE
OI100	0.80	$64.58	$51.66	02/18/2009	8	PROBATION INVESTIGATION
OI100	0.20	$64.58	$12.92	02/18/2009	4	ROUTINE INVESTIGATIVE WORK
OI100	0.50	$64.58	$32.29	02/20/2009	48	FORMAL HEARING
OI100	2.00	$64.58	$129.16	02/24/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	1.00	$64.58	$64.58	02/25/2009	58	TRAVEL TIME
OI100	5.00	$64.58	$322.90	02/25/2009	44	DEPOSITIONS
OI100	0.50	$63.04	$31.52	03/18/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	4.50	$63.04	$283.68	03/20/2009	44	DEPOSITIONS
OI100	0.50	$63.04	$31.52	03/24/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	0.50	$63.04	$31.52	03/30/2009	4	ROUTINE INVESTIGATIVE WORK
OI100	1.00	$63.04	$63.04	03/30/2009	58	TRAVEL TIME
OI100	0.20	$63.04	$12.61	03/30/2009	4	ROUTINE INVESTIGATIVE WORK
OI100	0.50	$63.04	$31.52	04/06/2009	6	SUPPLEMENTAL INVESTIGATION

Division of Medical Quality Assurance

MQA

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Time Tracking System
Itemized Cost by Complaint

Complaint 200605930

Report Date 10/27/2009

Staff Code	Activity Hours	Staff Rate	Cost	Activity Date	Activity Code	Activity Description
OI100	0.70	$63.04	$44.13	04/08/2009	43	PREPARE FOR DEPOSITION
OI100	1.70	$63.04	$107.17	04/08/2009	44	DEPOSITIONS
OI100	0.50	$63.04	$31.52	04/15/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	1.00	$63.04	$63.04	04/20/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	2.00	$63.04	$126.08	04/20/2009	76	REPORT PREPARATION
OI100	1.50	$63.04	$94.56	04/21/2009	58	TRAVEL TIME
OI100	0.50	$63.04	$31.52	04/21/2009	100	SERVICE OF ADMINISTRATIVE COMPLAINTS, SUBPOENAS, NOTICE TO CEASE
OI100	0.50	$63.04	$31.52	04/22/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	0.50	$63.04	$31.52	04/23/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	0.30	$63.04	$18.91	04/24/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	1.00	$63.04	$63.04	04/27/2009	58	TRAVEL TIME
OI100	0.40	$63.04	$25.22	04/27/2009	100	SERVICE OF ADMINISTRATIVE COMPLAINTS, SUBPOENAS, NOTICE TO CEASE
OI100	0.60	$63.04	$37.82	04/27/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	0.50	$63.04	$31.52	04/28/2009	100	SERVICE OF ADMINISTRATIVE COMPLAINTS, SUBPOENAS, NOTICE TO CEASE
OI100	0.50	$63.04	$31.52	04/28/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	0.50	$63.04	$31.52	05/04/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	0.60	$63.04	$37.82	05/06/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	1.50	$63.04	$94.56	05/08/2009	58	TRAVEL TIME
OI100	0.80	$63.04	$50.43	05/08/2009	100	SERVICE OF ADMINISTRATIVE COMPLAINTS, SUBPOENAS, NOTICE TO CEASE
OI100	0.50	$63.04	$31.52	05/08/2009	4	ROUTINE INVESTIGATIVE WORK
OI100	0.50	$63.04	$31.52	05/12/2009	4	ROUTINE INVESTIGATIVE WORK
OI100	0.50	$63.04	$31.52	05/19/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	5.00	$63.04	$315.20	05/20/2009	48	FORMAL HEARING
OI100	0.50	$63.04	$31.52	05/21/2009	43	PREPARE FOR DEPOSITION
OI100	5.00	$63.04	$315.20	07/10/2009	48	FORMAL HEARING
OI100	1.00	$63.04	$63.04	07/22/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	3.00	$63.04	$189.12	07/22/2009	76	REPORT PREPARATION
OI100	1.00	$63.04	$63.04	07/23/2009	6	SUPPLEMENTAL INVESTIGATION
OI100	2.00	$63.04	$126.08	07/23/2009	76	REPORT PREPARATION
Sub Total	**119.70**		**$7,662.77**			

Division of Medical Quality Assurance

MQA

*** CONFIDENTIAL ***

Time Tracking System
Itemized Cost by Complaint

Complaint 200605930

Report Date 10/27/2009

Staff Code	Activity Hours	Staff Rate	Cost	Activity Date	Activity Code	Activity Description
PROSECUTION SERVICES UNIT						
HLL40B	0.20	$122.84	$24.57	08/25/2006	38	REVIEW DISCOVERY REQUESTS/RESPONSES
HLL10A	0.50	$136.37	$68.19	06/04/2007	25	REVIEW CASE FILE
HLL10A	2.80	$111.56	$312.37	02/28/2008	28	PREPARE OR REVISE ADMINISTRATIVE COMPLAINT
HLL10A	0.50	$111.56	$55.78	02/28/2008	89	PROBABLE CAUSE PREPARATION
HLL10A	0.20	$111.56	$22.31	04/10/2008	36	PREPARATION OR REVISION OF LETTER
HLL10A	0.20	$111.56	$22.31	04/10/2008	37	REVIEW LETTER
HLL10A	0.60	$111.56	$66.94	04/22/2008	90	POST PROBABLE CAUSE PROCESSING
HLL10A	0.30	$111.56	$33.47	05/08/2008	37	REVIEW LETTER
HLL10A	0.30	$111.56	$33.47	05/08/2008	36	PREPARATION OR REVISION OF LETTER
HLL10A	0.30	$111.56	$33.47	06/12/2008	35	TELEPHONE CALLS
HLL57A	0.50	$111.56	$55.78	06/24/2008	70	CONFERENCES WITH LAWYERS
HLL10A	1.20	$111.56	$133.87	06/25/2008	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF
HLL57A	1.00	$111.56	$111.56	06/25/2008	70	CONFERENCES WITH LAWYERS
HLL57A	0.50	$111.56	$55.78	06/25/2008	26	PREPARE OR REVISE MEMORANDUM
HLL57A	3.00	$111.56	$334.68	07/14/2008	25	REVIEW CASE FILE
HLL57A	1.50	$111.56	$167.34	07/17/2008	25	REVIEW CASE FILE
HLL57A	5.50	$111.56	$613.58	08/21/2008	25	REVIEW CASE FILE
HLL57A	0.20	$111.56	$22.31	09/02/2008	26	PREPARE OR REVISE MEMORANDUM
HLL57A	3.50	$111.56	$390.46	09/17/2008	47	TRIAL PREPARATION
HLL57A	1.50	$111.56	$167.34	09/18/2008	39	PREPARE/RESPOND TO DISCOVERY
HLL57A	3.50	$111.56	$390.46	09/18/2008	47	TRIAL PREPARATION
HLL57A	1.00	$111.56	$111.56	09/18/2008	115	CONTACT WITH INVESTIGATORS
HL58B	0.30	$111.56	$33.47	09/19/2008	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF
HLL57A	2.00	$111.56	$223.12	09/19/2008	47	TRIAL PREPARATION
HLL57A	1.00	$111.56	$111.56	09/22/2008	43	PREPARE FOR DEPOSITION
HLL57A	3.00	$111.56	$334.68	09/22/2008	47	TRIAL PREPARATION
HLL57A	1.00	$111.56	$111.56	09/23/2008	47	TRIAL PREPARATION
HLL57A	5.10	$111.56	$568.96	09/29/2008	47	TRIAL PREPARATION
HLL57A	4.50	$111.56	$502.02	10/01/2008	58	TRAVEL TIME
HLL57A	3.00	$111.56	$334.68	10/01/2008	113	CONTACT WITH WITNESSES

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HLL57A	0.50	$111.56	$55.78	10/24/2008	43	PREPARE FOR DEPOSITION
HLL57A	2.00	$111.56	$223.12	10/29/2008	47	TRIAL PREPARATION
HLL57A	0.50	$111.56	$55.78	11/03/2008	45	PREHEARING MOTION/CONFERENCE CALL
HLL57A	2.00	$111.56	$223.12	12/02/2008	43	PREPARE FOR DEPOSITION
HLL57A	0.50	$111.56	$55.78	12/02/2008	113	CONTACT WITH WITNESSES
HLL57A	3.00	$111.56	$334.68	12/05/2008	113	CONTACT WITH WITNESSES
HLL57A	1.00	$111.56	$111.56	01/06/2009	43	PREPARE FOR DEPOSITION
HLL57A	0.50	$111.56	$55.78	01/06/2009	36	PREPARATION OR REVISION OF LETTER
HLL57A	2.00	$111.56	$223.12	01/06/2009	39	PREPARE/RESPOND TO DISCOVERY
HLL57A	2.00	$111.56	$223.12	01/09/2009	44	DEPOSITIONS
HLL57A	1.00	$111.56	$111.56	01/09/2009	43	PREPARE FOR DEPOSITION
HLL57A	5.00	$111.56	$557.80	01/09/2009	39	PREPARE/RESPOND TO DISCOVERY
HLL57A	1.00	$111.56	$111.56	01/12/2009	114	CONTACT WITH EXPERTS
HLL57A	3.00	$111.56	$334.68	01/12/2009	47	TRIAL PREPARATION
HLL57A	1.00	$111.56	$111.56	01/12/2009	43	PREPARE FOR DEPOSITION
HLL57A	1.00	$111.56	$111.56	01/13/2009	115	CONTACT WITH INVESTIGATORS
HLL57A	1.50	$111.56	$167.34	01/13/2009	38	REVIEW DISCOVERY REQUESTS/RESPONSES
HLL57A	2.00	$111.56	$223.12	01/13/2009	43	PREPARE FOR DEPOSITION
HLL57A	1.00	$111.56	$111.56	01/14/2009	43	PREPARE FOR DEPOSITION
HL58B	1.20	$111.56	$133.87	01/16/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF.
HLL57A	4.00	$111.56	$446.24	01/20/2009	43	PREPARE FOR DEPOSITION
HLL57A	2.00	$111.56	$223.12	01/20/2009	47	TRIAL PREPARATION
HL58B	1.00	$111.56	$111.56	01/21/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF.
HL12A	1.10	$100.00	$110.00	01/21/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF.
HLL57A	1.50	$111.56	$167.34	01/21/2009	46	LEGAL RESEARCH
HLL57A	1.50	$111.56	$167.34	01/21/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF.
HLL57A	2.00	$111.56	$223.12	01/21/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL57A	2.00	$111.56	$223.12	01/21/2009	43	PREPARE FOR DEPOSITION
HLL57A	1.50	$111.56	$167.34	01/21/2009	47	TRIAL PREPARATION
HL58B	0.50	$111.56	$55.78	01/22/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF.
HLL57A	2.00	$111.56	$223.12	01/22/2009	43	PREPARE FOR DEPOSITION
HLL57A	2.50	$111.56	$278.90	01/22/2009	44	DEPOSITIONS
HLL57A	5.00	$111.56	$557.80	01/22/2009	47	TRIAL PREPARATION

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HLL57A	2.00	$111.56	$223.12	01/23/2009	46	LEGAL RESEARCH
HLL57A	1.00	$111.56	$111.56	01/23/2009	41	REVIEW PLEADING
HLL57A	1.50	$111.56	$167.34	01/23/2009	39	PREPARE/RESPOND TO DISCOVERY
HL58B	0.30	$111.56	$33.47	01/23/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF.
HL58B	0.20	$111.56	$22.31	01/26/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF.
HLL57A	4.00	$111.56	$446.24	01/26/2009	39	PREPARE/RESPOND TO DISCOVERY
HLL57A	2.00	$111.56	$223.12	01/26/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL57A	0.50	$111.56	$55.78	01/26/2009	46	LEGAL RESEARCH
HLL57A	1.00	$111.56	$111.56	01/26/2009	47	TRIAL PREPARATION
HLL57A	3.50	$111.56	$390.46	01/27/2009	25	REVIEW CASE FILE
HLL57A	3.00	$111.56	$334.68	01/27/2009	43	PREPARE FOR DEPOSITION
HLL57A	0.50	$111.56	$55.78	01/27/2009	29	REVIEW ADMINISTRATIVE COMPLAINT
HLL57A	3.00	$111.56	$334.68	01/28/2009	25	REVIEW CASE FILE
HLL57A	3.00	$111.56	$334.68	01/28/2009	113	CONTACT WITH WITNESSES
HLL57A	1.00	$111.56	$111.56	01/28/2009	43	PREPARE FOR DEPOSITION
HL58B	0.70	$111.56	$78.09	01/29/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF.
HLL57A	3.00	$111.56	$334.68	01/30/2009	25	REVIEW CASE FILE
HLL57A	2.00	$111.56	$223.12	02/02/2009	43	PREPARE FOR DEPOSITION
HLL57A	2.00	$111.56	$223.12	02/02/2009	47	TRIAL PREPARATION
HLL57A	3.00	$111.56	$334.68	02/02/2009	25	REVIEW CASE FILE
HLL57A	2.00	$111.56	$223.12	02/03/2009	43	PREPARE FOR DEPOSITION
HLL57A	1.00	$111.56	$111.56	02/03/2009	44	DEPOSITIONS
HLL57A	2.00	$111.56	$223.12	02/03/2009	25	REVIEW CASE FILE
HLL57A	2.00	$111.56	$223.12	02/03/2009	47	TRIAL PREPARATION
HLL57A	1.50	$111.56	$167.34	02/04/2009	43	PREPARE FOR DEPOSITION
HLL57A	0.50	$111.56	$55.78	02/04/2009	70	CONFERENCES WITH LAWYERS
HLL57A	1.20	$111.56	$133.87	02/09/2009	47	TRIAL PREPARATION
HLL57A	0.50	$111.56	$55.78	02/10/2009	70	CONFERENCES WITH LAWYERS
HLL57A	2.00	$111.56	$223.12	02/10/2009	43	PREPARE FOR DEPOSITION
HLL57A	1.00	$111.56	$111.56	02/10/2009	25	REVIEW CASE FILE
HLL57A	1.00	$111.56	$111.56	02/10/2009	113	CONTACT WITH WITNESSES
HLL57A	2.00	$111.56	$223.12	02/10/2009	47	TRIAL PREPARATION
HLL57A	3.00	$111.56	$334.68	02/11/2009	47	TRIAL PREPARATION

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HLL57A	0.50	$111.56	$55.78	02/12/2009	47	TRIAL PREPARATION
HLL57A	3.00	$111.56	$334.68	02/12/2009	25	REVIEW CASE FILE
HL58B	0.60	$111.56	$66.94	02/13/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF
HLL57A	4.00	$111.56	$446.24	02/13/2009	47	TRIAL PREPARATION
HLL57A	3.00	$111.56	$334.68	02/13/2009	43	PREPARE FOR DEPOSITION
HLL57A	2.00	$111.56	$223.12	02/16/2009	38	REVIEW DISCOVERY REQUESTS/RESPONSES
HLL57A	1.20	$111.56	$133.87	02/16/2009	43	PREPARE FOR DEPOSITION
HLL57A	0.50	$111.56	$55.78	02/16/2009	46	LEGAL RESEARCH
HLL57A	2.00	$111.56	$223.12	02/17/2009	43	PREPARE FOR DEPOSITION
HLL57A	4.50	$111.56	$502.02	02/17/2009	47	TRIAL PREPARATION
HLL57A	1.00	$111.56	$111.56	02/19/2009	41	REVIEW PLEADING
HLL57A	1.00	$111.56	$111.56	02/19/2009	113	CONTACT WITH WITNESSES
HLL57A	2.00	$111.56	$223.12	02/19/2009	43	PREPARE FOR DEPOSITION
HLL57A	1.50	$111.56	$167.34	02/19/2009	47	TRIAL PREPARATION
HLL57A	2.00	$111.56	$223.12	02/19/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL57A	4.00	$111.56	$446.24	02/23/2009	43	PREPARE FOR DEPOSITION
HLL57A	1.50	$111.56	$167.34	02/23/2009	47	TRIAL PREPARATION
HLL57A	4.50	$111.56	$502.02	02/24/2009	58	TRAVEL TIME
HLL57A	1.00	$111.56	$111.56	02/24/2009	113	CONTACT WITH WITNESSES
HLL57A	4.00	$111.56	$446.24	02/24/2009	43	PREPARE FOR DEPOSITION
HLL57A	4.50	$111.56	$502.02	02/25/2009	58	TRAVEL TIME
HLL57A	5.00	$111.56	$557.80	02/25/2009	44	DEPOSITIONS
HLL57A	1.00	$111.56	$111.56	02/25/2009	43	PREPARE FOR DEPOSITION
HLL57A	3.00	$111.56	$334.68	02/26/2009	43	PREPARE FOR DEPOSITION
HLL57A	4.00	$111.56	$446.24	02/27/2009	43	PREPARE FOR DEPOSITION
HLL57A	4.00	$111.56	$446.24	02/27/2009	47	TRIAL PREPARATION
HLL57A	2.00	$111.56	$223.12	03/02/2009	39	PREPARE/RESPOND TO DISCOVERY
HLL57A	1.00	$111.56	$111.56	03/02/2009	47	TRIAL PREPARATION
HLL57A	3.00	$111.56	$334.68	03/03/2009	43	PREPARE FOR DEPOSITION
HLL57A	2.00	$111.56	$223.12	03/03/2009	47	TRIAL PREPARATION
HLL57A	1.00	$111.56	$111.56	03/03/2009	25	REVIEW CASE FILE
HLL57A	1.00	$111.56	$111.56	03/11/2009	43	PREPARE FOR DEPOSITION
HLL57A	2.00	$111.56	$223.12	03/11/2009	46	LEGAL RESEARCH

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HLL57A	0.50	$111.56	$55.78	03/11/2009	41	REVIEW PLEADING
HLL57A	1.50	$111.56	$167.34	03/12/2009	25	REVIEW CASE FILE
HLL57A	3.50	$111.56	$390.46	03/16/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL57A	0.50	$111.56	$55.78	03/17/2009	43	PREPARE FOR DEPOSITION
HLL57A	1.00	$111.56	$111.56	03/17/2009	44	DEPOSITIONS
HLL57A	2.00	$111.56	$223.12	03/17/2009	46	LEGAL RESEARCH
HLL57A	1.00	$111.56	$111.56	03/17/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HL58B	0.40	$111.56	$44.62	03/17/2009	46	LEGAL RESEARCH
HLL57A	0.50	$111.56	$55.78	03/18/2009	70	CONFERENCES WITH LAWYERS
HLL57A	5.00	$111.56	$557.80	03/18/2009	43	PREPARE FOR DEPOSITION
HLL57A	5.50	$111.56	$613.58	03/19/2009	43	PREPARE FOR DEPOSITION
HLL57A	4.50	$111.56	$502.02	03/19/2009	58	TRAVEL TIME
HLL57A	4.50	$111.56	$502.02	03/20/2009	58	TRAVEL TIME
HLL57A	4.00	$111.56	$446.24	03/20/2009	43	PREPARE FOR DEPOSITION
HLL57A	4.50	$111.56	$502.02	03/20/2009	44	DEPOSITIONS
HLL57A	6.00	$114.59	$687.54	03/21/2009	46	LEGAL RESEARCH
HLL57A	4.00	$114.59	$458.36	03/21/2009	43	PREPARE FOR DEPOSITION
HLL57A	2.60	$114.59	$297.93	03/24/2009	43	PREPARE FOR DEPOSITION
HLL57A	1.00	$114.59	$114.59	03/24/2009	38	REVIEW DISCOVERY REQUESTS/RESPONSES
HLL57A	2.00	$114.59	$229.18	03/25/2009	47	TRIAL PREPARATION
HLL57A	1.00	$114.59	$114.59	03/31/2009	47	TRIAL PREPARATION
HLL57A	1.00	$114.59	$114.59	04/08/2009	44	DEPOSITIONS
HL58B	0.50	$114.59	$57.30	04/08/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF.
HLL57A	3.00	$114.59	$343.77	04/10/2009	47	TRIAL PREPARATION
HLL55A	2.00	$114.59	$229.18	04/13/2009	47	TRIAL PREPARATION
HLL57A	2.50	$114.59	$286.48	04/27/2009	43	PREPARE FOR DEPOSITION
HLL57A	1.50	$114.59	$171.89	04/27/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL57A	4.00	$114.59	$458.36	04/27/2009	47	TRIAL PREPARATION
HLL57A	1.50	$114.59	$171.89	04/28/2009	43	PREPARE FOR DEPOSITION
HLL57A	1.50	$114.59	$171.89	04/28/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL57A	2.00	$114.59	$229.18	04/28/2009	47	TRIAL PREPARATION
HLL57A	1.50	$114.59	$171.89	04/28/2009	43	PREPARE FOR DEPOSITION
HLL57A	2.50	$114.59	$286.48	04/28/2009	40	PREPARATION OF OR REVISION OF A PLEADING

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HLL57A	4.50	$114.59	$515.66	04/28/2009	47	TRIAL PREPARATION
HLL57A	1.50	$114.59	$171.89	04/29/2009	43	PREPARE FOR DEPOSITION
HLL57A	1.50	$114.59	$171.89	04/29/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL57A	2.00	$114.59	$229.18	04/29/2009	47	TRIAL PREPARATION
HLL57A	2.50	$114.59	$286.48	04/30/2009	43	PREPARE FOR DEPOSITION
HLL57A	0.50	$114.59	$57.30	04/30/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL57A	2.50	$114.59	$286.48	04/30/2009	47	TRIAL PREPARATION
HLL57A	4.00	$114.59	$458.36	04/30/2009	58	TRAVEL TIME
HLL57A	6.00	$114.59	$687.54	05/01/2009	44	DEPOSITIONS
HLL57A	0.50	$114.59	$57.30	05/01/2009	43	PREPARE FOR DEPOSITION
HLL57A	4.00	$114.59	$458.36	05/01/2009	58	TRAVEL TIME
HLL57A	3.00	$114.59	$343.77	05/03/2009	47	TRIAL PREPARATION
HLL57A	5.00	$114.59	$572.95	05/04/2009	47	TRIAL PREPARATION
HLL57A	3.00	$114.59	$343.77	05/04/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HL58B	1.50	$114.59	$171.89	05/05/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF.
HLL57A	2.00	$114.59	$229.18	05/05/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL57A	3.50	$114.59	$401.07	05/06/2009	47	TRIAL PREPARATION
HLL57A	0.50	$114.59	$57.30	05/07/2009	47	TRIAL PREPARATION
HLL57A	5.00	$114.59	$572.95	05/08/2009	47	TRIAL PREPARATION
HLL57A	4.00	$114.59	$458.36	05/08/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL57A	2.00	$114.59	$229.18	05/10/2009	47	TRIAL PREPARATION
HL58B	1.80	$114.59	$206.26	05/11/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF.
HLL57A	6.70	$114.59	$767.75	05/11/2009	47	TRIAL PREPARATION
HLL57A	2.00	$114.59	$229.18	05/11/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL57A	5.00	$114.59	$572.95	05/12/2009	47	TRIAL PREPARATION
HLL57A	0.50	$114.59	$57.30	05/12/2009	45	PREHEARING MOTION/CONFERENCE CALL
HL58B	0.40	$114.59	$45.84	05/13/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF.
HLL57A	8.00	$114.59	$916.72	05/13/2009	47	TRIAL PREPARATION
HL58B	0.30	$114.59	$34.38	05/14/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF.
HLL57A	3.80	$114.59	$435.44	05/14/2009	47	TRIAL PREPARATION
HLL57A	3.00	$114.59	$343.77	05/14/2009	43	PREPARE FOR DEPOSITION
HLL57A	2.50	$114.59	$286.48	05/14/2009	44	DEPOSITIONS
HLL57A	9.00	$114.59	$1,031.31	05/15/2009	47	TRIAL PREPARATION

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HL58B	0.40	$114.59	$45.84	05/15/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF
HLL57A	4.50	$114.59	$515.66	05/18/2009	58	TRAVEL TIME
HLL57A	5.00	$114.59	$572.95	05/18/2009	47	TRIAL PREPARATION
HLL57A	11.50	$114.59	$1,317.79	05/19/2009	47	TRIAL PREPARATION
HLL57A	8.80	$114.59	$1,008.39	05/20/2009	47	TRIAL PREPARATION
HLL57A	4.00	$114.59	$458.36	05/20/2009	48	FORMAL HEARING
HLL57A	2.50	$114.59	$286.48	05/21/2009	47	TRIAL PREPARATION
HLL57A	6.00	$114.59	$687.54	05/21/2009	48	FORMAL HEARING
HLL57A	3.50	$114.59	$401.07	05/22/2009	47	TRIAL PREPARATION
HLL57A	4.50	$114.59	$515.66	05/22/2009	58	TRAVEL TIME
HLL57A	2.20	$114.59	$252.10	05/26/2009	47	TRIAL PREPARATION
HLL57A	2.20	$114.59	$252.10	05/27/2009	47	TRIAL PREPARATION
HLL57A	4.00	$114.59	$458.36	05/28/2009	47	TRIAL PREPARATION
HLL57A	3.50	$114.59	$401.07	07/07/2009	47	TRIAL PREPARATION
HLL57A	4.50	$114.59	$515.66	07/08/2009	58	TRAVEL TIME
HLL57A	7.50	$114.59	$859.43	07/08/2009	47	TRIAL PREPARATION
HLL57A	1.50	$114.59	$171.89	07/16/2009	49	REVIEW TRANSCRIPTS AND PREPARE RECOMMENDED ORDER
HLL57A	4.50	$114.59	$515.66	08/18/2009	49	REVIEW TRANSCRIPTS AND PREPARE RECOMMENDED ORDER
HLL57A	3.00	$114.59	$343.77	08/19/2009	49	REVIEW TRANSCRIPTS AND PREPARE RECOMMENDED ORDER
HLL56A	0.10	$112.43	$11.24	08/20/2009	60	MISCELLANEOUS
HLL56A	0.20	$112.43	$22.49	08/20/2009	35	TELEPHONE CALLS
HLL56A	0.30	$112.43	$33.73	08/20/2009	25	REVIEW CASE FILE
HLL56A	0.70	$112.43	$78.70	08/20/2009	46	LEGAL RESEARCH
HLL56A	0.30	$112.43	$33.73	08/20/2009	60	MISCELLANEOUS
HLL57A	4.00	$112.43	$449.72	08/20/2009	49	REVIEW TRANSCRIPTS AND PREPARE RECOMMENDED ORDER
HLL56A	0.20	$112.43	$22.49	08/21/2009	60	MISCELLANEOUS
HLL56A	0.10	$112.43	$11.24	08/21/2009	60	MISCELLANEOUS
HLL57A	4.00	$112.43	$449.72	08/21/2009	49	REVIEW TRANSCRIPTS AND PREPARE RECOMMENDED ORDER
HLL57A	7.50	$112.43	$843.23	08/22/2009	49	REVIEW TRANSCRIPTS AND PREPARE RECOMMENDED ORDER
HLL57A	8.00	$112.43	$899.44	08/23/2009	49	REVIEW TRANSCRIPTS AND PREPARE RECOMMENDED ORDER
HLL57A	4.00	$112.43	$449.72	08/25/2009	49	REVIEW TRANSCRIPTS AND PREPARE RECOMMENDED ORDER
HL58B	2.00	$112.43	$224.86	08/26/2009	49	REVIEW TRANSCRIPTS AND PREPARE RECOMMENDED ORDER
HL58B	0.30	$112.43	$33.73	08/27/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF

Division of
Medical Quality Assurance

MQA

*** CONFIDENTIAL ***

Time Tracking System
Itemized Cost by Complaint

Complaint 200605930

Report Date 10/27/2009

Staff Code	Activity Hours	Staff Rate	Cost	Activity Date	Activity Code	Activity Description
HL58B	1.00	$112.43	$112.43	09/21/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF
HLL56A	1.90	$112.43	$213.62	09/24/2009	25	REVIEW CASE FILE
HLL56A	0.10	$112.43	$11.24	09/25/2009	60	MISCELLANEOUS
HLL56A	1.40	$112.43	$157.40	09/28/2009	46	LEGAL RESEARCH
HLL56A	0.50	$112.43	$56.22	09/28/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL56A	3.30	$112.43	$371.02	09/28/2009	46	LEGAL RESEARCH
HLL56A	0.40	$112.43	$44.97	09/30/2009	35	TELEPHONE CALLS
HLL56A	0.40	$112.43	$44.97	10/01/2009	25	REVIEW CASE FILE
HLL56A	5.10	$112.43	$573.39	10/02/2009	25	REVIEW CASE FILE
HLL56A	0.50	$112.43	$56.22	10/05/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF
HLL56A	0.50	$112.43	$56.22	10/05/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF
HLL56A	0.30	$112.43	$33.73	10/05/2009	35	TELEPHONE CALLS
HLL56A	0.10	$112.43	$11.24	10/05/2009	60	MISCELLANEOUS
HLL56A	0.20	$112.43	$22.49	10/05/2009	60	MISCELLANEOUS
HLL56B	0.60	$112.43	$67.46	10/05/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF
HLL56A	1.30	$112.43	$146.16	10/06/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF
HLL56A	0.30	$112.43	$33.73	10/06/2009	35	TELEPHONE CALLS
HLL56A	0.80	$112.43	$89.94	10/06/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL56A	0.30	$112.43	$33.73	10/06/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF
HLL56A	0.60	$112.43	$67.46	10/06/2009	46	LEGAL RESEARCH
HLL56A	0.20	$112.43	$22.49	10/06/2009	35	TELEPHONE CALLS
HLL56A	0.10	$112.43	$11.24	10/06/2009	60	MISCELLANEOUS
HLL57A	5.00	$112.43	$562.15	10/06/2009	41	REVIEW PLEADING
HLL56B	0.90	$112.43	$101.19	10/06/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF
HLL56A	0.50	$112.43	$56.22	10/06/2009	64	LEGAL ADVICE/DISCUSSION - BOARD OFFICE,DEPT STAFF OR ATTY GEN OFF
HLL56A	1.20	$112.43	$134.92	10/07/2009	41	REVIEW PLEADING
HLL56A	0.10	$112.43	$11.24	10/07/2009	60	MISCELLANEOUS
HL58B	1.30	$112.43	$146.16	10/07/2009	41	REVIEW PLEADING
HLL56A	0.40	$112.43	$44.97	10/08/2009	60	MISCELLANEOUS
HLL56A	0.30	$112.43	$33.73	10/08/2009	41	REVIEW PLEADING
HLL56A	0.20	$112.43	$22.49	10/09/2009	60	MISCELLANEOUS
HLL56A	0.10	$112.43	$11.24	10/09/2009	35	TELEPHONE CALLS
HLL56A	0.10	$112.43	$11.24	10/09/2009	60	MISCELLANEOUS

Division of Medical Quality Assurance

MQA

*** CONFIDENTIAL ***

Time Tracking System
Itemized Cost by Complaint

Complaint 200605930

Report Date 10/27/2009

Staff Code	Activity Hours	Staff Rate	Cost	Activity Date	Activity Code	Activity Description
HLL57A	1.50	$112.43	$168.65	10/12/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL56A	0.80	$112.43	$89.94	10/12/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL56A	1.50	$112.43	$168.65	10/13/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL56A	1.80	$112.43	$202.37	10/13/2009	46	LEGAL RESEARCH
HLL56A	0.20	$112.43	$22.49	10/13/2009	60	MISCELLANEOUS
HLL57A	1.00	$112.43	$112.43	10/13/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL57A	3.00	$112.43	$337.29	10/14/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL56A	5.00	$112.43	$562.15	10/14/2009	40	PREPARATION OF OR REVISION OF A PLEADING
HLL56A	0.40	$112.43	$44.97	10/14/2009	35	TELEPHONE CALLS
HLL56A	0.20	$112.43	$22.49	10/14/2009	60	MISCELLANEOUS
HLL57A	6.00	$112.43	$674.58	10/15/2009	40	PREPARATION OF OR REVISION OF A PLEADING
Sub Total	**588.90**		**$66,455.99**			

Total Cost	**$74,313.94**

13595

Division of
Medical Quality Assurance

MQA

*** CONFIDENTIAL ***

Time Tracking System
Itemized Expense by Complaint

Complaint 200605930

Report Date: 10/27/2009

Staff Code	Expense Date	Expense Amount	Expense Code	Expense Code Description
PROSECUTION SERVICES UNIT				
HLL57A	03/03/2009	$148.84	131400	COURT REPORTING
HLL57A	02/10/2009	$550.85	131400	COURT REPORTING
HLL57A	03/11/2009	$220.00	131400	COURT REPORTING
HLL57A	04/07/2009	$247.40	131400	COURT REPORTING
HLL57A	04/20/2009	$121.55	131400	COURT REPORTING
HLL57A	04/08/2009	$76.25	131400	COURT REPORTING
HLL57A	04/17/2009	$722.85	131400	COURT REPORTING
HLL57A	06/05/2009	$1,866.40	131400	COURT REPORTING
HLL57A	05/08/2009	$219.20	131400	COURT REPORTING
HLL57A	08/14/2009	$758.15	131400	COURT REPORTING
HLL57A	06/26/2009	$1,474.40	131400	COURT REPORTING
HL34B	05/21/2007	$800.00	131630	EXPERT WITNESS
HLL57A	05/22/2009	$12,200.00	131800	EXPERT WITNESS FEES
HL34B	07/10/2009	$4,800.00	131800	EXPERT WITNESS FEES
HLL57A	05/14/2009	$1,250.00	131800	EXPERT WITNESS FEES
HLL57A	05/12/2009	$8.75	230000	PRINTING & REPRODUCTION
HLL57A	05/20/2009	$10.40	230000	PRINTING & REPRODUCTION
HLL57A	10/03/2008	$537.55	261010	TRAVEL - EMOLOYEE - IN FLA
HLL57A	02/25/2009	$326.05	261010	TRAVEL - EMOLOYEE - IN FLA
HLL57A	03/20/2009	$328.59	261010	TRAVEL - EMOLOYEE - IN FLA
HLL57A	05/01/2009	$329.76	261010	TRAVEL - EMOLOYEE - IN FLA
HL34B	05/21/2009	$490.39	261010	TRAVEL - EMOLOYEE - IN FLA
HL34B	07/10/2009	$421.39	261010	TRAVEL - EMOLOYEE - IN FLA
HLL57A	05/01/2009	$80.50	497000	PAYMENT FOR INFORMATION AND EVIDENCE
	SubTotal	**$27,989.27**		
	Total Expenses	**$27,989.27**		

American Court Reporting
425 Old Magnolia Road
Crawfordville, FL 32327
850-421-0058
FIN# 03-0480854

BOARD OF MEDICINE
LEGAL
2009 MAR -9 AM 8:32

Invoice

Date	Invoice #
3/6/2009	09-54

Bill To
Department of Health Phyllis Eidson 4052 Bald Cypress Way Bin - C65 Tallahassee, FL 32399

Description	Amount
Department of Health. Florida Board of Medicine v. James Pendergraft, IV, M.D., Case No.: 08-4197PL., 2006-05930 Date: 2/3/09 Matter: Telephone Deposition of P.F. Location: Orange County Attorney: Greg Morr, Esq. Appearance Fee: 9:00 a.m. - 9:33 a.m. Telephonic Deposition Transcript: 26 pages Certified Copy Exhibits: 27 Priority Mail: affidavit attached cg-09-26	65.00 68.90 9.99 4.95
Contract 050901. Visa not accepted	**Total** $148.84

PSU
3/9/09
3/B/09
8/19/09
PLEASE NOTE CHANGE IN BILLING ADDRESS
GRAVE CARE
131400
64-2265-01-015
ED: PM
DOH: MGAPS
DO 1157966

Balance Due $148.84

13596

STATE OF FLORIDA

DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,

Petitioner,

vs. CASE NO: 08-4197PL
2006-05930

JAMES S. PENDERGRAFT, IV, M.D.,

Respondent.

_____/

TELEPHONIC DEPOSITION OF:

P.F.

Taken by:	Greg S. Marr, Esquire
Date:	February 3, 2009
Time:	9:12 a.m.
Location:	Zora Neale Hurston Building 400 West Robinson Street South Tower Orlando, Florida
Reported By:	Cynthia R. Green, Court Reporter Notary Public, State of Florida

NATIONAL REPORTING SERVICE
66 West Flagler Street
Suite 310
Miami, Florida 33130
(305) 373-7295 Phone (305) 358-5444 Fax
Tax ID: 65-1138396

February 7, 2009

Greg Marr, Esq.
Department of Health
405 2 Bald Cypress Way
Bin C-65
Tallahassee, FL 32399

Invoice Number
10-16502

Re: Date of Job: 1/22/2009
Department of Health vs. James Pendergraft, M.D.

Description of Services		Pgs/Qty	Rate	Extension
Depo copy	Depo of Jorge Gomez, M.D.	89.00	3.40	302.60
Exhibit copy (black & white)		789.00	0.25	197.25
Miniscript		1.00	30.00	30.00
Fedex		1.00	21.00	21.00
		Invoice total:		**$550.85**

DBB 2/13/09

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DOAH CASE NO. 08-4197PL
DOH CASE NO. 2006-05930

DEPARTMENT OF HEALTH

Petitioner,

vs.

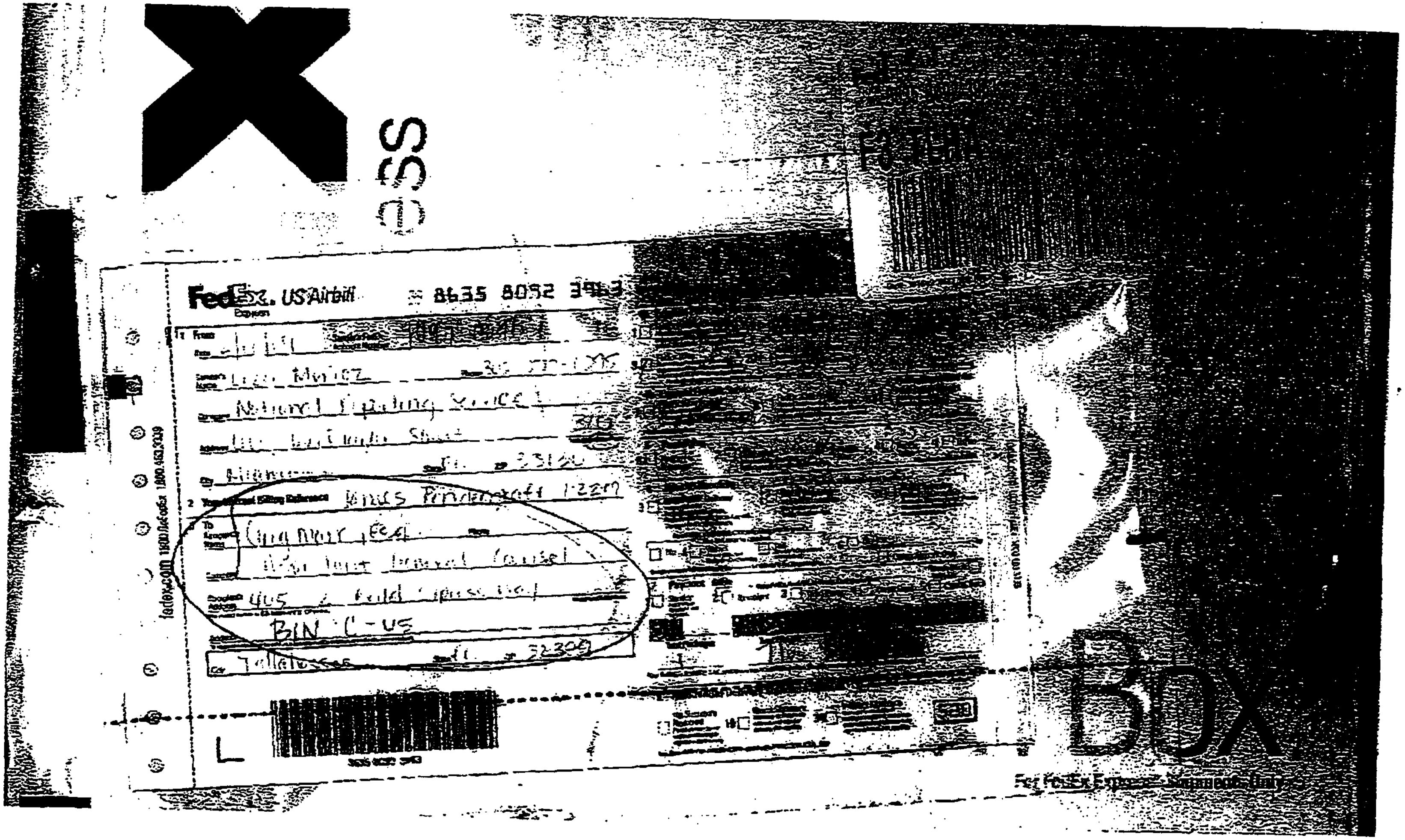
JAMES S. PENDERGRAFT, IV, M.D.,

Respondent.
_____/

6200 Sunset Drive
Suite 301
Miami, Florida
Thursday, January 22, 2009
6:00 p.m.

DEPOSITION OF JORGE L. GOMEZ, M.D.

Taken by MARIA ISABEL FERNANDEZ, Registered Professional Reporter and Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition Duces Tecum in the above cause.


FedEx. US Airbill
fedex.com 1.800.GoFedEx 1.800.463.3339
Box

ATKINSON-BAKER
DEPO.COM
500 NORTH BRAND BOULEVARD THIRD FLOOR
GLENDALE CA 91203-4725
800-288-3376 800-826-8910 fax

2009 APR -3 AM 9:55

1802.002
Page 1 of 1
Phyllis Edson
PH4113 EDSON
DOS 3/11/09

Gregory Morr
Florida Department of Health
4052 Bald Cypress Way
Bin C65 - Prosecution Services Unit
Tallahassee, FL 32399-

Please refer to the invoice No. and your Firm No. in any correspondence.
Contact Ann Kabanjian, akabanjian@depo.com

ABI'S Federal ID No.: 95-4189037

Selling Firm:	Florida Department of Health
Taking Attorney:	Gregory S. Morr
Case Name:	DOH vs James Pendergraft IV MD
Case No.:	08-4197PL
Claim No.:	
Insurance Co.:	
Insured:	DOL:
Clients Ref.#1:	
Clients Ref.#2:	
Adjuster:	

INVOICE NO.	A301CEA AA
FIRM NO.	1194288
INVOICE DATE	03/20/2009
DUE UPON RECEIPT	

Description: Reporter's appearance fee for Monika Hearne, M.D., taken 3/11/2009.

ITEM	QTY	PRICE	LINE TOTAL
Appearance Fee	1.00	$ 140.00	$ 140.00
Waiting Time (hours)	2.00	$ 40.00	$ 80.00
PAYMENT			- $ 220.00
BALANCE DUE			$ .00

A service fee of 1.5% per month may be added to any invoice over 30 days old.

Eldson, Phyllis

From: Marr, Greg
Sent: Monday, March 30, 2009 4:14 PM
To: Eldson, Phyllis
Subject: RE: Atkinson Baker Invoice

The deponent, Dr. Monika Hearne, in Texas, was called away unexpectedly to perform surgery, and it went on longer than she anticipated. The parties waited for her to return to her office for the deposition and finally ran out of time. The deposition was rescheduled and now has been completed.

From: Eldson, Phyllis
Sent: Monday, March 30, 2009 2:23 PM
To: Scott, Clara
Cc: Marr, Greg
Subject: Atkinson Baker Invoice

Please review the attached invoice and provide an explanation for the 2 hour wait time...Thank you, Phyllis

<< File: atkinson baker - pendergraft.pdf >>

Phyllis Eldson
Administrative Assistant II
Prosecution Services Unit
4052 Bald Cypress Way, Bin # C-65
Tallahassee, Florida 32399-3265
Phone: 850-245-4640 Ext. 8217
Fax: 850-245-4682
Phyllis_Eldson@doh.state.fl.us <mailto:Phyllis_Eldson@doh.state.fl.us>

How am I communicating? Please contact my supervisor.

Go confidently in the direction of your dreams.

DOH Mission: Promote, protect and improve the health of all people in Florida.
DOH Vision: A healthier future for the people of Florida.
****

ATKINSON-BAKER
DEPO.COM
500 NORTH BRAND BOULEVARD, THIRD FLOOR
GLENDALE, CA 91203-4725
800-288-3376, 800-925-5910 fax

LEGAL
2009 MAR 30 AM 11:47

Gregory Morr
Florida Department of Health
4052 Bald Cypress Way
Bin C65 - Prosecution Services Unit
Tallahassee, FL 32399-

INVOICE NO.	A301CEA AA
FIRM NO	1194288
INVOICE DATE	03/20/2009
DUE UPON RECEIPT	

Please refer to the Invoice No. and your Firm No. in any correspondence.
Contact Ann Kabanjian
akabanjian@depo.com

ABI'S Federal ID No.: 95-4189037

Setting Firm:	Florida Department of Health
Taking Attorney:	Gregory S. Morr
Case Name:	DOH vs James Pendergraft IV MD
Case No.:	08-4197PL 08 05 930
Claim No.:	
Insurance Co.:	
Insured:	DOL.
Clients Ref.#1:	
Clients Ref.#2:	
Adjuster:	

Description: Reporter's appearance fee for Monika Hearne, M.D., taken 3/11/2009. [redacted]

ITEM	QTY	PRICE	LINE TOTAL
Appearance Fee	1.00	$ 140.00	$ 140.00
Waiting Time (hours)	2.00	$ 40.00	$ 80.00
PAYMENTS			- $ 0.00
BALANCE DUE			$ 220.00

A service fee of 1.5% per month may be added to any invoice over 30 days old.

Fold and tear at this perforation, then return stub with payment.

BALANCE DUE	$ 220.00
INVOICE NO.	A301CEA AA
FIRM NO.	1194288

For: Reporter's appearance fee for Monika Hearne, M.D., taken 3/11/2009.

From: Gregory Morr
Florida Department of Health
4052 Bald Cypress Way
Bin C65 - Prosecution Services Unit
Tallahassee, FL 32399-

Remit To: Atkinson-Baker,Inc.
500 NORTH BRAND BOULEVARD,
THIRD FLOOR
GLENDALE, CA 91203-4725

If you have already paid for this service by COD, then this invoice is for your records only.

13603

181 4054
Phyllis Eidson
PHyllis EIDSON
OOS 4/7/09

ATKINSON-BAKER, INC.
500 NORTH BRAND BOULEVARD, THIRD FLOOR
GLENDALE, CA 91203-4725
800-288-3376, 800-925-5310 fax
www.depo.com

Greg S. Marr
Florida Department of Health
4052 Bald Cypress Way
Bin C65 - Prosecution Services Unit
Tallahassee, FL 32399-

Please refer to the invoice No. and your Firm No. in any correspondence.
Contact Ann Kabanjian, akabanjian@depo.com

INVOICE NO.	A302736 AA
FIRM NO.	1194268
INVOICE DATE	04/03/2009
	DUE UPON RECEIPT

ABI'S Federal ID No.: 95-4189037

Setting Firm:	Florida Department of Health
Taking Attorney:	Greg S. Marr
Case Name:	DOH v. James Pendergraft, IV, M.D.
Case No.:	08-4197PL 2006-05930
Claim No.:	
Insurance Co.:	
Insured:	DOL
Clients Ref.#1:	
Clients Ref.#2:	
Adjuster:	

Description: Reporter's transcript of the deposition of Monike Hearne, M.D., taken 3/17/2009.

ITEM	QTY	PRICE	LINE TOTAL
Minimum O&1 Transcript	1.00	$ 185.00	$ 185.00
Exhibit Copies (pages)	6.00	$ .40	$ 2.40
CD: Ascii/etrans/PDF/exhibits	1.00	$ 20.00	$ 20.00
Condensed Transcript	1.00	$ 15.00	$ 15.00
Processing, Handling & Delivery Fee	1.00	$ 25.00	$ 25.00

PAYMENT	- $ 247.40
BALANCE DUE	$ .00

A service fee of 1.5% per month may be added to any invoice over 30 days old.

BALAN
INVOIC
FIRM N
From: Greg S
Florida
4052 B
Bin C6
Tallaha

CREDIT CARD
VISA SALE
SALE AMOUNT $247.40
TAX AMOUNT $0.00
TOTAL AMOUNT $247.40
CUSTOMER COPY

n of
09

13604

Atkinson-Baker
Court Reporters
500 NORTH BRAND BOULEVARD, THIRD FLOOR
GLENDALE, CA 91203-4725
800-288-3376, 800-925-5910 fax

HEALTH CARE REGULATION
LEGAL
2009 APR 14 AM 10: 15

Greg S. Marr
Florida Department of Health
4052 Bald Cypress Way
Bin C65 - Prosecution Services Unit
Tallahassee, FL 32399-

Please refer to the Invoice No. and your Firm No. in any correspondence.
Contact Ann Kabonjian
akabonjian@doro.com
ABI'S Federal ID No.: 95-4189037

INVOICE NO.	A302736 AA
FIRM NO.	1194268
INVOICE DATE	04/03/2009
DUE UPON RECEIPT	

Setting Firm:	Florida Department of Health
Taking Attorney:	Greg S. Marr
Case Name:	DOH v. James Pendergraft, IV, M.D.
Case No.:	08-4197PL 2006-05930
Claim No.:	
Insurance Co.:	
Insured:	DOL:
Clients Ref.#1:	
Clients Ref.#2:	
Adjuster:	
Description:	Reporter's transcript of the deposition of Monika Hearne, M.D., taken 3/17/2009.

ITEM	QTY	PRICE	LINE TOTAL
Minimum O&1 Transcript	1.00	$ 185.00	$ 185.00
Exhibit Copies (pages)	6.00	$ .40	$ 2.40
CD: Ascii/etrans/PDF/exhibits	1.00	$ 20.00	$ 20.00
Condensed Transcript	1.00	$ 15.00	$ 15.00
Processing, Handling & Delivery Fee	1.00	$ 25.00	$ 25.00
PAYMENTS			- $ 0.00
BALANCE DUE			$ 247.40

A service fee of 1.5% per month may be added to any invoice over 30 days old.

Fold and tear at this perforation, then return stub with payment.

BALANCE DUE	$ 247.40
INVOICE NO.	A302736 AA
FIRM NO.	1194268

For: Reporter's transcript of the deposition of Monika Hearne, M.D., taken 3/17/2009.

From: Greg S. Marr
Florida Department of Health
4052 Bald Cypress Way
Bin C65 - Prosecution Services Unit
Tallahassee, FL 32399-

Remit To: Atkinson-Baker, Inc.
500 NORTH BRAND BOULEVARD,
THIRD FLOOR
GLENDALE, CA 91203-4725

PAID 4/16/09

If you have already paid for this service by COD, then this invoice is for your records only.

DEB 4/16/09

13605

STATE OF FLORIDA

DIVISION OF ADMINISTRATIVE HEARINGS

CERTIFIED COPY

DEPARTMENT OF HEALTH, BOARD OF MEDICINE	)	
PETITIONER,	)	
VS.	)	CASE NO. 08-4197PL
JAMES S. PENDERGRAFT, IV, M.D.,	)	2006-05930
RESPONDENT.	)	

2009 APR -7 PM 3:23

DEPOSITION OF

MONIKA HEARNE, M.D.

ROWLETT, TEXAS

MARCH 17, 2009

ATKINSON-BAKER, INC.
COURT REPORTERS
(800) 288-3376
www.depo.com

REPORTED BY: KENDRA ROWLAND, CSR NO. 5500

FILE NO.: A302736

American Court Reporting
425 Old Magnolia Road
Crawfordville, FL 32327
850-421-0058
EIN# 03-0480854

BOARD OF MEDICINE
LEGAL
2009 APR 22 AM 11:18

Invoice

Date	Invoice #
4/20/2009	09-136

Bill To
Department of Health Phyllis Eidson 4052 Bald Cypress Way Bin - C65 Tallahassee, FL 32399

Description	Amount
Department of Health, Board of Medicine v. James S. Pendergraft, MD Case No.: 08-4197 PL Date: 4/8/09 Matter: Telephone Deposition of Turiva Valez Attorney for DOH: Greg Marr	
Transcript: 44 pages @ 2.65	116.60
Postage and Delivery: affidavit attached	4.95
cg-09-66	
Contract 050901, Visa not accepted	Total $121.55

PLEASE NOTE CHANGE IN BILLING ADDRESS

PGU
4/22/09
4/20/09
4/24/09
Donna Brown
DONNA BROWN
131400
64 02 0570-015
ED: PA
OCA: mQARS
DO 1157966

Balance Due $121.55

AFFIDAVIT

I HEREBY CERTIFY that the April 8, 2006 deposition transcript of Turiya Velez, in the case of DOH/BOM v. James S. Pendergraft, IV, M.D., DOAH Case No.: 08-4197PL, was sent via Priority Mail to Greg S. Marr, Esquire, Tallahassee, Florida, at a rate of $4.95.

Cynthia R. Green

Cynthia R. Green, Court Reporter

CG-09-66

STATE OF FLORIDA

DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,

Petitioner,

vs. CASE NO: 08-4197PL

JAMES S. PENDERGRAFT, IV, M.D.,

Respondent.

_____/

DEPOSITION OF:

TURIYA CARMEN VELEZ

Taken by:	Greg S. Marr, Esquire
Date:	April 8, 2009
Time:	9:22 a.m.
Location:	Zora Neale Hurston Building 400 West Robinson Street South Tower - Suite 827 Orlando, Florida
Reported By:	Diana C. Garcia, Court Reporter Notary Public, State of Florida

American Court Reporting
425 Old Magnolia Road
Crawfordville, FL 32327
850-421-0058
EIN# 03-0480854

Invoice

Date	Invoice #
4/14/2009	09-122

Bill To
Department of Health Phyllis Eidson 4052 Bald Cypress Way Bin - C65 Tallahassee, FL 32399

2009 APR 15 AM 10:14

Description	Amount
Department of Health. Board of Medicine v. James S. Pendergraft, MD Case No.: 08-4197 PL Date: 4/8/09 Matter: Telephone Deposition of Turiva Valez Attorney for DOH: Greg Marr Appearance Fee: 9:00 a.m. - 10:14 a.m. dg-09-37	76.25

PSU
4/16/09
4/8/09
4/16/09
Donna Brown
DONNA BROWN
PLEASE NOTE CHANGE IN BILLING CODE
151408
642205-01-015
50; PH
OOAI MQAPS
PO 1157966

Contract 050901. Visa not accepted	Total	$76.25

Balance Due $76.25

13610

American Court Reporting
425 Old Magnolia Road
Crawfordville, FL 32327
850-421-0058
EIN# 03-0480854

2009 APR 22 AM 11: 18

Invoice

Date	Invoice #
4/20/2009	09-129

Bill To
Department of Health Phyllis Eidson 4052 Bald Cypress Way Bin - C65 Tallahassee, FL 32399

Description	Amount
Department of Health, Board of Medicine v. James S. Pendergraft, IV, M.D.	
Case No.: 08-4197PL Date: March 20, 2009 Matter: Deposition of James Pendergraft, IV., M.D. Location: Orlando Attorney: Marr	
Appearance Fee: 12:00 noon - 4:48 p.m.	126.00
Transcript: 184 pages	579.60
Exhibits:	7.40
Postage and Delivery: affidavit attached	9.85
dg-09-39/cg-09-61	

PSU
4/22/09
4/17/09
4/24/09
Donna Brown
DONNA BROWN
131400
64-22-05-01-015
PLEASE NOTE CHANGE ON BILLING ADDRESS
ED. P14

Contract 050901 OCA: MQAPS DO: 1157966	Total	$722.85

Balance Due	$722.85

13611

AFFIDAVIT

I HEREBY CERTIFY that the March 20, 2009 deposition transcript of James S. Pendergraft, IV, M.D., in the case of DOH/BOM v. James S. Pendergraft, IV, M.D., DOAH Case No.: 08-4197PL, was sent via Priority Mail to Greg S. Marr, Esquire, Tallahassee, Florida, at a rate of $9.85.

Cynthia R. Green
Cynthia R. Green, Court Reporter

CG-09-61

STATE OF FLORIDA

DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,

Petitioner,

vs.

CASE NO: 08-4197PL
2006-05930

JAMES S. PENDERGRAFT, IV, M.D.,

Respondent.

_____/

DEPOSITION OF:

JAMES S. PENDERGRAFT, IV., M.D.

Taken by: Greg S. Marr, Esquire

Date: March 20, 2009

Time: 12:14 p.m.

Location: Zora Neale Hurston Building
400 West Robinson Street, N-312
Orlando, Florida

Reported By: Diana C. Garcia, Court Reporter
Notary Public, State of Florida

...stage pickup right from your home or office at usps.com/pickup

...e online - Go to usps.com/postageonline

PLEASE PRESS FIRMLY

Use

Greg S. Marr, Equine
Florida Department of
Preservation Services
4052 Bald Cypress Way
Tallahassee, FL 32399-2400

13614

1850195
Phyllis Gideon
P Hy 11/13 EDSON
DOS 6/5/09

ATKINSON-BAKER, INC.
500 NORTH BRAND BOULEVARD, THIRD FLOOR
GLENDALE, CA 91203-4725
800-288-3376, 800-925-5910 fax
www.depo.com

2009 JUN -3 PM 12:02

Greg S. Marr
Florida Department of Health
4052 Bald Cypress Way
Bin C65 - Prosecution Services Unit
Tallahassee, FL 32399-

Please refer to the invoice No. and your Firm No. in any correspondence
Contact Ann Kabenjian
akabenjian@depo.com

ABI'S Federal ID No.: 95-4189037

Setting Firm:	Florida Department of Health
Taking Attorney:	Greg S. Marr
Case Name:	In re Pendergraft
Case No.:	08-4197PL ; 2006-05930
Claim No.:	
Insurance Co.:	
Insured:	DOL:
Clients Ref.#1:	
Clients Ref.#2:	
Adjuster:	
Description:	Reporter's transcript of the deposition of Steven Warsof, M.D., taken 5/14/2009. Expedited.

INVOICE NO.	A304808 AA
FIRM NO.	1194268
INVOICE DATE	06/20/2009
DUE UPON RECEIPT	

ITEM	QTY	PRICE	LINE TOTAL
Pages - O&1 - Medical/Expert	96.00	$ 4.25	$ 408.00
Expedite: 1 working day - 100%	96.00	$ 4.25	$ 408.00
Exhibit Copies (pages)	1806.00	$ .40	$ 722.40
CD: Ascii/etrans/PDF/exhibits	1.00	$ 20.00	$ 20.00
Condensed Transcript	1.00	$ 15.00	$ 15.00
Processing & Handling Fee	1.00	$ 25.00	$ 25.00
Attendance, Half-Day	1.00	$ 150.00	$ 150.00
Hours outside normal business hours	.75	$ 50.00	$ 37.50
UPS Overnight	1.00	$ 80.50	$ 80.50
PAYMENTS			- $ 0.00
BALANCE DUE			$ 1,866.40

A service fee of 1.5% per month may be added to any invoice over 30 days old.

Fold and tear at this perforation, then return stub with payment.

BALANCE DUE	$ 1,866.40
INVOICE NO.	A304808 AA
FIRM NO.	1194268

For: Reporter's transcript of the deposition of Steven Warsof, M.D., taken 5/14/2009. Expedited.

From: Greg S. Marr
Florida Department of Health
4052 Bald Cypress Way
Bin C65 - Prosecution Services Unit
Tallahassee, FL 32399-

Remit To: Atkinson-Baker,Inc.
500 NORTH BRAND BOULEVARD,
THIRD FLOOR
GLENDALE, CA 91203-4725

If you have already paid for this service by COD, then this invoice is for your records only.

PAID 6/19/09

DOD 6/19/09

13615

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ORIGINAL

DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,
Petitioner,

vs.

JAMES S. PENDERGRAFT, IV, M.D.,
Respondent.

CASE No. 08-4197PL
2006-05930

DEPOSITION OF

STEVEN WARSOF, M.D.

VIRGINIA BEACH, VIRGINIA

May 14, 2009

The deponent read corrected, and executed this deposition transcript

ATKINSON-BAKER, INC.
COURT REPORTERS
500 North Brand Boulevard, Third Floor
Glendale, California 91203
(818) 551-7300
REPORTED BY: NANCY C. MANN
File No.: A304808

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,
Petitioner,

vs.

JAMES E. PENDERGRAFT, IV, M.D.,
Respondent.

ORIGINAL

CASE No. 1A-4[illegible]
2006-05030

****
* Exhibits Part 1*
****

DEPOSITION OF

STEVEN WARSCY, M.D.

VIRGINIA BEACH, VIRGINIA

May 14, 2009

ATKINSON-BAKER, INC.
COURT REPORTERS
500 North Brand Boulevard, Third Floor
Glendale, California 91203
(818) 551-7300
REPORTED BY: NANCY C. MANN
File No.: A3P4808

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,
Petitioner,

vs.

JAMES S. PENDERGRAFT, IV, M.D.,
Respondent.

ORIGINAL

CASE No. 08-4197PL
2006-05930

****
* Exhibits Part 2*
****

DEPOSITION OF

STEVEN MARSOF, M.D.

VIRGINIA BEACH, VIRGINIA

May 14, 2009

ATKINSON-BAKER, INC.
COURT REPORTERS
500 North Brand Boulevard, Third Floor
Glendale, California 91203
(818) 551-7300
REPORTED BY: NANCY C. MANN
File No.: A304808

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,
Petitioner,

vs.

JAMES S. PENDERGRAFT, IV, M.D.,
Respondent.

ORIGINAL

CASE No. 08-4197PL
2006-05930

****
* Exhibits Part 3*
****

DEPOSITION OF

STEVEN MARSOF, M.D.

VIRGINIA BEACH, VIRGINIA

May 14, 2009

ATKINSON-BAKER, INC.
COURT REPORTERS
500 North Brand Boulevard, Third Floor
Glendale, California 91203
(818) 551-7300
REPORTED BY: NANCY C. MANN
File No.: A304808

ATKINSON-BAKER, INC.
500 NORTH BRAND BOULEVARD, THIRD FLOOR
GLENDALE, CA 91203-4726
800-288-3376, 800-925-5910 fax

Greg S. Marr
Florida Department of Health
4052 Bald Cypress Way
Bin C65 - Prosecution Services Unit
Tallahassee, FL 32399-

INVOICE NO.	A304808 AA
FIRM NO.	1194268
INVOICE DATE	5/20/2009
DUE UPON RECEIPT	

Please refer to the invoice No. and your Firm No. in any correspondence.
Contact Ann Kabanjian, akabanjian@ridepo.com

ABI'S Federal ID No.: 95-4188037

Setting Firm: Florida Department of Health
Taking Attorney: Greg S. Marr
Case Name: In re Pendergraft
Case No.: 08-4197PL ; 2006-05930

Claim No.:
Insurance Co.:
Insured: DOL:
Clients Ref.#1:
Clients Ref.#2:
Adjuster:

Description: Reporter's transcript of the deposition of Steven Wirsof, M.D., taken 5/14/2009. Expedited.

ITEM	QTY	PRICE	LINE TOTAL
Pages - O&1 - Medical/Expert	96.00	$ 4.25	$ 408.00
Expedite: 1 working day - 100%	96.00	$ 4.25	$ 408.00
Exhibit Copies (pages)	1808.00	$ .40	$ 722.40
CD: Ascii/etrans/PDF/exhibits	1.00	$ 20.00	$ 20.00
Condensed Transcript	1.00	$ 15.00	$ 15.00
Processing & Handling Fee	1.00	$ 25.00	$ 25.00
Attendance, Half-Day	1.00	$ 160.00	$ 160.00
Hours outside normal business hours	.75	$ 50.00	$ 37.50
UPS Overnight	1.00	$ 80.50	$ 80.50
PAYMENT			- $ 1886.40
BALANCE DUE			$ .00

A service fee of 1.5% per month may be added to any invoice over 30 days old.

FIRST CHOICE REPORTING SERVICES
121 S. ORANGE AVE
SUITE 800
ORLANDO FL, 32801
407-830-9044

Date: 07-10-2009 12:46:55 PM

CREDIT CARD SALE

CARD NUMBER: ********[redacted]
TRAN AMOUNT: $219.20
APPROVAL CD: 096057
CLERK ID: Rhughes
CUST CODE: Greg Mar
SALES TAX: $0.00
INVOICE #: 72318

1871567
Phyllis Gideon
P44113 EIDSON
DOS 5/8/09

13621

INVOICE

First-Choice REPORTING SERVICES

Invoice No.	Invoice Date	Job No.
72316	5/7/2009	99610

Job Date	Case No.
5/1/2009	08-4197PL

Case Name

Department of Health vs Pendergraft

Payment Terms

Due upon receipt

Greg Marr, Esq.
Department of Health
4052 Bald Cypress Way,
Bin C-65,
Tallahassee, FL 32399-3265

Deposition transcript copy of:

Patient SB		219.20
Condensed Transcript	62.00 Pages
Postage/Handling	

TOTAL DUE >>> **$219.20**
AFTER 6/6/2009 PAY $241.12

Payment is not contingent upon client reimbursment.

Tax ID: 59-347-3648

Phone: 850-414-9655 Fax:

Please detach bottom portion and return with payment

Greg Marr, Esq.
Department of Health
4052 Bald Cypress Way,
Bin C-65,
Tallahassee, FL 32399-3265

Job No. : 99610 BU ID : Orlando
Case No. : 08-4197PL
Case Name : Department of Health vs Pendergraft

Invoice No. : 72316 Invoice Date : 5/7/2009
Total Due : $ 219.20
AFTER 6/6/2009 PAY $241.12

PAYMENT WITH CREDIT CARD

Cardholder's Name:
Card Number:
Exp. Date: Phone#:
Billing Address:
Zip: Card Security Code:
Amount to Charge:
Cardholder's Signature:

Remit To: **First-Choice Reporting Services, Inc.**
121 South Orange Avenue
Suite 800
Orlando, FL 32801

Program Administrator Donna Brown
5/27/09

Spoke w/ admin processed payment 3rd time 06/10/09

Board paid 5/26/09 PE

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DOAH CASE NO.: 08-4197PL
DOH CASE NO.: 2006-05930

DEPARTMENT OF HEALTH,

Petitioner,

-vs-

JAMES S. PENDERGRAFT, IV, M.D.,

Respondent.

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

DEPOSITION OF: PATIENT SB

DATE TAKEN: MAY 1, 2009

TIME: 1:46 P.M.

PLACE: 4767 NEW BROAD STREET
THIRD FLOOR CONFERENCE ROOM
ORLANDO, FLORIDA

REPORTED BY: V. A. MONTZ, RPR AND
NOTARY PUBLIC

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

PRODUCTION DEPARTMENT
(407) 930-8044
FIRST-CHOICE REPORTING SERVICE
121 SOUTH ORANGE AVENUE
ORLANDO FL 32801

2 LBS

1 OF 1

SHIP TO:
GREG MARR, ESQ.
DEPARTMENT OF HEALTH
BIN C-65
4052 BALD CYPRESS WAY
TALLAHASSEE FL 32399

FL 323 0-01

UPS NEXT DAY AIR

1

TRACKING #: 1Z Y44 11X 01 4478 5481

BILLING: P/P

REF 1:99610

13624

American Court Reporting
425 Old Magnolia Road
Crawfordville, FL 32327
850-421-0058
EIN# 03-0480854

Invoice

Date	Invoice #
9/20/2009	09-303

2009 SEP 22 AM 9:19
BUREAU OF LEGISLATION
LEGAL

Bill To
Department of Health Phyllis Eidson 4052 Bald Cypress Way Bin - C65 Tallahassee, FL 32399

Description	Amount
Department of Health, Board of Medicine v. James S. Pendergraft, IV, M.D., Case No.: 08-4197PL Date: July 10, 2009 Matter: Hearing Judge: Quattlebaum Location: Orange County Attorney: Greg Marr	
Appearance Fee: 9:00 a.m. - 1:35 p.m.	153.25
Transcript: 188 pages, original	592.20
Postage and Delivery: Affidavit attached	13.70
cg-09-137	
Contract 050901. Visa not accepted	**Total** $758.15

75 O
9/29/09
8/14/09
9/23/09
Donna Brown
DONNA BROWN
1314.00
64-22-05-01-015
ED: pm
OGA: mQAPS
DO: AOA4FO

Balance Due $758.15

Recd 9/30/09 pc

13625

AFFIDAVIT

I HEREBY CERTIFY that the 07/10/09 DOAH hearing transcript in the case of DOH/BOM v. James S. Pendergraft, IV, M.D., Case No. 09-4197PL, was mailed via Priority Mail to Greg Marr, Esquire, Tallahassee, Florida, and to DOAH, Tallahassee, Florida, at a total rate of $13.70.

Cynthia R. Green

Cynthia R. Green, Court Reporter

CG-09-137

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,

Petitioner,

vs. CASE NO.: 08-4197PL

JAMES S. PENDERGRAFT, IV, M.D.,

Respondent.

/

VOLUME IV

HEARING BEFORE:

Administrative Law Judge William F. Quattlebaum

Date:	July 10, 2009
Time:	9:00 a.m.
Location:	Zora Neale Hurston Building 400 West Robinson Street, N-608 Orlando, Florida
Reported By:	Cynthia R. Green, Court Reporter Notary Public, State of Florida

CERTIFIED COPY

Schedule package pickup right from your home or office at usps.com/pickup

Print postage online - Go to usps.com/postageonline

PLEASE PRESS FIRMLY

PLEA

American Court Reporting
498 Barrington Circle
Winter Springs, FL 32708

Destination:

Greg S. Marr, Esq.
Department of Health
4052 Bald Cypress Way
Bin C-65
Tallahassee, FL 32399-3265

Pays de destination:

EP

Cradle to Cradle Cer
is awarded to produc
an innovative vision c
ecologically-intelligei
eliminates the conce
This USPS® packagi
certified for its mater
recyclability, and ma
characteristics.

1845

32355

13628

American Court Reporting
425 Old Magnolia Road
Crawfordville, FL 32327
850-421-0058
EIN# 03-0480854

Invoice

Date	Invoice #
9/20/2009	09-301

2009 SEP 22 AM 10:19

Bill To
Department of Health Phyllis Eidson 4052 Bald Cypress Way Bin - C65 Tallahassee, FL 32399

Description	Amount
Department of Health, Board of Medicine v. James S. Pendergraft, IV, M.D., Case No.: 08-4197PL Date: May 30-21, 2009 Matter: Hearing Judge: Quattlebaum Location: Orange County Attorney: Greg Marr	PSU DATE INVOICE RECEIVED: 9/22/09 DATE: 6/26/09 DATE: 9/29/09 Donna Brown DONNA BROWN 131400 64-22-05-01015
Appearance Fee: 5/20/09, 9:30 a.m. - 2:17 p.m.	189.00
Appearance Fee: 5/21/09, 9:30 a.m. - 4:38 p.m.	189.00
Transcript: 97 pages, original	305.55
Transcript: 291 pages, Certified Copy	771.15
Postage and Delivery: Affidavit attached	19.70
cg-09-135	
	ED: PA CVA: MQAPS DC: AOA 4FO
Contract 030901, Visa not accepted	Total $1,474.40

Balance Due $1,474.40

Read 9/28/09 pc

AFFIDAVIT

I HEREBY CERTIFY that the 05/20/09 and 5/21/09 DOAH hearing transcript in the case of DOH/BOM v. James S. Pendergraft, IV, M.D., Case No. 09-4197PL, was mailed via Priority Mail to Greg Marr, Esquire, Tallahassee, Florida, and to DOAH, Tallahassee, Florida, at a total rate of $13.70.

Cynthia R. Green

Cynthia R. Green, Court Reporter

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,

Petitioner,

vs. CASE NO.: 08-4197PL

JAMES S. PENDERGRAFT, IV, M.D.,

Respondent.

_____/

VOLUME I OF III

HEARING BEFORE:

Administrative Law Judge William F. Quattlebaum

Date: May 20, 2009

Time: 9:30 p.m.

Location: Zora Neale Hurston Building
400 West Robinson Street, N-101
Orlando, Florida

Reported By: Cynthia R. Green, Court Reporter
Notary Public, State of Florida

CERTIFIED COPY

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,

Petitioner,

vs. CASE NO.: 08-4197PL

JAMES S. PENDERGRAFT, IV, M.D.,

Respondent.

_____/

VOLUME II OF III

HEARING BEFORE:

Administrative Law Judge William F. Quattlebaum

Date: May 21, 2009

Time: 9:29 p.m.

Location: Zora Neale Hurston Building
400 West Robinson Street, N-101
Orlando, Florida

Reported By: Diana C. Garcia, Court Reporter
Notary Public, State of Florida

CERTIFIED COPY

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,

Petitioner,

vs. CASE NO.: 08-4197PL

JAMES S. PENDERGRAFT, IV, M.D.,

Respondent.

_____/

VOLUME III OF III

HEARING BEFORE:

Administrative Law Judge William F. Quattlebaum

Date: May 21, 2009

Time: 9:29 p.m.

Location: Zora Neale Hurston Building
400 West Robinson Street, N-101
Orlando, Florida

Reported By: Diana C. Garcia, Court Reporter
Notary Public, State of Florida

CERTIFIED COPY

JORGE L.GOMEZ, M.D., P.A.

Invoice date May 17. 2007

DOH v. Pornergraft, M.D.
Complaint No. 2006-05930

Review of the records provided and preparation of report	2 hour
Total	$800.00

PSU
5/21/07
5/21/07
5/22/07
NORIZA NOUR

13180
64-22-05-01-015
EO: PA
OGC: VNGWA PS

Paid 5/21/07 PE

13634

JORGE L.GOMEZ, M.D., P.A.

Invoice date: June 3, 2009

In Re: Complaint No. 2006-05930

January 12, 2009	Review of the medical records	0.5 hours
January 13, 2009	Telephone conference with Mr. Marr	0.5 hours
January 21, 2009	Preparation for deposition	1.0hours
April 23, 2009	Review of copy of my deposition	1.0 hours
April 1, 2009	Review deposition of Dr. Pendergraf	1.0 hours
May 17, 2009	Review of Dr. Warsof Deposition and preparation for hearing	2.0 hours
May 20,. 2009	Travel time to Orlando	4.0 hours
May 20, 2009	Meeting with Mr. Marr	0.5 hours
May 21, 2009	Final Hearing in Orlando	8.0 hours
May 22, 2009	Final Hearing in Orlando (postponed)	8.0 hours
May 22, 2009	Travel time to Miami	4.0 hours
Total time:		30.5 hours
Amount billed ($400 per hour):		$12,200.00

Please send make your payment to:
Jorge L. Gomez, M.D., P.A.
Tax ID: 65-0723836
Address: 6200 Sunset Place
Suite 301
Miami, Florida 33143

PSU
6/8/09
5/22/09
6/23/09
KATHRYN PRICE
13830
64-22-05-01-015
ED: PA
OCA: MAPS
DO1295732

13635

Invoice date: July 15, 2009

In Re: Complaint No. 2006-05930

July 09,. 2009	Travel time to Orlando	4.0 hours
July 10, 2009	Final Hearing in Orlando	4.0 hours
July 10, 2009	Travel time to Miami	4.0 hours
Total time:		12.0 hours
Amount billed ($400 per hour):		$4,800

Please send make your payment to:
Jorge L. Gomez, M.D., P.A.,
Tax ID: 65-0723836
Address: 6200 Sunset Place
Suite 301
Miami, Florida 33143

Steven L. Warsof, M.D.,P.C.
1080 First Colonial Rd, Suite 305
Virginia Beach, Va. 23454
757 395-8900

July 31, 2009

Ken Metzger, Esq.
MGF&B
1408 N. Piedmont Way
Tallahassee, Fl. 32308

Re:DOH v Pendergraft
2006-05930

Dear Att. Metger

This will serve as my updated bill for deposition on the above matter. It is now 3 months in arrears. Please forward as appropriate for payment.

Date	Services	charges	payment	bal.
5/14/09	Deposition 2 ½ hrs	$1250.		$1250.
5/31/09	Bill Resubmitted			
6/30/09	Bill Resubmitted			
7/31/09	Bill Resubmitted			

Total.....$1250.

Please remit payment to:
Steven L. Warsof, M.D.,P.C.
1080 First Colonial Rd., Suite 305
Virginia Beach, Va. 23454

Charlie Crist
Governor

FLORIDA DEPARTMENT OF HEALTH

Ana M. Viamonte Ros, M.D., MPH
Secretary of Health

MEMORANDUM

To: Phyllis Eldson

From: Irene Lake, Regulatory Supervisor il

Re: DOH v. James Pendergraft, IV, MD
Invoice for Steven L. Warsorf, MD – Respondent Expert

Date: August 4, 2009

I am requesting that the attached invoice be processed as after the fact.

On May 12, 2009, the attorney submitted the direct order request form to the expert witness office for Dr. Warsorf's deposition scheduled for May 14, 2009. Unfortunately, the expert office did not forward the direct order request form to you prior to the services being rendered.

Because of the time that has past, it is difficult to provide an adequate justification for why the appropriate paperwork was not in place prior to the services being rendered.

Department of Health
Office of the General Counsel - Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, FL 32399-3265

Secretary of State

Division of Library & Information Services
Administrative Code
Tallahassee, FL 32399-0250

To: Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, FL 32399-3265

Invoice Number: 90-1367

This Invoice Number must appear on all checks or correspondence regarding this invoice.

Invoice Date: 05/07/09

Qty:	Description	Cost per Unit	Amount
1	Certified copy of Rule 64B8-9.003, F.A.C., as was in effect 8-20-02 until 9-10-06 Requested by Barbara Sample-Poole Case # 2006-05930	8.75 PSU 5/12/09 5/12/09 5/21/09 Donna Brown DONNA BROWN 230000 64-92-05-01-015	$8.75
FEID # 59-3466865		Total Amount Due:	$8.75

ED: PA
DOA: MQAPS
PO 1027433

Please pay this invoice within 15 days and return the remittance copy with your payment.
If you have questions concerning this invoice, please call 850-245-6270.

[redacted]

State of Florida Agencies please pay by Journal Transfer to SAMAS Account Code
46-60-2-572001-46400100-00
BF Category 001803

[redacted]

Customer Copy

13639

Secretary of State
Division of Library & Information Services
Administrative Code
Tallahassee, FL 32399-0250

To: Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, FL 32399-3265

Invoice Number: 90-1368

This Invoice Number must appear on all checks or correspondence regarding this invoice

Invoice Date: 05/12/09

Qty:	Description	Cost per Unit	Amount
1	Certified copy of Rule 64B8-8.001, F.A.C., as was in effect 1-4-00 until 8-12-08	8.75	$8.75
11	Pages copied	0.15	$1.65
	Requested by Barbara Sample-Poole 245-4640 x 8130 Case # 2006-05030		
			$10.40

PSU
5/20/09
5/20/09
5/21/09
Donna Brown
DONNA BROWN
PLEASE NOTE CHANGE IN BILLING CODES
53.00.00
64-22-05-21-015

FEID # 59-3466865
EO: PA
DOA: MQAPS
DO 1027433

Total Amount Due: $10.40

Please pay this invoice within 15 days and return the remittance copy with your payment.
If you have questions concerning this invoice, please call 850-245-6270.

[redacted] Department of State, R.A. Gray [redacted]

State of Florida Agencies please pay by Journal Transfer to SAMAS Account Code
45-80-2-572001-45400100-00
BF Category 001903

[redacted]

Rec'd 5/20/09 PL

Customer Copy

13640

STATE OF FLORIDA
VOUCHER FOR REIMBURSEMENT
OF IN-STATE TRAVEL EXPENSES

TRAVELER Greg S. Marr
Address 4052 Bald Cypress Way #C-65
CHECK ONE: x OFFICER/EMPLOYEE ___ NONEMPLOYEE IND. CONTRACTOR ___ OPS

Social Security No. 8437
HEADQUARTERS Tallahassee
RESIDENCE (CITY) Tallahassee

DATE	Travel Performed From Point of Origin To Destination	Purpose or Reason (Name of Conference) (Purchasing Card Description)	Hour of Departure And Hour of Return	Meals for Class A & B Travel	Per Diem or Actual Lodging Expenses	Map Mileage Claimed	Vicinity Mileage Claimed	Other Expenses Amount	Other Expenses Type	PCARD Charges
			M							
10/1/2008	Tallahassee to Orlando	Interview fact witness	9:30 A M	30.00					Avis Rental Car *	105.18
		DOH v Fendercraft 2006-05930	M					6.75	Toll	
10/2/2008	Orlando	File Petition to Enforce Department Subpoena	M	36.00				100.63	Gas	
		DOH v Pendergraft 2004-16725	M						Hotel	198.99
10/3/2008	Orlando to Tallahassee	Present cases at Board Medicine meeting	5:15 P M		60.00					
			M							
			M							
	* Avis Upgrade $ 24.16		M							
			M							
			M							
			M							
			M							
			M							
			M							
			M							
			M							
			M							
			M							
			M							
			M							
			M							
Statement of Benefits to the State: (Conference or Convention)				Column Total $ 66.00	Column Total $ 60.00	0 Mi. 0.445 Mi. $ (0.00)		Column Total $ 107.38		Summary Total $ 537.55

537.55
261010

OBJECT	AMOUNT	OBJECT	AMOUNT
261100 Per Diem	60.00	261500 Air	—
261200 Meals	66.00	261803 Incidental	107.38
261300 Mileage	—	261005 Rnt Car	105.18
261400 Lodging	198.99	261	

TR______ SEL___
64-22-050-1015
EO__PA__ VR__ CF__ OCA__MOAPS_____
INVOICE #__________TRAN DATE__________

LESS ADVANCE RECEIVED	($)
LESS NON-REIMBURSABLE ITEMS INCLUDED ON PCARD	304.17
NET AMOUNT DUE TRAVELER	$ 233.38
NET AMOUNT DUE THE STATE	

I hereby certify or affirm and declare that this claim for reimbursement is true and correct in every material matter; that the travel expenses were actually incurred by me as necessary in the performance of official duties; that per diem claimed has been appropriately reduced by any meals or lodging included in the convention or conference registration fees claimed by me, and that this voucher conforms in every respect with the requirements of Section 112.061, Florida Statutes.

TRAVELER'S SIGNATURE: Greg S Marr
SIGNATURE DATE: 10/13/2008 TITLE: Assistant General Counsel

Pursuant to Section 112.061 (3) (a), Florida Statutes, I hereby certify or affirm that to the best of my knowledge the travel was on official business of the State of Florida and was for the purpose(s) stated above.

SUPERVISOR'S SIGNATURE: [signature]
SUPERVISOR'S TITLE: DGC
SIGNATURE DATE: 10/14/08

[redacted]

Invoice No. ______
Voucher/SWD No. ______
RF Ck/Warrant No. ______
RF Ck/Warrant Date ______

Advance ______
Warrant No. ______
Warrant Date ______
Statewide Doc. No. ______
Agency Voucher No. ______

Preparer's Name ______ Clara Scott
Preparer's Phone No. ______ 850-245-4640 x8221
Date Prepared ______ 10/13/2008

3/4/09
PG

DH 676A 09/06

13641

STATE OF FLORIDA
VOUCHER FOR REIMBURSEMENT
OF IN-STATE TRAVEL EXPENSES

TRAVELER Greg S. Marr
Address 4052 Bald Cypress Way #C-65
CHECK ONE: x OFFICER/EMPLOYEE ___ NONEMPLOYEE IND. CONTRACTOR ___ OPS

Social Security No. 8437
HEADQUARTERS Tallahassee
RESIDENCE (CITY) Tallahassee

DATE	Travel Performed From Point of Origin To Destination	Purpose or Reason (Name of Conference) (Purchasing Card Description)	Hour of Departure And Hour of Return	Meals for Class A & B Travel	Per Diem or Actual Lodging Expenses	Map Mileage Claimed	Vicinity Mileage Claimed	Other Expenses Amount	Other Expenses Type	PCARD Charges
			M							
2/24/2009	Tallahassee to Orlando	Traveling / Interview fact witnesses	9:00 A M	30.00					Avis Rental Car *	74.24
		DOH v Pendergraft 2006-05930	M					6.75	Toll	
			M					35.06	Gas	
			M						Hotel	100.00
			6:30 P M							
2/25/2009	Orlando to Tallahassee	Depositions of witnesses	M		80.00					
		DOH v Pendergraft 2006-05930	M							
			M							
			M							
			M							
	* Avis Upgrade $ 12.08 taken from		M							
	total amount that's due to traveler		M							
			M							
			M							
			M							
			M							
			M							
			M							
			M							
			M							
			M							
			M							
Statement of Benefits to the State: (Conference or Convention)				Column Total $30.00	Column Total $ 80.00	$ 0 Mi. 0.445 Mi. (0.00)		Column Total $ 41.81		Summary Total $ 326.05

326.05
261010

TR___ SEL___
64-22-050-1015
EO__PA__ VR__ CF__ OCA__MQAPS____
INVOICE #__________TRAN DATE________

OBJECT	AMOUNT	OBJECT	AMOUNT
261100 Per Diem	80.00	261500 Air	
261200 Meals	30.00	261003 Incidental	41.81
261300 Mileage		261005 Rntl Car	174.24
261400 Lodging	100.00	261	

LESS ADVANCE RECEIVED	($)
LESS NON-REIMBURSABLE ITEMS INCLUDED ON PCARD	174.24
NET AMOUNT DUE TRAVELER	$ 151.81
NET AMOUNT DUE THE STATE	

I hereby certify or affirm and declare that this claim for reimbursement is true and correct in every material matter; that the travel expenses were actually incurred by me as necessary in the performance of official duties; that per diem claimed has been appropriately reduced by any meals or lodging included in the convention or conference registration fees claimed by me and that this voucher conforms in every respect with the requirements of Section 112.061, Florida Statutes.

TRAVELER'S SIGNATURE: Greg S Marr
SIGNATURE DATE: 3/2/09 TITLE: Assistant General Counsel

Pursuant to Section 112.061 (3) (a), Florida Statutes, I hereby certify or affirm that to the best of my knowledge the travel was on official business of the State of Florida and was for the purpose(s) stated above.

SUPERVISOR'S SIGNATURE: Kathryn W. Price
SUPERVISOR'S TITLE: Deputy General Counsel
SIGNATURE DATE: 3/3/09

[redacted]

Invoice No. ____________
Voucher/SWD No. ____________
RF Ck/Warrant No. ____________
RF Ck/Warrant Date ____________

Advance ____________
Warrant No. ____________
Warrant Date ____________
Statewide Doc. No. ____________
Agency Voucher No. ____________

Preparer's Name______ Clara Scott
Preparer's Phone No.____ 850-245-4640 x8221
Date Prepared________ 3/2/2009

DH 676A 09/06

3/10/09

13642

STATE OF FLORIDA
VOUCHER FOR REIMBURSEMENT
OF IN-STATE TRAVEL EXPENSES

TRAVELER Greg S. Marr
Address 4052 Bald Cypress Way #C-65
CHECK ONE: X OFFICER/EMPLOYEE ___ NONEMPLOYEE IND. CONTRACTOR ___ OPS

Social Security No. 8437
HEADQUARTERS Tallahassee
RESIDENCE (CITY) Tallahassee

DATE	Travel Performed From Point of Origin To Destination	Purpose or Reason (Name of Conference) (Purchasing Card Description)	Hour of Departure And Hour of Return	Meals for Class A & B Travel	Per Diem or Actual Lodging Expenses	Map Mileage Claimed	Vicinity Mileage Claimed	Other Expenses Amount	Other Expenses Type	PCARD Charges
			M							
3/19/2009	Tallahassee to Orlando	Travline	1:30 A M	30.00						
		DOH v Pendergraft 2006-05890	M						Avis Rental Car *	73.94
			M					6.50	Toll	
			M					43.15	Gas	
			M						Hotel	95.00
			9:00 P M							
3/20/2009	Orlando to Tallahassee	Depositions of Respondent	M		80.00					
		DOH v Pendergraft 2006-05930	M							
		Obtain Court Docket	M							
		DOH v Pendergraft 2004-16725	M							
		Obtain Court Docket	M							
		Dom v Pendergraft 2006-27204	M							
			M							
			M							
	* Avis Upgrade $ 12.08 taken from		M							
	total amount that's due to traveler		M							
			M							
			M							
			M							
			M							
			M							
			M							
			M							
			M							

3 25 59
2610 10

Statement of Benefits to the State: (Conference or Convention)

	Column Total	Column Total	0 Mi. 0.465 Mi.	Column Total	Summary Total
	$ 30.00	$ 80.00	$ (0.00)	$ 49.65	$ 328.59

TR_____ SEL___
64-22-050-1015
ED___PA___ VR___ CF___ OCA___MQAPS_____
INVOICE #_____TRAN DATE_____

OBJECT	AMOUNT	OBJECT	AMOUNT
261100 Per Diem	80.00	261500 Air	0.00
261200 Meals	30.00	261003 Incidental	49.65
261300 Mileage	0.00	261005 Rnt Car	73.94
261400 Lodging	95.00	261	

LESS ADVANCE RECEIVED	($)
LESS NON-REIMBURSABLE ITEMS INCLUDED ON PCARD	$ ((168.94))
NET AMOUNT DUE TRAVELER	$ 147.57
NET AMOUNT DUE THE STATE	

I hereby certify or affirm and declare that this claim for reimbursement is true and correct in every material matter; that the travel expenses were actually incurred by me as necessary in the performance of official duties; that per diem claimed has been appropriately reduced by any meals or lodging included in the convention or conference registration fees claimed by me; and that this voucher conforms in every respect with the requirements of Section 112.061, Florida Statutes.

TRAVELER'S SIGNATURE: Greg S Marr
SIGNATURE DATE: 3/23/09 TITLE: Assistant General Counsel

Pursuant to Section 112.061 (3) (a), Florida Statutes, I hereby certify or affirm that to the best of my knowledge the travel was on official business of the State of Florida and was for the purpose(s) stated above.

SUPERVISOR'S SIGNATURE: Katherine C. Price
SUPERVISOR'S TITLE: Deputy General Counsel
SIGNATURE DATE: 3/24/09

FOR AGENCIES

Invoice No. _____
Voucher/SWD No. _____
RF Ck./Warrant No. _____
RF Ck./Warrant Date _____

Advance _____
Warrant No. _____
Warrant Date _____
Statewide Doc. No. _____
Agency Voucher No. _____

Preparer's Name Clara Scott
Preparer's Phone No. 850-245-4540 x2221
Date Prepared 3/23/2009

DH 875A 09/08

3/25/09

13643

STATE OF FLORIDA
VOUCHER FOR REIMBURSEMENT
OF IN-STATE TRAVEL EXPENSES

TRAVELER Greg S. Marr HL57A
Address 4052 Bald Cypress Way #C-65
CHECK ONE: X OFFICER/EMPLOYEE ___ NONEMPLOYEE INC. CONTRACTOR ___ OPS

Social Security No. 8437
HEADQUARTERS Tallahassee
RESIDENCE (CITY) Tallahassee

DATE	Travel Performed From Point of Origin To Destination	Purpose or Reason (Name of Conference) (Purchasing Card Description)	Hour of Departure And Hour of Return		Meals for Class A & B Travel	Per Diem or Actual Lodging Expenses	Map Mileage Claimed	Vicinity Mileage Claimed	Other Expenses Amount	Other Expenses Type	PCARD Charges
				M						Avis Rental Car *	$ 79.74
4/30/2009	Tallahassee to Orlando	Travling	1:45 P	M	19.00						
		DOH v Pendergrast 2006-05930		M					7.50	Toll	
5/1/2009	Orlando	Attend and conduce depositions of Witnesses		M					44.52	Gas	
				M						Hotel	99.00
5/1/2009	Orlando to Tallahassee	Travelling	7:00P	M		80.00					
				M							
				M							
				M							
				M							
				M							
				M							
				M							
	* Avis Upgrade $ 7.11 taken from			M							(
	total amount that's due to traveler			M							
				M							
				M							
				M							
				M							
				M							
				M							
				M							

329.76
2010

Statement of Benefits to the State: (Conference or Convention)

	Column Total	Column Total	0 Mi. 0.445 /M	Column Total	Summary Total
	$ 19.00	$ 80.00	$ (0.00)	$ 52.02	$329.76

OBJECT	AMOUNT	OBJECT	AMOUNT		
261100 Per Diem	80.00			LESS ADVANCE RECEIVED	$ ( )
261200 Meals	19.00	261003 Incidentals	52.02	LESS NON-REIMBURSABLE ITEMS INCLUDED ON PCARD	$ ((178.74))
261300 Mileage	0.00	261005 Rnt Car	79.74	NET AMOUNT DUE TRAVELER	$ 151.02
261400 Lodging	99.00	261		NET AMOUNT DUE THE STATE	

TR_____ SEL____
84-22-050-1015
EO___PA__ VR___ CF___ OCA___MOAPS_____
INVOICE #_____TRAN DATE_____

I hereby certify or affirm and declare that this claim for reimbursement is true and correct in every material matter; that the travel expenses were actually incurred by me as necessary in the performance of official duties; that per diem claimed has been appropriately reduced by any meals or lodging included in the convention or conference registration fees claimed by me; and that this voucher conforms in every respect with the requirements of Section 112.061, Florida Statutes.

TRAVELER'S SIGNATURE: Greg Marr
SIGNATURE DATE: 5/1/09 TITLE: _____ Assistant General Counsel: _____

Pursuant to Section 112.061 (5) (a), Florida Statutes, I hereby certify or affirm that, to the best of my knowledge the travel was on official business of the State of Florida and was for the purpose(s) stated above.

SUPERVISOR'S SIGNATURE: Kathryn Le Prell
SUPERVISOR'S TITLE: Doc
SIGNATURE DATE: 5/5/09

[redacted]
Invoice No _____
Voucher/SWC No. _____
RF Ck /Warrant No. _____
RF Ck /Warrant Date _____

Advance _____
Warrant No. _____
Warrant Date _____
Statewide Doc. No. _____
Agency Voucher No. _____

Preparer's Name _____ Barbara Sample-Poole
Preparer's Phone No. _____ 850-245-4640 x5130
Date Prepared _____ 5/4/2009

5/5/09

13644

HL345

STATE OF FLORIDA
VOUCHER FOR REIMBURSEMENT OF IN-STATE TRAVEL EXPENSES

TRAVELER Jorge L. Gomez, M.D.
Address 6200 Sunset Drive, Suite 301, Miami, FL 33143
CHECK ONE: ___ OFFICER/EMPLOYEE X NONEMPLOYEE IND. CONTRACTOR ___ OPS

Social Security No. 3836
HEADQUARTERS Tallahassee
RESIDENCE (CITY) Tallahassee

DATE	Travel Performed From Point of Origin To Destination	Purpose or Reason (Name of Conference) (Purchasing Card Description)	Hour of Departure And Hour of Return	Meals for Class A & B Travel	Per Diem or Actual Lodging Expenses	Map Mileage Claimed	Vicinity Mileage Claimed	Other Expenses Amount	Other Expenses Type	PCARD Charges
			M					$ 223.39	Mileage Personal Car	
5/20/2009	Tallahassee to Orlando	Traveling	1:00 P M	19.00						
		DOH v Pendergraft 2006-06930	M					10.00	Toll	
		Testimony at Hearing DOAH 08-4187PL	M							
			M					198.00	Hotel	
5/21/2009	Orlando to Tallahassee	Traveling	1:00P M		40.00					
			M							
			M							
			M							
			M							
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			M							
			M							
			M							
Statement of Benefits to the State: (Conference or Convention)				Column Total: $ 19.00	Column Total $ 40.00	0 Mi. 3445 Mi. $ (0.00)		Column Total $ 431.39		Summary Total $471.39

261010
490.39

TR______ SEL____
64-22-050-1015
EO__PA__VR__ CF__ OCA__MQAPS______
INVOICE #__________TRAN DATE__________

OBJECT	AMOUNT	OBJECT	AMOUNT
261100 Per Diem			
261200 Meals		261003 Incidental	
261300 Mileage		261005 Rnt Car	
261400 Lodging		261	

LESS ADVANCE RECEIVED	($)
LESS NON-REIMBURSABLE ITEMS INCLUDED ON PCARD	($)
NET AMOUNT DUE TRAVELER	$ 471.39
NET AMOUNT DUE THE STATE	

I hereby certify or affirm and declare that this claim for reimbursement is true and correct in every material matter; that the travel expenses were actually incurred by me as necessary in the performance of official duties; that per diem claimed has been appropriately reduced by any meals or lodging included in the convention or conference registration fees claimed by me, and that this voucher conforms in every respect with the requirements of Section 112.061, Florida Statutes.

TRAVELER'S SIGNATURE: [signature]
SIGNATURE DATE: 06-22-09 TITLE: Department Expert Witness

Pursuant to Section 112.061 (3) (a), Florida Statutes, I hereby certify or affirm that to the best of my knowledge the travel was on official business of the State of Florida and was for the purpose(s) stated above.

SUPERVISOR'S SIGNATURE: [signature]
SUPERVISOR'S TITLE: Deputy General Counsel
SIGNATURE DATE: June 26, 2009

[redacted]

Invoice No. ______
Voucher/SWD No. ______
RF Ck/Warrant No. ______
RF Ck/Warrant Date ______

Advance ______
Warrant No. ______
Warrant Date ______
Statewide Doc. No. ______
Agency Voucher No. ______

Preparer's Name ______ Barbara Sample-Poole
Preparer's Phone No. ______ 850-245-4640 x8130
Date Prepared ______ 6/5/2009

DH 6764 09/06

7/22/09

13645

STATE OF FLORIDA
VOUCHER FOR REIMBURSEMENT
OF IN-STATE TRAVEL EXPENSES

TRAVELER Jorge L. Gomez, M.D. HL343
Address 5200 Sunset Drive, Suite 301, Miami, FL 33143
CHECK ONE: ___ OFFICER/EMPLOYEE X NONEMPLOYEE IND. CONTRACTOR ___ OPS

Social Security No. [redacted]
HEADQUARTERS Tallahassee
RESIDENCE (CITY) Tallahassee

DATE	Travel Performed From Point of Origin To Destination	Purpose or Reason (Name of Conference) (Purchasing Card Description)	Hour of Departure And Hour of Return	Meals for Class A & B Travel	Per Diem or Actual Lodging Expenses	Map Mileage Claimed	Vicinity Mileage Claimed	Other Expenses Amount	Other Expenses Type	PCARD Charges
			M					$ 223.39	Milage Personal Car	
7/9/2009	Miami to Orlando	Traviling	2:00 P M	19.00						
		DOH v Pendergraft 2005-05630	M							
		Testimony at Final Hearing DOAH 08-4197PL	M							
			M					99.00	Hotel	
7/10/2009	Orlando to Miami	Traveling	6:00 P M		80.00					
			M							
			M							
			M							
			M							
			M							
			M							
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			M							
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			M							
			M							

421.39
261010

Statement of Benefits to the State: (Conference or Convention)

	Column Total	Column Total	C Mi. 0.445 Mi.	Column Total	Summary Total
	$ 19.00	$ 80.00	$ (0.00)	$ 322.39	$421.39

TR_____ SEL___
54-22-050-1015
EO___PA__ VR___ CF___ OCA__MQAPS_____
INVOICE #_____ TRAN DATE_____

OBJECT	AMOUNT	OBJECT	AMOUNT
261100 Per Diem			
261200 Meals		261003 Incidental	
261300 Mileage		261005 Rent Car	
261400 Lodging		261	

LESS ADVANCE RECEIVED	($)
LESS NON-REIMBURSABLE ITEMS INCLUDED ON PCARD	($)
NET AMOUNT DUE TRAVELER	$ 421.39
NET AMOUNT DUE THE STATE	

I hereby certify or affirm and declare that this claim for reimbursement is true and correct in every material matter; that the travel expenses were actually incurred by me as necessary in the performance of official duties; that per diem claimed has been appropriately reduced by any meals or lodging included in the convention or conference registration fees claimed by me; and that this voucher conforms in every respect with the requirements of Section 112.061, Florida Statutes.

TRAVELER'S SIGNATURE: [signature]
SIGNATURE DATE: 7/27/09 TITLE: MD Department Expert Witness

Pursuant to Section 112.061 (3) (a), Florida Statutes, I hereby certify or affirm that to the best of my knowledge the travel was on official business of the State of Florida and was for the purpose(s) stated above.

SUPERVISOR'S SIGNATURE: [signature]
SUPERVISOR'S TITLE: Deputy General Counsel
SIGNATURE DATE: August 5, 2009

[redacted]
Invoice No. _____
Voucher/SWD No. _____
RF Ck./Warrant No. _____
RF Ck./Warrant Date _____

Advance _____
Warrant No. _____
Warrant Date _____
Statewide Doc. No. _____
Agency Voucher No. _____

Preparer's Name _____ Barbara Sample-Poole
Preparer's Phone No. ____ 850-245-4640 x8130
Date Prepared _____ 7/20/2009

8/19/09 BS

DH 8764 06/06

13646

Tab 37

STATE OF FLORIDA
DEPARTMENT OF HEALTH
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

Petitioner,

v.

DOAH CASE NO. 08-4197PL
DOH CASE NO. 2006-05930

JAMES S. PENDERGRAFT, IV, M.D.,

Respondent.
_____/

RESPONDENT'S RESPONSE AND OBJECTIONS TO PETITIONER'S MOTION TO ASSESS COSTS IN ACCORDANCE WITH SECTION 456.072(4)

Respondent, James S. Pendergraft, IV, M.D. ("Respondent" or "Dr. Pendergraft"), by and through his undersigned counsel, pursuant to section 456.072(4), Florida Statutes, files Respondent's Response and Objection to Petitioner's Motion to Assess Costs in Accordance with Section 456.072(4), and in support, states:

On October 20, 2009, the Department served its Motion to Assess Costs in Accordance With Section 456.072(4) in this case. Attached to its Motion, the Department included the affidavit of Julie M. Weeks, a "Complaint Cost Summary," thirteen (13) pages entitled "Confidential Time Tracking System Itemized Cost by Complaint," two single pages, both entitled "Confidential Time Tacking System Itemized Expense by Complaint" (dated 10/05/2009 and 10/19/2009), followed by various documents in support of the alleged "expenses" itemized therein. On October 27, 2009, seven days into Respondent's response time of 10 days, the Department served its Amended Motion to Assess Costs in Accordance with Section 456.072(4) in this case.

OBJECTIONS IN SUPPORT OF DENIAL OF THE DEPARTMENT'S MOTION TO ASSESS COSTS

Objection I: Neither the Department nor the Board has initiated rulemaking proceedings regarding "costs" under section 456.072(4), Florida Statutes.

Respondent's first objection to the Department's Motion to Assess Costs under section 456.072(4), Florida Statutes, is that neither the Department nor the Board has initiated rulemaking regarding these costs. The process for determining costs pursuant to section 456.072(4), Florida Statutes, requires rulemaking. *See Mohamed Ibrahim Abdel-Aziz, M.D. v. Department of Health, Board of Medicine,* DOAH Case No. 03-0295RU (Final Order, June 4, 2003). To date, the Department has not initiated rulemaking regarding section 456.072(4) costs.

This Board has been ordered to cease relying on any unpromulgated rules for determining the appropriate costs to be assessed in disciplinary cases. *Id.* In that Final Order, the Administrative Law Judge found, however, that the Board is not prohibited from assessing costs limited to traditionally recognized costs, such as court reporter fees, transcript costs, witness fees, and costs of service of process. *Id. Also see In re Hapner*, 737 So. 2d 1075 (Fla. 1999); *Winn-Dixie Stores, Inc. v. Vote*, 463 So. 2d 456 (Fla. 2d DCA 1985).

In the *Abdel-Aziz* Final Order the ALJ noted the ample examples that the Department and Board could utilize to promulgate rules to put physicians on notice as to what types of expenses are included in the phrase "costs related to the investigation and prosecution of the case." Yet neither the Department nor the Board has initiated rulemaking. The statutory language states: "Such costs related to the investigation and prosecution include, but are not limited to, salaries and benefits of personnel, costs related to the time spent by the attorney and other personnel working on the case, and any other expenses incurred by the department for the case. §456.072(4), Fla. Stat. However, there has been no rulemaking regarding the definition of the

terms utilized therein, or the methodology by which those costs are determined. Instead, the Department merely offers the affidavit of a Department employee to explain the purported way which figures on an accompanying 13 page spreadsheet were compiled.

Because there is no rule that has gone through the appropriate rulemaking process to ensure its reasonableness and applicability, the *prima facie* authority and credibility of this employee to make the assertions in her affidavit and the accuracy and methodology of the generalized entries on the 13-page attachment has not been established. The Respondent objects to the assessment of costs under section 456.072(4), in the absence of the Department and/or the Board promulgating appropriate rules which give adequate notice as to what shall constitute recoverable costs and how "salaries and benefits of personnel" and "costs related to the time spent by other personnel working on the case" shall be calculated.

Objection II: The Department's interpretation and use of section 456.072(4), Florida Statutes, are unconstitutional, both facially and as-applied, and violate basic principles of due process providing no *meaningful* notice or opportunity to be heard on the issue.

Without waiving any and all other objections, the Respondent next objects to the assessment of costs under section 456.072(4) in this case because the statute provides insufficient due process for the Department to prove and the Respondent to challenge the asserted costs by the Department, particularly those for which no guidance has been provided through rulemaking. The procedure of affidavit and objections in the statute does not provide sufficient process for determining whether the costs are lawful, reasonable, and whether the Department's asserted evidence is sufficient to support the asserted claim to costs.

> In the absence of a rule setting out a procedure for establishing the appropriate amount of such costs, fundamental fairness requires that the Board ... require [the Department] to submit to the Board and to the Respondent an itemized listing of the costs for which payment is requested and that the Respondent be given an opportunity to contest the accuracy and reasonableness of the costs

> before the Board determines the amount of costs the Respondent will be required to pay.

Dep't of Health, Bd. of Nursing v. Matus, No. 97-1911, 1997 WL 1053326 (Fla.Div.Adm.Hrgs.)(Recommended Order), *cited in Dep't of Health, Bd. of Medicine v. Freshwater,* No. 02-2576PL, 2002 WL 31440747(Fla.Div.Adm.Hrgs.).

The Department's Motion to Assess Costs with its attachments hardly provides the Respondent his "opportunity to be heard" on the issues of accuracy and reasonableness before the Board meeting at which this case will be heard. The Board's imposition of a cost judgment against a physician without allowing the physician any opportunity to be heard is error. *Rupp v. Dep't of Health,* 936 So. 2d 790, 795 (Fla. 3d DCA 2007).

Further, there is no adequate due process when there is no mechanism for discovery or fact-finding, no requirement that this evidence be put on before the ALJ at hearing, and no authorized mechanism for the return of the matter to an ALJ for such determinations. As such, the statute leaves this decision to the Board, following the mere filing of the Department's hearsay affidavit and alleged itemized costs and the Respondent's written objections.

This lack of due process on the issue of costs is especially glaring where, as here, the "evidence" consists of an affidavit of a Department employee who neither investigated nor prosecuted this case, who is not an "expert" on the content and reasonableness of the itemized costs, and a computer generated printout of hours, codes, and descriptions of purported "activity" of investigators and prosecutors so generalized as to leave the reader at a total loss as to what services were actually performed. Respondent objects to the Board's assessment of costs under section 456.0702(4), Florida Statutes, because of the lack of due process in the statutory provision, which would allow for meaningful notice and opportunity to challenge the adequacy, accuracy and methodology of the Department's motion, affidavit and attached documentation.

Objection III: The Department failed to allege that "costs" was a penalty sought in this case and failed to put on any evidence during the administrative hearing or anywhere else in the official record of this case regarding its asserted "costs."

Without waiving all other objections, the Respondent next objects to the assessment of costs under section 456.072(4) because the Department failed to include the imposition of costs as one of the penalties sought in this case and failed to present any evidence on costs in the administrative hearing before the Administrative Law Judge. In the Administrative Complaint in this case, the Department pled for the imposition of one or more of the following penalties: "permanent revocation or suspension of Respondent's license, restriction of practice, imposition of an administrative fine, issuance of a reprimand, placement of the Respondent on probation, corrective action, refund of fees billed or collected, remedial education and/or any other relief that the Board deems appropriate." Administrative Complaint, p. 10.

The Department did not place into evidence at the hearing before the ALJ any proof of the costs of the investigation and prosecution that had been incurred during the course of this matter. Thus, in the Recommended Order, because there was no evidence regarding costs, the ALJ did not recommend any costs be assessed against the Respondent. The Respondent objects to the assessment of costs under section 456.072(4) because costs were not pled as a penalty sought, no evidence regarding costs was presented to the ALJ, and the ALJ did not include costs in his recommended penalty.

Objection IV: The Department is asking the Board to consider matters that are "new evidence" contrary to provisions of Chapter 120, Florida Statutes, the Administrative Procedures Act, which governs these proceedings.

Without waiving all other objections, the Respondent next objects to the imposition of costs under section 456.072(4) in this case because the Department's affidavit and itemized spreadsheet are impermissible "new evidence" being presented to the Board in contravention of

provisions of Chapter 120 governing these hearings. Section 120.57(1)(f), Florida Statutes, defines the official "record" in administrative cases "involving disputed issues of material fact," such as this one.[1] None of the articulated elements of the official record could be interpreted as authorizing the additional evidence sought to be presented to the Board in this case in the form of the Department's affidavit and attachments.

Under section 120.57(1)(f), (k), and (l), Florida Statutes, the Board is restricted to considering only that evidence adduced at hearing and may not base any determination in its final order on any evidence that was not before the Administrative Law Judge at the formal administrative hearing. *See Lieberman v. Dep't of Prof'l Regulation*, 573 So. 2d 349 (Fla. 5th DCA 1991).

Further, in its review of the decision of the ALJ, the Board is not authorized to reopen the record to receive additional evidence, and make additional findings. *Lawnwood Med. Ctr., Inc. v. Agency for Health Care Adm.*, 678 So. 2d 421, 425 (Fla. 1st DCA 1996), *citing Henderson Signs v. Fla. Dep't. of Transportation*, 397 So. 2d 769, 772 (Fla. 1st DCA 1981). Further, the Board may not use its power to take official recognition as a device to circumvent the ALJ's finding of fact by building a new record on which to make new findings. *Lawnwood, supra,*

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[1] (f) The record in a case governed by this subsection shall consist only of:
1. All notices, pleadings, motions, and intermediate rulings.
2. Evidence admitted.
3. Those matters officially recognized.
4. Proffers of proof and objections and rulings thereon.
5. Proposed findings and exceptions.
6. Any decision, opinion, order, or report by the presiding officer.
7. All staff memoranda or data submitted to the presiding officer during the hearing or prior to its disposition... .
8. All matters placed on the record after an ex parte communication.
9. The official transcript.

§120.57(1)(f), Fla. Stat.

citing Fla. Dep't. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1989). This is especially so, where, as herein, the evidence sought to be introduced could, in the exercise of due diligence, have been offered at the original hearing. *J.W.C., supra,* at 786.

The assessment of costs under section 456.072(4) has been found to be a penalty by an ALJ:

> The [Department] is specifically authorized to assess prosecutorial costs by Subsection 456.072(4), Florida Statutes (2005), which states that costs shall be assessed "[i]n addition to any other discipline imposed through final order," clearly indicating that costs are assessed as a form of disciplinary penalty, not simply to reimburse the governmental agency for expenses.

Dep't. of Health, Bd. of Pharmacy v. Bousquet, 2007 WL 2300784 (Fla. Div.Adm.Hrgs.) (emphasis added). Evidence sought to be admitted before the Board on the issue of penalty is "new evidence" that should have been considered by the ALJ who is charged with formulating the recommended penalty. *See Ong v. Dep't. of Prof'l Regulation*, 565 So. 2d 1384, 1387 (Fla. 5th DCA 1990)(mitigating facts must be within the record for the Board to rely upon them in modifying a recommended penalty); *Libby Investigations v. Dep't of State, Div. of Licensing*, 685 So. 2d 69 (Fla. 1st DCA 1996) (reversible error to increase penalty where no evidence in the record that the ALJ found aggravating circumstances).

Thus, evidence in support of "facts" regarding an additional element of the penalty must be of record before the ALJ in order to be considered in the recommended penalty and in order to be considered by the Board in rejecting or modifying the penalty, including the assessment of costs. Because the alleged "facts" in the Department's affidavit and its attachments were not presented to the ALJ, the "facts" as presented to this Board are outside the official record and may not be considered by the Board in assessing costs as part of the penalty.

Objection V. The Department is requesting an increase to the recommended penalty without record evidence for the Board to cite to under its review standard in section 120.57(1)(l), Florida Statutes.

Without waiving all other objections, the Respondent next objects to the Department's Motion to Assess Costs because the Department is asking the Board to increase the penalty without the record evidence to cite to in accordance with the Board's statutory standard of review. Section 120.57(1)(l), Florida Statutes, limits the Board's consideration of the ALJ's recommended penalty by stating:

> The [Board] may accept the recommended penalty in a recommended Order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action.

Thus, if there is no documentary or testimonial evidence in the record before the ALJ relating to costs, the Board may not increase or decrease the penalty by adding the costs pursuant to the Department's motion and inadequate supporting documentation.

Objection VI. The Department's Motion to Assess Costs, Affidavit and Summary of Costs are insufficient to prove the amount of reasonable costs expended or necessary to prosecute this case.

Without waiving all other objections, the Respondent objects to the Department's Motion to Assess Costs under Section 456.072(4), Florida Statutes, because section 120.57(1)(j) and relevant case law[2], costs must be established by clear and convincing evidence presented by the Department at hearing before the ALJ in order to be considered and included in the recommended penalty. The affidavit and its attachments offered to the Board by the Department as "evidence" of the Department's costs in this case are hearsay. As out-of-court statements offered to prove the truth of the matters asserted therein, these hearsay documents have not been

[2] *Dep't. of Banking and Finance v. Osborne Stern and Co.*, 670 So. 2d 932 (Fla. 1996; *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987).

shown to be trustworthy and accurate representations of the information contained therein. "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." §120.57(1)(c), Fla. Stat. There has been no testimonial evidence adduced at hearing to support the hearsay statements contained in these documents. *See DeMello v. Buckman*, 991 So. 2d 907 (Fla. 4th DCA 2008) *quoting Rodriguez v. Campbell*, 720 So. 2d 266, 267 (Fla. 4th DCA 1998)(Reversal and remand appropriate "[w]hen the record contains some competent substantial evidence supporting the fee or cost order, yet fails to include some essential evidentiary support such as testimony from the attorney performing the services, or testimony from additional expert witnesses...").

Further, there has been no showing that these documents are exceptions to the hearsay rules of evidence such that the Board could rely upon them to make a finding, an act which has already been shown to be out of the Board's authority under Chapter 120. There has been no demonstration that these attachments and the itemizations included represent the actual assessable costs of the investigation and prosecution incurred by the Department, especially, for example, as to the "salary and benefits of personnel." *See generally Juste v. Dep't of Health and Rehabilitative Servs.*, 520 So. 2d 69 (Fla. 5th DCA 1988); *Johnson v. Dep't of Health and Rehabilitative Servs.*, 546 So. 2d 741 (Fla. 1st DCA 1989).

Specifically, the 13-page "Time Tracking System" spreadsheet attached in support of the Department's Motion is devoid of any information to verify the expenditures it is alleged to represent. Items of alleged expenditures of time do not specify the work being done by Department employees, except in the most generalized language. The "codes" purporting to identify the employee who performed the work must be matched to a separate list that purports to

accurately portray which code corresponds to what employee. These documents and their content do not give sufficient detail to know what work was performed, who performed the work, whether that work was reasonable and necessary to the investigation and prosecution of this case, and whether the work done was appropriate to the level employee performing the work. Nor do these hearsay documents support or explain why it took 9 different Department attorneys to work on this case, and why the involvement of so many of the Department's legal employees was reasonable or necessary to prosecute this matter.

The Respondent objects to the Department's Motion and its attachments, and each and every item contained therein, as being hearsay insufficient, without corroborating evidence, to support any findings by the Board on the issue of assessable costs in this case. Therefore, the Board should decline to rely upon the Department's Motion and the hearsay attachments thereto as proof of the alleged assessable costs in this case.

WHEREFORE, for the foregoing reasons, Respondent respectfully requests that the Board of Medicine deny the Department's Motion to Assess Costs in Accordance With Section 456.072(4).

OBJECTIONS IN SUPPORT OF REDUCTION OF COSTS SPECIFIED IN THE DEPARTMENT'S MOTION TO ASSESS COSTS

Objection VII. The Department's itemized costs relating to work performed by investigative and legal staff are not actual costs, and therefore must be deleted from the total costs assessed.

Alternatively, and without waiving any other objections, the Respondent objects to the itemized costs relating to work performed by investigative and legal staff, which are not actual costs. Instead they result from a calculation that bears no relationship to the actual cost of the staff time to the Department. Neither the Department's affidavit nor the "Complaint Cost

Summary" shows the actual "salary plus benefits" totals for each of the attorneys and investigators whose time appears in the itemization. The actual "salary plus benefits" totals are required so as to calculate the hourly rate at which each of these employee's time should be charged. Instead the "Complaint Cost Summary" shows an hourly "cost" rate of ranging from a low of $111.56 (2008) to $114.59 (2009) per hour for attorney time, regardless of their actual cost in terms of "salary plus benefits" as is articulated in the statutory language authorizing recovery of these "costs." Extrapolating these figures, it appears that the Department's attorneys have an annualized salary plus benefits of between $233,854.40 to $238,347.20.[3] Yet, public records demonstrate that this is not the case. These amounts far exceed the salary ranges for Department attorneys, exceed (by over 100%) the annual salaries of even the most senior experienced attorneys, and certainly exceed any conceivable calculation of "salary plus benefits," authorized by the statute. In fact the total amount billed for attorney time, $66,320.01, exceeds the annual salary of the attorney represented by the code HLL57A. For $66,320.01 to be an actual cost, one attorney would have to work full-time on this case only for almost a full year. The entries in the Time Tracking System indicate that this is not the case.

In summary, the hourly rates utilized by the Department were not developed through rulemaking. Because of this, the Department has not established their basis in or relationship to the actual cost of the individual attorney's salary and benefits as an hourly cost to the Department. These hourly rates – and the resultant amounts charged by the Department as the costs of employee salary and benefits – are not an accurate representation of the Department's actual "costs" of the salary and benefits for the employees whose time is itemized in the Time Tacking System Itemized Cost by Complaint printout attached to the Motion for Costs. Instead,

[3] The hourly rate times a 2080 work hours in a year (40 hours/week times 52 weeks/year).

these amounts represent an unjust and unlawful enrichment inuring to the Department and Board. For these reasons, the cost award in this case should be reduced by the total amount on the Complaint Cost Summary for staff time: $74,177.96.

Objection VIII. The Department's itemized costs relating to travel time by investigative and legal staff, as well as expert witnesses, cannot be included as costs, and therefore must be deleted from the total costs assessed.

Alternatively, and without waiving any other objection, the Respondent objects to the total amount of costs in the Department's Motion to Assess Costs because the Administrative Law Judge found that the Department did not prove but two of the fifteen allegations it made in a three-count administrative complaint against Dr. Pendergraft based upon his care and treatment of Patient SB. Of the three allegations in Count III of the Administrative Complaint that Dr. Pendergraft violated section 458.331(1)(q) by improper prescribing, the Administrative Law Judge found that the Department proved none of the allegations. (Recommended Order ¶¶ 85, 86) Of the four allegations in Count I of the Administrative Complaint that Dr. Pendergraft violated section 458.331(1)(m), regarding medical records, the Administrative Law Judge found only a sole instance of "failing to document the removal of a portion of a fetal limb" (a not-uncommon consequence of pregnancy termination) which occurred immediately prior to Dr. Pendergraft having to arrange emergency transport for his patient to the hospital. (Recommended Order ¶¶ 42, 61.) This was an isolated omission to his notes in the heat of an emergent situation, not a willful or contumacious failure to keep adequate medical records. Of the eight Department allegations in Count II that Dr. Pendergraft violated the prevailing standard of care in his treatment of Patient SB, the ALJ found that the Department had only proven a sole infraction: his alleged failure to advise the hospital's physician during telephone conversations that a portion of the patient's fetus had been removed. (Recommended Order ¶¶ 78, 80)

These two infractions found by the Administrative Law Judge in his Recommended Order are both essentially based on a communication breakdown during an emergent situation. Because the Department only proved 2 of the 15 allegations contained in the Administrative Complaint, the costs assessed should be prorated to reflect this fact. Therefore, the total award of costs should be reduced by 13/15s for an 87% reduction of $88,885.49. Even viewing the results in the manner most favorable to the Department, the best that can be said is that the Department prevailed on two of the three counts in the Administrative Complaint. Therefore, alternatively, the costs should be prorated in accordance with the Department's stated policy by at least one-third, resulting in a reduction of the total costs of $102,167.23 by $34,055.74.

Objection IX. The Department's itemized costs relating to travel time by investigative and legal staff, as well as expert witnesses, cannot be included as costs, and therefore must be deleted from the total costs assessed.

Alternatively, and without waiving any other objection, the Respondent asserts that the all attorney, staff, and expert travel time should be excluded from the award of costs in this matter. An attorney's travel time is not to be included as an item of costs to be taxed. *In re Amendments to Uniform Guidelines for Taxation of Costs,* 915 So. 2d 612, 615 (Fla. 2005)(and cases cited therein);[4] *see also C.B.T. Realty Corp. v. St. Andrews Cove I Condominium Assoc.*,

[4] Notwithstanding the paucity of guidance in section 456.072(4), Florida Statutes, Respondent asserts that the assessment of costs is controlled by case law and by the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions ("Statewide Guidelines"). The Statewide Guidelines are codified as Appendix II to the Florida Rules of Civil Procedure. The Florida Rules of Civil Procedure are applicable in these proceedings. The Statewide Guidelines have been found to be applicable to litigation involving administrative agencies. *See Dep't. of Transportation v. Skidmore*, 720 So. 2d 1125 (Fla. 4th DCA 1998). In the *Skidmore* case, the Department of Transportation successfully argued that costs assessed against it should not include items expressly excluded by the Statewide Guidelines. *Id.* at 1130-31. Because agencies receive the benefit of the Statewide Guidelines, they should also be held to them. Although "advisory" in nature, a lower tribunal may not ignore these guidelines in assessing costs and must do so in its "sound discretion." *Id.* at 1130.

508 So. 2d 409 (Fla. 1st DCA 1987); *Fla. Gas Co. v. Spectra-Physics, Inc.*, 406 So. 2d 1280 (Fla. 1st DCA 1981) ("Expenses for travel time of an attorney taking a deposition are not taxable as costs, absent a special provision of contract or statute."). It follows that if attorney travel time is not included, the travel time for investigative staff should not be included in costs to be taxed. In like manner, the travel time billed by expert witnesses should not be included in an award of costs in this case.[5] Therefore the total amount of the entries for travel time must be deleted from the costs assessed in this matter. For investigators, the amount should be reduced by $702.68; for attorneys, $5,479.74; and for experts travel time (16 hours at $400.00 per hour), $6,400.00.

Objection X. The Department's itemized travel costs by investigative and legal staff cannot be included as costs, and therefore must be deleted from the total costs assessed.

It is an abuse of discretion to impose an award of travel expenses for trial or discovery purposes where the record does not indicate that experts or trial witnesses had to travel for trial or discovery purposes from out of state. *See Dep't. of Transportation v. Skidmore*, 720 So. 2d 1125 (Fla. 4th DCA 1998); *see also Sunshine Kitchens, Inc. v. Mallin*, 388 So. 2d 1260 (Fla. 3d DCA 1980)(Air fare expenses for counsel to attend depositions are not taxable costs.)(and cases

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[5] The Statewide Uniform Guidelines for Taxation of Costs in Civil Actions states:

III. Litigation Costs That Should Not Be Taxed as Costs.

- A. The Cost of Long Distance Telephone Calls with Witnesses, both Expert and Non-Expert (including conferences concerning scheduling of depositions or requesting witnesses to attend trial)
- B. Any Expenses Relating to Consulting But Non-Testifying Experts
- C. Cost Incurred in Connection with Any Matter Which Was Not Reasonably Calculated to Lead to the Discovery of Admissible Evidence
- D. Travel Time
  1. Travel time of attorney(s).
  2. Travel time of experts(s).
- E. Travel Expenses of Attorney(s)

cited therein). Further, pursuant to the Statewide Guidelines, travel expenses of attorneys are costs that should not be assessed. *See*, fn.6 *supra*. In light of this clear case law, the Department's staff travel expenses must be deleted from any award of costs in this case. Therefore, any award of costs should be reduced by the amounts listed on the "Time Tracking System Itemized Expense by Complaint": $537.55, $326.05, $328.59, $329.76, $490.39, and $421.39 for a total of $2,433.73.

WHEREFORE, for the foregoing reasons, Respondent respectfully requests that the Board of Medicine reduce any award pursuant to the Department's Motion to Assess Costs in Accordance With Section 456.072(4), by the amounts specified.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Response to the Motion to Assess Costs In Accordance with Section 456.072(4) was forwarded by hand delivery for filing to R. Sam Power, Clerk, Department of Health, 4052 Bald Cypress Way, Bin C-01, Tallahassee, Florida 32399-3201 and Greg Marr, Esquire, Assistant General Counsel, Department of Health, Prosecution Services Unit, 4052 Bald Cypress Way, Bin C-65, Tallahassee, Florida 32399-3265, with a hard copy to follow by United State mail delivery, this 30th day of October, 2009.

Kenneth J. Metzger

Tab 37

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK: Angela Barton
DATE 12/1/09

STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,

PETITIONER,

v. **CASE NO.: 2006-05930**

JAMES S. PENDERGRAFT, IV, M.D.,

RESPONDENT.

_____/

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE AND OBJECTIONS TO PETITIONER'S MOTION TO ASSESS COSTS IN ACCORDANCE WITH SECTION 456.072(4)

Petitioner, Department of Health (Department), files this Reply to Respondent's Response and Objections to Petitioner's Motion to Assess Costs in Accordance with section 456.072(4). In support, the Department states as follows:

On October 20, 2009, the Department served by U.S. Mail and email its Motion to Assess Costs in Accordance with Section 456.072(4). Attached to its motion, the Department included the affidavit of Julie M. Weeks regarding the costs, a Complaint Cost Summary, a list of the Itemized Costs from the Department's Time Tracking System, and various receipts, invoices, and other documents related to costs of this case. The Department filed an Amended Motion to Assess Costs in Accordance with Section 456.072(4), on October 27, 2009. The amendment was made to delete some attorney time that should have been charged to training and to add additional costs incurred since the original motion was filed. Respondent filed his Response and

Objections to Petitioner's Motion to Assess Costs in Accordance with Section 456.072(4), on October 30, 2009, and his Notice of Supplemental Authority to Respondent's Response and Objections to Petitioner's Motion to Assess Costs in Accordance with Section 456.072(4).

Response to Objections

Response to Objection 1: Rulemaking proceedings are not required for the assessment of costs.

Section 456.072(4) (2006),[1] reads as follows:

> In addition to any other discipline imposed through final order, or citation, entered on or after July 1, 2001, under this section or discipline imposed through final order, or citation, entered on or after July 1, 2001, for a violation of any practice act, the board, or the department when there is no board, shall assess costs related to the investigation and prosecution of the case. The costs related to the investigation and prosecution include, but are not limited to, salaries and benefits of personnel, costs related to the time spent by the attorney and other personnel working on the case, and any other expenses incurred by the department for the case. The board, or the department when there is no board, shall determine the amount of costs to be assessed after its consideration of an affidavit of itemized costs and any written objections thereto. In any case where the board or the department imposes a fine or assessment and the fine or assessment is not paid within a reasonable time, the reasonable time to be prescribed in the rules of the board, or the department when there is no board, or in the order assessing the fines or costs, the department or the Department of Legal Affairs may contract for the collection of, or bring a civil action to recover, the fine or assessment.

[1] The Motion to Assess Costs and Amended Motion to Assess Costs refer to the 2003 version of the statute because that is the year when the statute was last amended to include attorney's time as a cost. See ch. 2003-146, § 19, Laws of Fla. The statute did not change from 2003 until 2006 when the events underlying this case occurred.

Respondent argues that the Department and the Board are required to make rules regarding assessing costs. First and foremost, Respondent has missed his opportunity to assert that the Department's Motion to Assess Costs is based on an unadopted rule. Section 120.57(1)(e)(1.), Florida Statutes (2009), explains as follows:

> An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule. The administrative law judge shall determine whether an agency statement constitutes an unadopted rule. This subparagraph does not preclude application of adopted rules and applicable provisions of law to the facts.

The Department's Notice of Assessment of Costs, which was attached to the Administrative Complaint, clearly placed Respondent on notice that the Department has incurred costs related to the investigation and prosecution of this matter and that the Board shall assess costs related to the investigation and prosecution of this case. Therefore, Respondent had a responsibility under section 120.57(1)(e), Florida Statutes, to initiate a proceeding before the Division of Administrative Hearings before an Administrative Law Judge (ALJ) asserting that the Department's process for determining costs constitutes an unadopted rule. Had Respondent followed the appropriate procedure, this issue would have been raised in the appropriate forum. Now that the case is before the Board of Medicine at a hearing on the recommended order in a disciplinary case, it is too late to raise an issue of an unadopted rule for the first time.

Respondent inappropriately relies on Abdel-Aziz v. Department of Health, Board of Medicine, DOAH Case No. 03-0295 RU (Final Order, June 4, 2003), in support of his argument. The licensee in Abdel-Aziz appropriately initiated a rule challenge before an

ALJ; the issue was not raised before the Board for the first time as is being done here. In addition, contrary to Respondent's assertion, the ALJ in Abdel-Aziz did not hold that the Department had to make rules relating to costs. In fact, the ALJ held specifically that "[h]ow the Department calculates the costs of investigation and prosecution and what the Department includes in its calculations are not rules because the Department does not impose the requested costs on the physician and cannot require the physician to pay those costs." Id. at 19. In addition, the ALJ found that the Complaint Cost Summary, the Time Tracking Report, and the methodologies were internal memoranda, which by definition were not rules.

While the ALJ held that the Board was required to make rules because it consistently included certain items as costs, including attorney's time, the statute was changed shortly after the case was decided. The prior statute (under which Abdel-Aziz was decided) provided only that the board "may assess costs related to the investigation and prosecution of the case." § 456.072(4), Fla. Stat. (2002). The statute did not provide further guidance. Subsequent to the decision in Abdel-Aziz, the statute was amended to include the following language:

> Such costs related to the investigation and prosecution include, but are not limited to, salaries and benefits of personnel, costs related to the time spent by the attorney and other personnel working on the case, and any other expenses incurred by the department for the case. The board, or the department when there in no board, shall determine the amount of costs to be assessed after its consideration of an affidavit of itemized costs and any written objections thereto.

Ch. 2003-146, § 19, Laws of Fla. Thus, the statute now provides what should be included in costs and the proper procedure to determine the costs. The statute is clear and there is no need for rulemaking to interpret this plain, unambiguous statute.

Respondent also relies on In re Hapner, 737 So. 2d 1075 (Fla. 1999), in support of his assertion that these costs may not be imposed because they are not "traditionally recognized costs, such as court reporter fees, transcript costs, witness fees and costs of service of process." (Objections p.2) However, Hapner is also not applicable to the case at hand as the statute has changed. In Hapner, the Judicial Qualifications Commission asked the Florida Supreme Court to assess costs in a disciplinary proceeding against a judge and asked that costs include attorney fees and travel costs. The Court noted that the Florida Constitution provided for the recovery of "costs of investigation and prosecution"—language similar to the language that existed prior to 2003 in Section 456.072(4), Florida Statutes. The Court held that because the Constitution is silent as to which costs in particular may be assessed, neither attorney fees nor travel costs could be awarded under the limited governing language contained in the Constitution. See id. at 1077-78.

In contrast, the language contained in the current version of section 456.072(4), Florida Statutes, is much more descriptive and provides for the recovery of costs "including but not limited to, the salaries and benefits of personnel, costs related to the time spent by the attorney and other personnel working on the case, and any other expenses incurred by the department for the case." Thus, this case is not like Hapner because the current version of section 456.072(4), explains what should be included in

costs. Neither the Department nor the Board is required to initiate rulemaking regarding costs. Therefore, Respondent's Objection I should be rejected.

Response to Objection II: Section 456.072(4), Florida Statutes, on its face and as applied, is constitutional and does not violate due process

In objection II, Respondent asserts that the Board's interpretation and use of section 456.072(4), Florida Statutes, in assessing costs is unconstitutional because it fails to provide Respondent with adequate due process. It is well-established that the Board is without authority to declare a statute unconstitutional either facially or as applied. See, e.g., Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249, 250 (Fla. 1987) ("[I]t is axiomatic that an administrative agency has no power to declare a statute void or otherwise unenforceable."); Lennar Homes, Inc. v. Dep't of Bus. & Prof'l Reg., Div. of Fla. Land Sales, Condos. & Mobile Homes, 888 So. 2d 50, 53 (Fla. 1st DCA 2004) ("[A]n agency does not possess the authority to determine the constitutionality of statutes."). Therefore, Respondent's Objection II should be rejected.

Despite the fact that the Board cannot rule on the constitutionality of the statute, the Department maintains that the statute and the Department's interpretation of same is constitutional. Due process is provided by the procedure laid out in the statute. The Florida Supreme Court set forth the applicable standard in Keys Citizens for Responsible Government, Inc. v. Florida Keys Aqueduct Authority, 795 So. 2d 940, 948 (Fla. 2001):

> The basic due process guarantee of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." . . . Procedural due process requires both fair notice and a real opportunity to be heard. . . . [T]he notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to

> convey the required information, and it must afford a reasonable time for those interested to make their appearance." Further the opportunity to be heard must be "at a meaningful time and in a meaningful manner."

Id. (citations omitted). In an administrative hearing, "less stringent formalities are needed to satisfy due process concerns." Rucker v. City of Ocala, 684 So. 2d 836, 841 (Fla. 1st DCA 1996). See also Hadley v. Dep't of Admin., 411 So. 2d 184, 187 (Fla. 1982) ("[T]he formalities requisite in judicial proceedings are not necessary to meet due process requirements in the administrative process.").

The "specific parameters of the notice and opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding." Henderson v. Dep't of Health, Bd. of Nursing, 954 So. 2d 77, 80 (Fla. 5th DCA 2007) (citing Gilbert v. Homar, 520 U.S. 924 (1997)). In the present proceeding, following the issuance of the Recommended Order, the Department filed its Motion to Assess Costs in Accordance with Section 456.072(4) and attached Ms. Week's affidavit and itemized costs and expenses. Respondent filed a response and objections, and Respondent will have the opportunity to present these objections to the Board at the hearing. This follows the procedure laid out in the statute and provides sufficient opportunity for Respondent to be heard at a meaningful time, in a meaningful manner, and in accordance with the statute. See id. (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

Response to Objection III: The Department followed the proper procedure pursuant to statute to seek costs

In Objection III, Respondent argues that the Department failed to allege costs as a penalty sought in the case and failed to present evidence of the costs to the ALJ. This

argument fails because it ignores the plain language of section 456.072(4), Florida Statutes. See Doll v. Dep't of Health, 969 So. 2d 1103, 1106 (Fla. 1st DCA 2007) ("Section 456.072(4), Florida Statutes, controls the award of costs in this matter."). Section 456.072(4), requires the Board to assess costs in a disciplinary action and sets out the procedure the Department and the Board must follow in assessing such costs. § 456.072(4), Fla. Stat. (2005) ("[T]he board . . . shall assess costs related to the investigation and prosecution of the case. . . . The board . . . shall determine the amount of costs to be assessed after its consideration of an affidavit of itemized costs and any written objections thereto."). The Board is properly following the procedure in section 456.072(4), and the Department was not required to present evidence of costs assessed by the Board at the formal hearing. Section 456.072(4) gives the Board, not the ALJ, authority to assess costs within the parameters of the statutory language.

The Florida Legislature has clearly defined the penalties for a violation of any applicable practice act. Section 456.072(2), provides as follows:

> (a) Refusal to certify, or to certify with restrictions, an application for a license.
>
> (b) Suspension or permanent revocation of a license.
>
> (c) Restriction of practice or license, including, but not limited to, restricting the licensee from practicing in certain settings, restricting the licensee to work only under designated conditions or in certain settings, restricting the licensee from performing or providing designated clinical and administrative services, restricting the licensee from practicing more than a designated number of hours, or any other restriction found to be necessary for the protection of the public health, safety, and welfare.

(d) Imposition of an administrative fine not to exceed $10,000 for each count or separate offense. If the violation is for fraud or making a false or fraudulent representation, the board, or the department if there is no board, must impose a fine of $10,000 per count or offense.

(e) Issuance of a reprimand or letter of concern.

(f) Placement of the licensee on probation for a period of time and subject to such conditions as the board, or the department when there is no board, may specify. Those conditions may include, but are not limited to, requiring the licensee to undergo treatment, attend continuing education courses, submit to be reexamined, work under the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found.

(g) Corrective action.

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

(i) Refund of fees billed and collected from the patient or a third party on behalf of the patient.

(j) Requirement that the practitioner undergo remedial education.

It is clear from a comparison of the language found in section 456.072(2), regarding penalties, and section 456.072(4), regarding the assessment of costs, that the Legislature drew a clear distinction between what constitutes penalties to be imposed following a finding of guilt and what constitutes costs to be subsequently assessed.

Because costs are not a potential penalty to be considered by the ALJ and because costs are solely within the discretion of the Board, evidence regarding costs is improper in the administrative hearing before the ALJ. Therefore, the Department had

no obligation to offer evidence regarding costs at that stage of the proceedings and Respondent's Objection III should be rejected.

Response to Objection IV: The Department followed the proper procedure pursuant to statute to seek costs

Respondent mistakenly asserts that the Department's affidavit and attached spreadsheet filed in support of its Motion to Assess Costs constitutes impermissible "new evidence" under chapter 120. Once again, Respondent is confusing the Board's consideration of the Recommended Order, which is controlled exclusively by the record as defined is section 120.57(1)(f), Florida Statutes, with the Board's subsequent consideration of the Department's Motion to Assess Costs, which is controlled exclusively by section 456.072(4), Florida Statutes. See Doll, 969 So. 2d at 1106.

The cases cited by Respondent in support of his argument that the Department's Motion to Assess Costs constitutes new evidence have no relevance to this matter. Lieberman v. Department of Professional Regulation, 573 So. 2d 349 (Fla. 5th DCA 1991) and Lawnwood Medical Center, Inc. v. Agency for Health Care Administration, 678 So. 2d 421 (Fla. 1st DCA 1996), do not address costs under section 456.072(4). Instead, they address attempts to offer evidence under chapter 120 that should have been presented to and considered by the ALJ. As stated above, the consideration and determination of costs in this case are not governed by chapter 120 but are governed by section 456.072(4), Florida Statutes, and are solely within the purview of the Board.

Although an ALJ in Department of Health, Board of Pharmacy v. Bousquet, 2007 WL 2300784, DOAH Case Nos. 07-1436PL & 07-1437PL (Recommended Order 2007), stated that costs were a form of disciplinary penalty, that case is not binding on the

Board. This ALJ's language in Bousquet is contrary to the plain meaning of the language in section 456.072, Florida Statutes, and general law regarding the assessment of costs. Typically, costs are incident to the action and need not be asserted in a pleading. See First Protective Ins. Co. v. Featherston, 978 So. 2d 881, 884 (Fla. 2d DCA 2008); Estate of Brock, 695 So. 2d 714, 716 (Fla. 1st DCA 1996). Therefore, costs in this case did not need to be pled by the Department.[2] In addition, the ALJ in Bousquet was not addressing the issue of whether costs should be pled in an administrative complaint. Therefore, the Board should not be swayed by the ALJ's statement in Bousquet.

The Department also points out that although the costs assessment was not requested as a penalty, a "Notice Regarding Assessment of Costs" was attached to the Administrative Complaint, immediately following the Notice of Rights. The Notice reads as follows:

> Respondent is placed on notice that Petitioner has incurred costs related to the investigation and prosecution of this matter. Pursuant to Section 456.072(4), Florida Statutes, the Board shall assess costs related to the investigation and prosecution of a disciplinary matter, which may include attorney hours and costs, on the Respondent in addition to any other discipline imposed.

[2] The Florida Supreme Court has held that attorney's fees based on a statute must be sought in the pleadings. See Stockman v. Downs, 573 So. 2d 835, 837-38 (Fla. 1991). However, the Court in Stockman also reasoned that when the opposing party has notice of the intent to seek attorney's fees and fails to object to the fact that fees were not pled, any objection to fee entitlement is waived. See id. at 838; see also Auglink Comm'ns, Inc. v. Canevari, 932 So. 2d 338, 340-41 (Fla. 5th DCA 2006) (reasoning that fees were permissible because "in this case it is abundantly clear that there was no surprise caused by [the party's] failure to plead entitlement to attorneys' fees in his answer."); Sardon Found. v. New Horizons Serv. Dogs, Inc., 852 So. 2d 416, 421 (Fla. 5th DCA 2003).

Thus, Respondent has been on notice since the service of the Administrative Complaint that costs would be assessed.

In sum, the Department is not offering "new evidence" that should have been offered before the ALJ as part of the record of that proceeding. Therefore, Respondent's Objection IV should be rejected.

Response to Objection V: Costs are appropriately assessed by the Board pursuant to statute and are not an increase in the recommended penalty

For the same reasons discussed in the Department's Response to Objection IV, the Department asserts that the assessment of costs does not constitute a penalty. Therefore, the issue of the assessment of costs is not an issue to present to the ALJ, it is not part of the Recommended Order, and the costs assessment is solely within the discretion of the Board.

Response to Objection VI: The Department has presented competent, substantial evidence to prove the costs assessed in this case

Respondent argues that the Department offers only hearsay evidence in support of its Motion to Assess Costs. Respondent is incorrect. As explained above, the Department followed the correct procedure in section 456.072(4), by submitting an affidavit of itemized costs, and the Board correctly considered the affidavit and its attachments. § 456.072(4), Fla. Stat. (2005). The Board is not bound by the Florida Evidence Code when determining the amount of costs to be assessed. See id.

However, even if the evidence code applied, the affidavit and accompanying documents would constitute admissible hearsay under the public records exception. Section 90.803(8), Florida Statutes (2009) provides as follows:

> Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness.

Here, the itemized cost report and itemized expense report are reports or data compilations of a public agency (the Department), which set forth the activities of the office or agency. Cf. Yisrael v. State, 986 So. 2d 491, 498-500 (Fla. 2008) (holding that Department of Corrections' crime and time report was a public record). Together with the affidavit, the Itemized Cost Report and Itemized Expense report is self-authenticating under section 90.902(2), Florida Statutes (2005). § 90.902(2), Fla. Stat. (2005) (explaining that extrinsic evidence of authenticity as a condition precedent for admissibility is not necessary for "[a] document not bearing a seal but purporting to bear a signature of an officer or employee of any [any state], affixed in the officer's or employee's official capacity").

Accordingly, in the present case, the signed affidavit of Ms. Weeks—reviewing the data of the Time Tracking System and verifying that the amounts correspond with the Costs by Complaint report—is competent substantial evidence of the Department's costs. See Doll, 969 So. 2d at 1106. See also Gatlin v. State, 618 So. 2d 765, 766 (Fla. 2d DCA 1993) (observing that "the state's affidavit setting forth the costs of the prosecution falls under the exception to the hearsay rule contained in section

90.803(8), Florida Statutes (1991), and was properly admitted as a statement reduced to writing setting forth the activities of the office").

Additionally, Respondent asserts that the documents and their content do not give sufficient detail to know what work was performed, who performed the work, and whether that work was reasonable and necessary to the investigation and prosecution of the case. On the contrary, however, the documents identify the people working on the case by code, it specifically lists the person, date, amount of time spent on the case, and the specific work performed on the case. The Board has the discretion to determine the amount of costs to be assessed after its consideration of these documents and the written objections as specified in the statute. These documents contain sufficient information for Respondent to raise appropriate objections. Thus, this objection should be denied.

Response to Objection VII: The Department's costs are proper pursuant to statute

In this objection, Respondent challenges the way the Department calculated the staff time. Respondent is arguing that the calculation of attorney's fees is improper, essentially because there was no rulemaking. Again, as explained in the response to Objection I, it is not appropriate to raise an issue regarding rulemaking before the Board in a license discipline case.

This does not constitute unlawful enrichment. The Board pays the Department for the attorney's time working on a case whether or not it gets reimbursed by the licensee. In addition, the attorneys continue to incur additional expense preparing for the Board meeting and responding to these objections that will not be assessed to

Respondent as costs, but still will be paid by the Board to the Department. For these reasons, Respondent's Objection VII should be rejected.

Response to Objection VIII:[3] The Board should assess all costs of the prosecution

Respondent argues that the Board should assess only a portion of the costs because the Department did not prevail on all counts. However, the statute states as follows: "In addition to any other discipline imposed through final order . . . for a violation of any practice act, the board . . . shall assess costs related to the investigation and prosecution of the case." § 456.072(4), Fla. Stat. (2006) (emphasis added). By the plain language of the statute, costs are imposed when there is a violation of the practice act. In this case, 2 violations of the practice act were found. Thus, the Board should assess "costs related to the investigation and prosecution of the case." Id. Nothing in the language of the statute provides authority for a reduction in costs based on how many counts upon which the Department prevailed.

In addition, the suggestion that the Department prevailed on only 2 of 15 allegations is disingenuous at best. In the Administrative Complaint, the Department charged Respondent with 3 counts of violating the practice act. The Department charged that Appellant violated section 458.331(1)(m), Florida Statutes, (record-keeping); section 458.331(1)(t), Florida Statutes, (standard of care); and section 458.331(1)(q) (improper prescribing). The ALJ found a violation of section 458.331(1)(m) and 458.331(1)(t). The ALJ did not find a violation of section

[3] The Department notes that Objection VIII is incorrectly titled in the Objections and it does not relate to costs of travel time.

458.331(1)(q). Respondent incorrectly states that "the Administrative Law Judge found that the Department proved none of the allegations" regarding the charge under section 458.331(1)(q). This is simply not true. The Department proved each of the factual allegations that were disputed by Respondent. The ALJ found that Respondent ordered Demerol for the patient in this case on two occasions, that a physician must be licensed by the Drug Enforcement Administration (DEA) to administer Demerol, and that Respondent was not licensed by the DEA when he administered the Demerol to the patient in this case. (Recommended Order, pp. 5-6) The ALJ rejected Respondent's testimony that he was serving as a conduit between the medical assistant and another doctor. (Recommended Order, p. 6) Despite these findings, however, the ALJ concluded as a matter of law that these facts did not constitute improper prescribing, a conclusion the Department vehemently disputes in its Exceptions to the Recommended Order.

The point here is that the suggestion that the Department prevailed on 2 of 15 allegations is ludicrous when there were 3 counts and the Department proved the factual allegations related to improper prescribing, but the ALJ found as a matter of law that the facts did not constitute a violation of one of the statute. At most, if the Board elects to reduce the amount of costs, it should only be by 1/3, not 13/15ths.

Respondent also filed supplemental authority: the Final Order in the Department of Health v. Edison, DOH Case No., 2004-04940 (Final Order 2007), where the Board assessed only a portion of the costs requested. That case is distinguishable, however, because in that case, the Department had charged Dr. Edison with 4 counts: a violation

of section 458.331(1)(m), Florida Statutes (2003) (record-keeping); section 458.331(1)(t), Florida Statutes (2003) (standard of care); section 458.331(1)(q), Florida Statutes (2003) (improper administration of drugs); and section 458.331(1)(w), Florida Statutes (2003) (improper delegation). The Department proved only the record-keeping violation, but did not prove that the doctor violated the standard of care, that he improperly administered medication, or improperly delegated to his nurse. This is different from the present case where the Respondent not only failed to keep proper records, but he also violated the standard of care. Thus, Respondent's Exception VIII should be rejected.

Response to Objection IX: Costs related to travel are properly included in costs pursuant to the statute

By its title, the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions applies in civil actions, not administrative actions. State, Department of Transportation v. Skidmore, 720 So. 2d 1125 (Fla. 4th DCA 1998), is not applicable because even though an agency was involved, it was not a "typical" administrative case. Instead, it was an eminent domain case, governed by chapter 73, Florida Statutes, which specifically states that the Rules of Civil Procedure apply in eminent domain cases. See § 73.012, Fla. Stat. (2009).

Even if the Statewide Uniform Guidelines for Taxation of Costs were to generally apply to administrative actions under chapter 120, in this specific case, there is a controlling statute regarding what costs should be assessed. The statute specifies that "costs related to the investigation and prosecution include, but are not limited to, salaries and benefits of personnel, costs related to the time spent by the attorney and

other personnel working on the case, and any other expenses incurred by the department for the case." Clearly, travel for hearings and depositions is an expense incurred by the department for the case. Thus, Objection IX should be rejected,

Response to Objection X: Costs related to travel are properly included in costs pursuant to the statute

This objection also relates to travel expenses and should be denied for the same reasons explained in the Department's Response to Objection IX.

Wherefore, the Department respectfully requests that the Board of Medicine deny Respondent's Objections to Petitioner's Motion to Assess Costs in Accordance with Section 456.072(2).

Respectfully submitted this 1st day of December, 2009.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been furnished as a PDF document by electronic mail (k.metzger@mgfblaw.com), to Kenneth J. Metzger, Metzger, Grossman, Furlow & Bayó, LLC, 1408 North Piedmont Way, Tallahassee, FL 32308, Counsel for Respondent, this 1st day of December, 2009.

GREG S. MARR

STATE OF FLORIDA
DEPARTMENT OF HEALTH
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

Petitioner,

v.

DOAH CASE NO. 08-4197PL
DOH CASE NO. 2006-05930

JAMES S. PENDERGRAFT, IV, M.D.,

Respondent.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY TO RESPONDENT'S RESPONSE AND OBJECTIONS TO PETITIONER'S MOTION TO ASSESS COSTS IN ACCORDANCE WITH SECTION 456.072(4)

Respondent, James S. Pendergraft, IV, M.D. submits as supplemental authority to Respondent's Response and Objection to Petitioner's Motion to Assess Costs in Accordance with Section 456.072(4), the Board of Medicine Final Order in *Department of Health v. Richard B. Edison, M.D.*, DOH Case No. 2004-04940, DOAH Case No. 2006-0598PL (Bd. of Medicine, January 5, 2007), attached as Exhibit 1.

This decision is submitted as authority in support of point VIII in his Response, regarding prorating the assessment of costs in proportion to the number of charges in which the Department prevailed. Specifically, in the Edison Final Order, the Board stated: "The Board...imposes costs ... in the amount of $15, 696.37 which represents a quarter of the actual costs incurred ... because the Petitioner [Department] prevailed only on one (1) of the four (4) charges set forth in the administrative complaint." *Id. at p. 9.* The *Edison* Final Order demonstrates that there is Board precedent for reduction of costs based on the number of charges the Department prevailed on.

Respectfully submitted,

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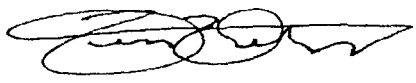
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Response to the Motion to Assess Costs In Accordance with Section 456.072(4) was forwarded by hand delivery for filing to R. Sam Power, Clerk, Department of Health, 4052 Bald Cypress Way, Bin C-01, Tallahassee, Florida 32399-3201 and to Greg Marr, Esquire, Assistant General Counsel, Department of Health, Prosecution Services Unit, 4052 Bald Cypress Way, Bin C-65, Tallahassee, Florida 32399-3265, with a hard copy to follow by United State mail delivery, this 17th day of November, 2009.



Kenneth J. Metzger