Final Order No. DOH-25-0029-FOF-MQA

FILED DATE JAN 03 2025
Department of Health
By: Deputy Agency Clerk

STATE OF FLORIDA
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

Petitioner,

vs.

CANDACE SUE COOLEY, M.D.,

Respondent.
_____/

DOH CASE NO.: 2022-41532
DOAH CASE NO.: 24-1259PL
LICENSE NO.: ME0077965

FINAL ORDER

THIS CAUSE came before the BOARD OF MEDICINE (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on December 6, 2024, in Orlando, Florida, for the purpose of considering the Administrative Law Judge's 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, and C) in the above-styled cause. Petitioner was represented by Andrew J. Pietrylo, Jr., Chief Legal Counsel. Respondent was present and was represented by Julie Gallagher, Esq.

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

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 and the underlying proceedings complied with the essential requirements of law.

PETITIONER'S EXCEPTIONS TO THE CONCLUSIONS OF LAW

The Board reviewed and considered the Petitioner's Exceptions to the Conclusions of Law contained in the Recommended Order and ruled as follows:

1. The Board reviewed and considered the Petitioner's exception to Paragraphs 49 and 50 of the Recommended Order and voted to deny the exception as the conclusions of law provided by the Administrative Law Judge are more reasonable than those alternative conclusions presented by the Petitioner and for the reasons outlined in the Respondent's response to the exception.

2. The Board reviewed and considered the Petitioner's exception to Paragraphs 61 and 62 of the Recommended Order and voted to deny the exception as the conclusions of law provided by the Administrative Law Judge are more reasonable than those alternative conclusions presented by the Petitioner and for the reasons outlined in the Respondent's response to the exception.

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.

RULINGS ON EXCEPTIONS TO PENALTY

1. Petitioner withdrew Petitioner's exception titled Exception Three - Penalty.

2. The Board reviewed and considered the Petitioner's Fourth Exception to the recommended penalty contained in the Recommended Order, and denied the exception because to the extent the ALJ's recommended penalty was a factual finding it was based on competent substantial evidence and the underlying hearing complied with the essential elements of law. To the extent the recommended penalty was a conclusion of law, it was more reasonable than the conclusions contained in the Petitioner's exception, and for the reasons set forth in the Respondent's Response to Petitioner's Exceptions.

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 be and hereby is REPRIMANDED by the Board.

2. Respondent shall pay an administrative fine in the amount of $10,000.00 to the Board within 30 days from the date the Final Order is filed. Said fine shall be paid by money order or cashier's check.

3. Respondent shall document completion of five (5) hours of continuing medical education (CME) in the area of Laws, Rules and Ethics within one (1) year from the date the Final Order is filed. These hours shall be in addition to those hours required for biennial renewal of licensure. Respondent shall first submit a written request to the Probation Committee for approval prior to performance of said CME course(s). Pursuant to Rule 64B8-8.0011(5), F.A.C., all continuing education imposed by Board Order must be completed **via formal live lecture format or via a webinar meeting** the standards set forth in rule.

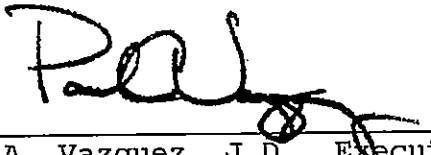
RULING ON MOTION TO ASSESS COSTS

Respondent shall pay the costs associated with this case in the amount of $7,635.91. Said costs shall be paid within 30 days from the date the Final Order is filed. The costs shall be paid by money order or cashier's check.

(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 2nd day of January, 2025.

BOARD OF MEDICINE



Paul A. Vazquez, J.D., Executive Director
For Nicholas W. Romanello, Esquire, 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: Candace Sue Cooley, M.D., at 4464 Canyonbrook Drive, Highlands Ranch, CO 80130; Julie Gallagher, Esq., Grossman, Furlow & Bayo, LLC, at 2022-2 Raymond Diehl Road, Tallahassee, FL 32308; James H. Peterson, III, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; via eFiling (cc) by email to: Julie Gallagher, Esq., at **j.gallagher@gfblawfirm.com**; Andrew J. Pietrylo, Jr., Chief Legal Counsel, Department of Health, at **Andrew.Pietrylo@flhealth.gov**; and Christopher Dierlam, Senior Assistant Attorney General, Office of the Attorney General, at **Christopher.Dierlam@myfloridalegal.com** this 3rd day of January, 2025.

Amy L. Carraway

Deputy Agency Clerk

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,

Petitioner,

vs. Case No. 24-1259PL

CANDACE SUE COOLEY, M.D.,

Respondent.
_____/

RECOMMENDED ORDER

An administrative hearing was conducted in this case on June 11, 2024, via Zoom conference before James H. Peterson, III, an Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Andrew James Pietrylo, Jr., Esquire
Prosecution Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Julie Gallagher, Esquire
Grossman, Furlow & Bayo, LLC
2022-2 Raymond Diehl Road
Tallahassee, Florida 32308

STATEMENT OF THE ISSUES

The issues in this matter are whether Candace Sue Cooley, M.D. (Respondent), violated section 458.331(1)(g), Florida Statutes,[1] by performing

[1] All references to the Florida Statutes and Florida Administrative Code are to the 2021 versions, unless otherwise noted.

Exhibit A

abortions in violation of section 390.0111(3), Florida Statutes, as alleged in the Administrative Complaint, and if so, the appropriate penalty.

PRELIMINARY STATEMENT

On July 28, 2023, the Department of Health (Petitioner or Department) filed an Administrative Complaint alleging that Respondent violated section 458.331(1)(g) by performing abortions in violation of section 390.0111(3).

Respondent timely filed a request for an administrative hearing to challenge the issues raised in the Administrative Complaint. On September 6, 2022, AHCA referred this matter to DOAH for assignment of an ALJ to conduct a chapter 120, Florida Statutes, evidentiary hearing.

The case was assigned to the undersigned, who presided over the administrative hearing. At the hearing, the Department called Respondent as its only witness and Respondent testified on her own behalf. The parties offered six (6) joint exhibits, all of which were admitted as Joint Exhibits 1 through 6. Petitioner also offered Respondent's deposition, which was admitted as Petitioner's Exhibit 1. The parties stipulated that the ALJ may consider the testimony offered at the final hearing in DOAH Case No. 22-2684, as if offered in this case, and may adopt the relevant Findings of Fact from the Recommended Order in that case.

The proceedings were recorded and a transcript was ordered. The parties were initially given 30 days from the filing of the transcript within which to file proposed recommended orders. The one-volume Transcript of the final hearing was filed June 2, 2024. Thereafter, two requests for extensions of time to file proposed recommended orders were granted, after which the parties timely filed their respective Proposed Recommended Orders, both of which, along with testimony and relevant findings of fact from the

recommended order in DOAH Case No. 22-2684, have been considered in preparing this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency charged with the regulation of the practice of medicine, pursuant to section 20.43, and chapters 456 and 458, Florida Statutes.

2. Respondent is a licensed physician in the State of Florida, having been issued license number ME77965 on May 7, 1999.

3. Respondent has spent most of her career practicing medicine in the specialty of obstetrics and gynecology and is certified by the American Board of Obstetrics and Gynecology.

4. Between 1999–2011 and 2014–2023, Respondent practiced medicine in Florida.

5. Respondent is also licensed as a physician in the State of Colorado, where she has practiced obstetrics and gynecology.

6. Respondent's address of record with the Department is 4464 Canyonbrook Drive, Highlands Ranch, Colorado 80130.

7. At all times material to the allegations in this case, the Center of Orlando for Women (Clinic) was an abortion clinic located in Orlando, Florida.

8. Florida's Agency for Health Care Administration (AHCA) is the licensing and regulatory agency that oversees abortion clinics in Florida pursuant to chapters 390 and 408, Part II, Florida Statutes.

9. Respondent began working at the Clinic in 2019. While there, Respondent's work hours varied between 25 and 30 hours per week. Respondent exclusively performed abortions at the Clinic and was compensated on a per-patient basis, but was not compensated for patients who presented and later decided not to proceed with an abortion. No other physicians performed abortions at the Clinic during Respondent's tenure.

10. Respondent had a good relationship with the management and staff of the Clinic, who were open to Respondent's feedback about improving patient care.

11. The Clinic's management had no control over Respondent's medical decision-making and never interfered in her treatment of patients. They never attempted to compel Respondent to do anything unethical or illegal.

12. Respondent provided both surgical and medication abortions, with the majority being medication abortions.

13. The prevailing professional standard of care in Florida requires a physician to obtain a patient's informed consent prior to treatment. Other states have similar standards of care for informed consent.

14. The process for informed consent is designed to allow patients to make informed decisions about their medical care. The process involves the physician informing the patient about the reason for the treatment, how the treatment will be provided, and the potential risks and benefits of the treatment. The process also allows the patient to ask the physician questions about the treatment.

15. Prior to 2015, the Florida Legislature enacted section 390.0111(3), known as the "Woman's Right to Know Act." In 2015, the Legislature amended section 390.0111(3) to modify what constitutes the "voluntary and informed" consent that a physician is required to obtain from a pregnant woman prior to performing the termination of a pregnancy. As amended, the physician is now required to provide certain information regarding the nature and risks of the procedure. as well as the age of the fetus, a minimum of 24 hours before the termination procedure is performed.

16. Shortly after the 2015 amendment was signed into law, litigation ensued in the Circuit Court for the Second Judicial Circuit, in and for Leon

County, Florida.[2] During this litigation, the plaintiffs moved for entry of a temporary injunction to prevent the amendment from going into effect. The court granted the plaintiffs' motion and entered an injunction Order on June 30, 2015, thereby blocking the enforceability of the 24-hour Wait Period.

17. Following a number of years of active litigation in several different judicial forums,[3] on April 8, 2022, Leon County Circuit Court Judge Angela Dempsey issued an Order Granting Defendant's Motion for Summary Final Judgment, which dissolved the court-imposed stay, pending the entry of a Final Judgment. On April 25, 2022, Judge Dempsey entered the Final Judgment,[4] which formally gave effect to the 24-hour waiting period requirement.

18. When she began performing abortions at the Clinic, Respondent was generally aware that there were laws regulating abortion in Florida, including several requirements from section 390.0111(3) relating to counseling patients before an abortion. However, prior to April 2022,

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[2] *Gainesville Woman Care, LLC, et. al. v. State of Fla., et. al.*, Case No. 2015 CA 1323 (Fla. 2nd Cir. Ct.)(complaint filed June 11, 2015). Both Petitioner and AHCA were parties to that litigation. The defendants that were parties to that case, as set forth in the original complaint and subsequent related litigation documents, included: The Florida Department of Health; John H. Armstrong, M.D., in his Official Capacity as Secretary of Health for the State of Florida; The Florida Board of Medicine; James Orr, M.D., in his Official Capacity as Chair of the Florida Board of Medicine; The Florida Board of Osteopathic Medicine; Anna Hayden, D.O., in her Official Capacity as Chair of The Florida Board of Osteopathic Medicine; AHCA; and Elizabeth Dudek, in her Official Capacity as Secretary of AHCA.

[3] After the original injunction was entered in *Gainesville Woman Care. LLC, et. al. v. State of Florida, et. al.*, 2015 CA 1323 (Fla. 2nd Cir. Ct. June 30, 2015), the defendants (the State) appealed and the trial court's injunction order was reversed in *State v. Gainesville Woman Care, LLC*, 187 So. 3d 279 (Fla. 1st DCA 2016)(reversing injunction order); reinstated in *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243 (Fla. 2017)(quashing decision and remanding); subsequently remanded in *State v. Gainesville Woman Care, LLC*, 213 So. 3d 1141(2017)(remanding to lower court); then the law was declared unconstitutional in *Gainesville Woman Care, LLC v. State*, Case No. 2015 CA 1323, 2018 WL 3090185 (Fla. 2nd Cir. Ct. Jan. 9, 2018) (summary judgment finding the act unconstitutional); which was reversed in *State v. Gainesville Woman Care, LLC*, 278 So. 3d 216 (Fla. 1st DCA 2019)(reversed and vacating judgment); and remanded back to the circuit court, where the Final Judgment giving effect to the 24-hour Wait Period was entered on April 25, 2022.

[4] *Gainesville Woman Care. LLC, et al. v. State of Fla., et. al.*, 2015 CA 1323 (Fla. 2nd Cir. Ct. Apr. 25, 2022).

Respondent was unaware of the 24-hour waiting period that had been enacted in 2015 or the legal challenge to it. She had heard of similar laws but did not know that Florida had one or that it had been put on hold for seven years.

19. Respondent's work hours at the Clinic varied between 25 and 30 hours per week.

20. Prior to May 9, 2022, Respondent routinely performed abortions at the Clinic on the same day that the patient first presented to the Clinic. Respondent would typically spend between 10 to 15 minutes examining and counseling each patient before performing the abortion, regardless of whether the procedure would be a medication or surgical abortion.

21. As part of her counseling, Respondent would determine why the patient was seeking an abortion and would decline to perform the abortion if she believed that the patient needed more time to consider the decision or was being coerced.

22. Usually, there was no medical reason why a patient could not take additional time to consider the decision. Some patients would change their minds after being counseled by Respondent and decide not to proceed with the abortion. If the patient returned later to proceed with the abortion, Respondent would then perform the procedure. The Clinic would not charge the patient any more money if they returned later for the procedure.

23. In early April 2022, Respondent first learned that the 24-hour waiting period requirement would go into effect sometime in the future, but she did not know when. Respondent did not oppose this new legal requirement and believed that it was intended to help patients make an informed decision about their pregnancy. Respondent, however, did not take any immediate steps to incorporate the 24-hour waiting period into her practice at the Clinic. Rather, Respondent decided to wait until the requirement went into effect.

24. In mid-April, the Clinic's management team became aware that the injunction delaying the start of the 24-hour waiting period had been dissolved

and that the requirement would go into effect at some uncertain date in the future. In an effort to learn the effective date, the Clinic team searched the internet, called AHCA, searched AHCA's website, and searched the website of the Department of Health but found no information on the effective date of the 24-hour waiting period.

25. During this time period, Respondent received an email from a woman named "Giselle." According to Respondent, the woman (described by Respondent as "not medical") ran several clinics after the woman's husband had died. The email stated that the 24-hour waiting period would be going into effect on April 25, 2024. Respondent did not attempt to verify the information. Instead, she talked to the Clinic "about everything."

26. Between April 14 and May 4, 2022, the Clinic's human resources director, Julie Murano, called AHCA almost daily (14 times). Each time she communicated with AHCA, she was told "we are aware of the ruling and we have no information" or words to that effect. On May 3, 2022, the contact at AHCA told Ms. Murano to stop calling every day and to check the website as the information would be posted on AHCA's website when they received the information.

27. Respondent, aware of the Clinic's efforts, did not believe that the 24-hour waiting period was in effect. While Respondent did not consult with any other medical professionals or legal counsel, she also looked on both the Department of Health and AHCA websites, but did not find anything about the effective date.

28. Eventually, despite not yet being certain of when it would be legally required, the Clinic decided to implement the 24-hour waiting period. On May 5, 2022, the Clinic staff created a new process by which patients would present to the Clinic in the morning to be counseled, then return to the Clinic the following afternoon (or later) to receive the abortion procedure, thus ensuring that more than 24 hours had passed. The new process was implemented by the Clinic on May 9, 2022. Saturday, May 7, 2022, was the

last day the Center admitted patients and a termination procedure was performed by Respondent on the same day.

29. On June 9, 2022, AHCA circulated an informational email entitled "Abortion Clinic Reminder" which stated, "On April 8, 2022, the Second Judicial Circuit Court affirmed the constitutionality of this law which then took effect upon entry of final judgment on April 25, 2022."

30. However, on May 11, 2024, almost a month prior to that informational email, Gayle Ray, a Registered Nurse Specialist for AHCA, appeared unannounced at the Center to conduct a survey of the Clinic to evaluate the Clinic's compliance with applicable state laws and regulations by gathering data, reviewing records, and interviewing staff. The unannounced survey was conducted eight days after AHCA had advised the Clinic's human resources director that the effective date of the 24-hour Wait Period would be posted on AHCA's website when available, and over four weeks prior to AHCA's issuance of its June 9, 2022, "Abortion Clinic Reminder" email, which informed that the effective date of the 24-hour Wait Period went into effect on April 25, 2022.

31. The Clinic was not aware of, and did not find out the effective date of the 24-hour Wait Period until AHCA's surveyor, Ms. Ray, imparted the information to the Clinic during her on May 11, 2022, unannounced survey. The day of that survey was also the first time Respondent became aware of the effective date. By that date, the 24-hour Wait Period had been in effect for over two weeks.[5]

32. The survey found that between April 26, 2022, and May 7, 2022, 193 abortion procedures were performed at the Clinic without waiting the required 24 hours after the initial physician visit and consultation. The survey also verified that by May 9, 2022, the Clinic had voluntarily

[5] Following the lifting of the injunction on April 25, 2022, AHCA surveyed all 55 licensed abortion clinics in Florida, including the Clinic, and found that 41 of the 55 clinics, or 75 percent, had complied with the 24-hour waiting period, and 14, or 25 percent, had not.

implemented a 24-hour waiting period prior to becoming aware that the 24-hour Wait Period had gone into effect.

33. Neither Respondent nor the Clinic contested the findings of the AHCA survey.

34. Respondent admitted that she is the physician who performed the 193 abortion procedures at the Clinic between April 26, 2022, and May 7, 2022.

35. There is no evidence of any violations of the 24-hour Wait Period by the Center or Respondent after May 7, 2022.

CONCLUSIONS OF LAW

36. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

37. The Department seeks to discipline Respondent's license as a physician based on an alleged violation of chapter 458. Because disciplinary proceedings are penal in nature, the Department must prove the allegations against Respondent by clear and convincing evidence. *Dep't of Banking & Fin. v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996).

38. As stated by the Florida Supreme Court:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting *Slomowitz v. Walker*, 492 So. 2d 797, 800 (Fla. 4th DCA 1983)). "[E]ven when the evidence is in conflict, the proof may be more than sufficient to meet the standard of clear

and convincing evidence." *In re Henson*, 913 So. 2d at 592 (quoting *In re Bryan*, 550 So. 2d 447, 448 n.* (Fla. 1989)).

39. It is well-established that "penal statutes . . . are construed in favor of the licensee and against the regulatory authority." *Djokic v. Dep't of Bus. & Prof'l Reg., Div. of Real Estate, 875 So. 2d 693, 695* (Fla. 4th DCA 2004); *see also Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143* (Fla. 1st DCA 1992)(Disciplinary statutes and rules "must be construed strictly, in favor of the one against whom the penalty would be imposed.").

40. The Administrative Complaint charges Respondent with violating section 458.331(1)(g) by failing to perform any statutory or legal obligation placed upon a licensed physician.

41. Respondent, as a licensed physician, had a statutory or legal obligation to comply with the requirements of section 390.0111.

42. Section 390.0111, entitled "Termination of Pregnancies," states, in pertinent part:

> (1) TERMINATION AFTER GESTATIONAL AGE OF 15 WEEKS; WHEN ALLOWED.—A physician may not perform a termination of pregnancy if the physician determines the gestational age of the fetus is more than 15 weeks unless one of the following conditions is met:
>
> * * *
>
> (3) CONSENTS REQUIRED.—A termination of pregnancy may not be performed or induced except with the voluntary and informed written consent of the pregnant woman or, in the case of a mental incompetent, the voluntary and informed written consent of her court-appointed guardian.
>
> (a) Except in the case of a medical emergency, consent to a termination of pregnancy is voluntary and informed only if:
>
> 1. The physician who is to perform the procedure, or the referring physician, has, at a minimum,

> orally, while physically present in the same room, and *at least 24 hours before the procedure*, informed the woman of:
>
> a. The nature and risks of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a knowing and willful decision of whether to terminate a pregnancy.
>
> b. The probable gestational age of the fetus, verified by an ultrasound, at the time the termination of pregnancy is to be performed.
>
> * * *
>
> c. The medical risks to the woman and fetus of carrying the pregnancy to term.
>
> The physician may provide the information required in this subparagraph within 24 hours before the procedure if requested by the woman at the time she schedules or arrives for her appointment to obtain an abortion and if she presents to the physician a copy of a restraining order, police report, medical record, or other court order or documentation evidencing that she is obtaining the abortion because she is a victim of rape, incest, domestic violence, or human trafficking. (emphasis added).

43. Section 390.0111(3)(c), states, in pertinent part, "A violation of this subsection by a physician constitutes grounds for disciplinary action under s. 458.331...."

44. Section 458.331(1)(g), in turn, authorizes disciplinary action against physicians for "[f]ailing to perform any statutory or legal obligation placed upon a licensed physician."

45. Respondent admits that she violated section 458.331(1)(g) by performing 193 abortions from April 25, 2022, through May 7, 2022, without waiting 24 hours as required by section 390.0111, thus subjecting her to

discipline.

46. The Board of Medicine has promulgated disciplinary guidelines in Florida Administrative Code Rule 64B8-8.001(3), which provides:

> (3) 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.

47. For a first offense of section 458.331(1)(g) for failing to comply with a legal obligation, discipline under the guidelines is "based upon the severity of the offense and the potential for patient harm, [and ranges] from a letter of concern to revocation or denial, and an administrative fine from $5,000.00 to $10,000.00, unless otherwise provided by law." Here, in mitigation, the evidence indicates that no patients suffered physical harm as a result of Respondent's violation. While there was evidence that patients sometimes changed their mind before the waiting period was law, there was no evidence showing that any patients were harmed by not having a 24-hour delay in receiving their abortion.

48. Respondent had one prior discipline in 2017 in a matter unrelated to the issues in this case. There were no allegations of substandard care of a patient or any harm to a patient in that prior case.

49. The Administrative Complaint alleges a single violation of section 458.331(1)(g), stating, "[b]ased on the foregoing, Respondent violated section 458.331(1)(g)." Although the Department, in its Proposed Recommended Order, concedes that the procedures performed by Respondent were "not charged in the Administrative Complaint as separate counts," it argues that "each abortion performed by Respondent in violation of section 390.0111 clearly constitutes a separate offense." The Department, however, did not charge 193 separate violations. Although there were 193 procedures performed between April 25 and May 7, 2022 (while both the Clinic and Respondent were unaware that the 24-hour Wait Period was in effect), only a single violation of section 458.331(1)(g) was alleged.

50. This proceeding is predicated on the allegations set forth in the Administrative Complaint. *See Trevisani v. Dep't of Health*, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005). Due process prohibits the Department from taking disciplinary action against a licensee based on matters not specifically alleged

in the charging instruments, unless those matters have been tried by consent. *See Shore Vill. Prop. Owner's Ass'n v. Dep't of Env't Prot.*, 824 So. 2d 208, 210 (Fla. 4th DCA 2002). Accordingly, disciplinary action in this case is limited to the one violation of section 458.331(1)(g) charged in the Administrative Complaint.

51. In further mitigation, the violation in this case had never happened before because the 24-hour waiting period had never been required. The evidence also showed the violation was self-corrected two days before the inspection on May 11, 2022, when the Clinic and Respondent implemented the new requirement without knowing whether it was actually in effect.

52. In addition, the violation was unintentional and occurred despite reasonable efforts by the Clinic and Respondent to determine the effective date of the waiting period. Unlike the Department and AHCA, neither Respondent nor the Clinic were parties to the litigation which occurred in Leon County, some 250 miles from the Clinic. There was nothing readily accessible online about the Final Judgment having been issued on April 25, 2022. AHCA's subsequent after-the-fact notice to providers on June 9, 2022, was insufficient to provide timely and effective information as to the effective date of the amended law.

53. AHCA's case against the Clinic for the same abortions at issue in this case was heard in December 2022 and January 2023 before ALJ J. Bruce Culpepper (DOAH Case No. 22-2684).[6] In that case, AHCA sought the maximum fine of $1,000.00 for each abortion and provided testimonial evidence that it did not single out the Clinic, but that it was "standard operating procedure" to impose the maximum fine.

54. The Clinic in DOAH Case No. 22-2684 admitted the alleged violations and the Recommended Order found that the clear and convincing evidence

[6] *AHCA v. Center of Orlando for Women*, LLC, DOAH Case No. 22-2684 (Fla. DOAH Apr. 7, 2023; Fla. AHCA Aug. 14, 2023).

supported the allegations against the Clinic. The Recommended Order in DOAH Case No. 22-2684 further noted that neither the statute or rule provided for aggravating and mitigating circumstances to consider in imposing a fine. Nevertheless, the Recommended Order reduced the fine from the $193,000.00 sought by AHCA to $67,550.00 ($350.00 times each of the 193 separate violations) based upon "extenuating and mitigating circumstances surrounding the Center's violation." Ultimately, however, after the Recommended Order in DOAH Case No. 22-2684 was entered, AHCA took exception to the lower penalty and its agency clerk issued a final order imposing the maximum fine of $1,000.00 per violation for a total fine of $193,000.00 imposed against the Clinic.

55. The extenuating and mitigating circumstances considered by ALJ Culpepper included: a) information regarding the April 2022 ruling in Leon County Circuit Court was not readily available and there was no showing of intentional violation; b) the Center voluntarily modified its policy to provide for a 24-hour waiting period before becoming aware that the requirement had gone into effect; c) the Center provided a 24-hour waiting period prior to the May 11, 2022, survey conducted by AHCA; d) the Center was proactive and took repeated reasonable steps to ascertain the effective date of the 24-hour Wait Period; e) there was no evidence that the Center violated the 24-Hour Wait Period after May 7, 2022; and f) there was no evidence that the 193 women who underwent the procedures would not have provided their voluntary informed consent or would have changed their minds if given a 24-hour Wait Period.

56. The same extenuating and mitigating circumstances applied by ALJ Culpepper to the Clinic in DOAH Case No. 22-2684 apply to Respondent in the case-at-bar, and have been considered in recommending a penalty for this case.

57. In addition, another circumstance that was raised but not considered as extenuating in DOAH Case No. 22-2686 merits further reflection. At that

hearing, AHCA conceded that it did not send out an official notification to abortion providers about the effective date of the 24-hour waiting period until June 9, 2022. AHCA maintained, however, that it had no statutory or regulatory duty to alert abortion providers to changes in the law or to provide an update regarding the legal challenge in Leon County Circuit Court.

58. In rejecting the Clinic's argument that AHCA should bear some responsibility because of its delay in sending out its official notification, ALJ Culpepper concluded:

> AHCA presents the more sound argument that the entities it licenses are responsible for operating lawfully and knowing and complying with the applicable laws and regulations. Section 408.803(9) clearly directs that an entity licensed by AHCA "is legally responsible for all aspects of the provider operation." Plainly stated, the Center, as a matter of law, is charged with the knowledge of the provisions of law regulating its duties and responsibilities.

59. AHCA's proposed recommended order in that case cited cases supporting the proposition that there is no duty for a regulator to advise licensees about the law because "a licensee is presumed to know the law related to the licensee's duties and responsibilities." That argument, however, fails to consider the fact that information about the effective date was not readily available. Moreover, the entities from whom the Clinic and Respondent were seeking information (both the Department and AHCA) regarding the effective date of the 24-hour Wait Period were actual parties to the litigation in which the Final Judgment reinstating the 24-hour requirement was entered. And yet, despite numerous inquiries from the Clinic's human resources director to AHCA to learn the effective date, the contact at AHCA told the director to stand down, and that the information would be posted on AHCA's website when available. On the date of that communication, May 3, 2022, the 24-hour Wait Period had been reinstated for over a week. Thereafter, both the Clinic and Respondent continued to

check both AHCA's and the Department's websites for the effective date, to no avail.

60. Both the Clinic and Respondent relied to their detriment on the information given by AHCA, by continuing to check websites instead of complying with the 24-hour requirement. While perhaps not on all fours, the facts suggest that AHCA should have been estopped from pursuing violations when it gave inaccurate information within its grasp (as an actual party to the 24-hour Wait Period litigation) regarding the effective date of the 24-hour requirement. *See, e.g., Dolphin Outdoor Advertising v. Dep't of Transp.*, 582 So. 2d 709, 710-11 (Fla. 1st DCA 1991)("elements of estoppel: (1) a representation as to a material fact that is contrary to a later-asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.")

61. In any event, here, Respondent is not being excused from compliance with the law, but rather her unsuccessful efforts to comply are only considered as mitigators for the penalty. Considering those applicable mitigating circumstances under rule 64B8-8.001(3) listed above, the similar extenuating factors considered by ALJ Culpepper in DOAH Case No. 22-2684, and the fact that both the Clinic and Respondent were misinformed while making reasonable efforts to find out the effective date of the law, it would be inappropriate to impose the ultimate penalty of revocation against Respondent's license in this case.

62. Rather, in light of these circumstances, but also considering this is Respondent's second disciplinary proceeding (although unrelated to the violation in this case), the maximum fine of $10,000.00, as conceded by Respondent in her Proposed Recommended Order, is appropriate.

63. Further, section 456.072(4) provides that, in addition to any other discipline imposed by the Board for violation of the practice act, the Board shall assess the costs related to the investigation and prosecution of the case.[7]

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Medicine issue a Final Order finding that Respondent violated section 458.331(1)(g), as alleged in the Administrative Complaint, imposing a $10,000.00 fine, a reprimand, a requirement that Respondent take continuing education in the laws and rules governing the practice of medicine in Florida, and assessing costs of investigation and prosecution of this case.

DONE AND ENTERED this 19th day of September, 2024, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
DOAH Tallahassee Office

Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, Florida 32301-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of September, 2024.

[7] The Department shall be diligent in ensuring that costs incurred in prosecuting DOAH Case No. 22-2684 are not imputed to Respondent.

COPIES FURNISHED:

Julie Gallagher, Esquire
(eServed)

Andrew James Pietrylo, Jr., Esquire
(eServed)

John Wilson, General Counsel
(eServed)

Paul A. Vazquez, J.D., Executive Director
(eServed)

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.

STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,

Petitioner,

v.

DOAH CASE NO. 24-1259PL
DOH CASE NO. 2022-41532

CANDACE SUE COOLEY, M.D.,

Respondent.
_____/

RESPONDENT'S RESPONSE TO PETITIONER'S EXCEPTIONS

Respondent, Candace Sue Cooley, M.D., files this Response to Petitioner's Exceptions to the Recommended Order and states the following:

1. The Administrative Complaint filed in this case alleged a single violation of Section 458.331(1)(g), Fla. Stat., to wit: failing to comply with a legal obligation placed upon a licensee. The specific allegation was that Respondent failed to wait 24 hours, after providing the patient with required information to obtain informed consent, before performing the termination procedure. Due to unclarity in the law, and a lack of available information concerning the effective date of the recent change in the law that required the 24-hour waiting period, Respondent failed to do this 193 times between April 26 and May 7, 2022. Respondent stipulated to the violation of law and to the underlying fact that the unintentional failure to provide the required waiting period occurred 193 times. The formal hearing, therefore, concerned mitigation of the conduct and a recommendation for the appropriate penalty.

Exhibit B

2. The Administrative Law Judge heard from Dr. Cooley during the hearing and also reviewed stipulated documents from a disciplinary action against the clinic by the Agency for Health Care Administration. The Department presented no other witnesses.
3. After considering at length the mitigation offered in this case—that the clinic (and Dr. Cooley) were unaware of the effective date of the change, had no objection to the change, made reasonable and repeated efforts (14 telephone calls) to obtain the effective date of the change from AHCA, no patients were harmed by the failure to provide the 24-hour period, and that the violation was self-corrected before the clinic became aware of the effective date. Based on these factors, the Administrative Law Judge recommended Dr. Cooley be fined $10,000, be reprimanded, be required to take continuing education in the laws and rules governing the practice of medicine in Florida, and be assessed the costs of the investigation and prosecution.
4. Petitioner has taken exception to the Judge's Conclusions of Law in paragraphs 49 and 50 of the Recommended Order that concluded Respondent can only be disciplined for one violation of Section 458.331(1)(g), Fla. Stat. because only one violation was alleged in the administrative complaint. The Judge relied on *Trevisani v. Department of Health*, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005) which held that due process prevents the Department from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instruments, unless those matters have been tried by consent. Petitioner argues that, since 193 instances of failing to provide the 24-hour waiting period were alleged as facts in the Administrative Complaint and Respondent stipulated that that had occurred, Respondent can be disciplined as if she had been

charged with 193 counts of violating Section 458.331(1)(g), Fla. Stat. This is simply without merit.

5. The ruling in *Trevisani,* Id, and also in *Shore Village Property Owner's Ass'n v. Department of Environmental Protection,* 824 So. 2d 208, 210 (Fla. 4th DCA 2002) were predicated on providing due process to licensees (or litigants), which requires notice of the penalties they face. There is nothing in the Administrative Complaint that suggests to Respondent she might face a $1.9 million fine for failing to comply with the 24-hour waiting period. This is the logical conclusion to Petitioner's argument—$10,000 fine multiplied by 193. Had the Respondent known the Department viewed its single-count complaint as a 193-count complaint, Respondent might have made different decisions about how to proceed in this case. Instead, the Department chose to allege all of its facts surrounding the 193 times the 24-hour waiting period wasn't offered into a single violation of the statute, 458.331(1)(g), Fla. Stat. The Department must now live with that choice.
6. Petitioner argues that the Board's rule 68B8-8.001(3)c), Fla. Admin. Code, allows the Board to consider separate counts or offenses established at trial. The Board's actions are governed by statute, rule , and case law. The Board cannot due something it is prohibited from doing just because it has a rule that suggests it can.
7. It is correct that the Board may reject or modify conclusions of law over which it has substantive jurisdiction if it concludes that its conclusion of law or interpretation of law is as reasonable or more reasonable than the Judge's conclusion(s). The Board has no substantive jurisdiction over the legal issue of whether the Administrative Complaint charged one violation or 193 in its complaint and cannot undo the Judge's conclusions of

law on this issue. Even if the Board concludes it has jurisdiction over the term "offenses" in its rule, the Board and Department are no longer entitled to any deference or inference of correctness to that interpretation. Article 5, Section 21, of the Florida Constitution precludes any deference to governmental agencies regarding interpretation of their statutes and rules. Hence, the Board could be overturned on appeal if it rejects the Judge's conclusions of law as requested by the Petitioner.

8. Petitioner also takes exception to paragraphs 61 and 62 which contain the Administrative Law Judge's penalty recommendation and his reasons therefore. The Petitioner does not disagree with the mitigating factors cited by the Judge but complains that its aggravating factor of "193 offenses" was not duly considered because the recommendation should have been revocation.

9. The Judge considered all of the mitigating factors, including the lack of evidence of any harm to the patients. The Department presented no testimony as to any patient harm that occurred to any patient by not having been given the 24-hour waiting period. The Judge was well aware that the Board's disciplinary guidelines included revocation for a first offense of violating Section 458.331(1)(g), Fla. Stat. He could have recommended that penalty. Despite this, the Judge concluded the penalty should be as recommended, much less than revocation.

10. The Department's request for revocation is extreme and unwarranted. The violation of statute was inadvertent, unknowing, unintentional, and was self-corrected before being told the effective date of the 24-hour waiting period. There was no harm to patients. In *Department of Health v. Christopher Saputo,* DOAH Case No. 22-003103, Final Order filed September 11, 2023, the Board was faced with a physician whose malpractice in an

abortion clinic with two patients was so severe (as found by the Judge and the Board) that both patients almost died and at least one lost her fertility. In those grievous cases, the Board did not revoke Dr. Saputa's license. Rather, it suspended him for one year and restricted him from performing abortions in Florida. Similarly, some physicians with patient deaths related to the Brazilian Butt Lift procedure, have not had their licenses revoked but, rather, have been given remedial education and monitoring.

11. Here, Respondent did not harm any patients and no patients complained. She has never had any prior discipline related to her care and treatment of patients. The penalty of revocation simply doesn't fit the violation. Even if the fact that 193 terminations were performed in a two-week period without the 24-hour waiting period is considered in aggravation, that number alone does not outweigh the mitigating factors in the case. Petitioner states that 193 patients had termination procedures without providing informed consent. This is a misleading statement. All information required to be given to the patient was given, including the ultrasound confirming gestational age, information about the manner and risks of the procedure, a discussion of options, and, in Respondent's case, a discussion to ensure the patient was not being coerced, was provided. Only part of the informed consent process was not complied with—the 24-hour waiting period. Otherwise, all patients were duly informed about the procedure, its potential risks, potential outcomes, and options other than abortion. Each was provided an opportunity to review the ultrasound as required by law. All of this is part of the informed consent process. Petitioner would have the Board think the patients were not given any information about the procedure and were simply rushed into a procedure room without

receiving any information required by the standard of care or the law. This is simply not true.

12. The evidence at hearing showed Respondent had no personal opposition to the law, did not try to avoid compliance with it, and was simply unaware it had gone into effect despite reasonable and extensive efforts to learn the effective date. The clinic began complying with the law even before it knew the law was in effect. There was no evidence any patient was harmed by not having had to wait 24 hours for the procedure. Revocation is not warranted or appropriate under the circumstances of this case.

13. This effort to revoke Respondent's license appears retaliatory against Respondent for exercising her due process rights, rather than based on the facts of the case. Prior to hearing, the penalty sought by the Department was a restriction on Respondent's license to prohibit her from performing abortions again in Florida. There was no indication Petitioner might seek revocation of Respondent's license if she did not accept the offer, until the Department filed its Proposed Recommended Order and recommended revocation. This increase in penalty recommendation appears to be motivated by retaliation for Respondent taking the Department to a trial so she could present mitigation to the Judge which, in this case, took an hour.

14. Whatever the reason for seeking revocation now, the penalty is not warranted in this instance due to all of the mitigating circumstances present, the lack of patient harm, and the lack of any prior discipline related to the care and treatment of patients.

WHEREFORE, Respondent respectfully requests that the Board deny Petitioner's Exceptions to the Recommended Order and, instead, adopt the Recommended Order in toto, including the penalty recommended by the Administrative Law Judge.

Respectfully submitted,

Julie Gallagher (FBN 333298)
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to counsel for Petitioner, Andrew J. Pietrylo, Jr., Chief Legal Counsel, Department of Health, 4052 Bald Cypress Way, Bin # C -65, Tallahassee, Florida, 32399-3265 via email at Andrew.Pietrylo@flhealth.gov. , to Mr. Paul Vazquez, Executive Director, Board of Medicine, at paul.vazquez@flhealth.gov, and was filed with the Agency Clerk this 14th day of October, 2024.

Julie Gallagher

Grossman, Furlow & Bayó, LLC
ATTORNEYS AT LAW

TO: Agency Clerk
Florida Department of Health

FAX: 850 413-8743

DATE: October 14, 2024

FROM: Julie Gallagher

RE: Case No. 2022-41532; DOAH Case No. 23-1259PL

COMMENTS: Please find attached a copy of Respondent's Response to Petitioner's Exception to Recommended Order

TOTAL NUMBER OF PAGES INCLUDING COVER LETTER: 8

IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL BACK AS SOON AS POSSIBLE.

TELEPHONE: (850) 385-1314 **FACSIMILE: (850) 385-4240**

STATE OF FLORIDA
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

PETITIONER,

v.

DOAH CASE NO.: 23-1259PL
DOH CASE NO. 2022-41532

CANDACE SUE COOLEY, M.D.,

RESPONDENT.
_____/

PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

The Department of Health ("Petitioner"), by and through its undersigned attorney and pursuant to section 120.57, Florida Statutes (2024), and Rule 28-106.217, Florida Administrative Code, hereby files the following Exceptions to the Administrative Law Judge's Recommended Order entered on September 19, 2024, in the above-styled cause.

I. PROCEDURAL BACKGROUND

1. Respondent is a licensed physician in the State of Florida, having been issued license number ME77965 on May 7, 1999. Recommended Order, p. 3.

2. A formal administrative hearing in this matter was held on June 11, 2024, by Zoom Conference. Recommended Order, pp. 1-2.

3. The administrative hearing was held to adjudicate whether Respondent violated section 458.331(1)(g), Florida Statutes, by performing abortions in violation of section 390.0111(3), Florida Statutes, as alleged in the Administrative Complaint, and if so, the appropriate penalty. Recommended Order, p. 3.

Exhibit C

4. On September 19, 2024, the presiding Administrative Law Judge ("ALJ") entered a Recommended Order finding that Petitioner proved by clear and convincing evidence that Respondent violated section 458.331(1)(g), as alleged in the Administrative Complaint. Recommended Order, pp. 11-12, 18.

5. The ALJ recommended that the Board of Medicine ("Board") enter a Final Order imposing a $10,000 fine, a reprimand, and continuing education in the laws and rules governing the practice of medicine in Florida; and assessing the costs of investigation and prosecution of the case. Recommended Order, p. 18.

II. APPLICABLE STANDARD OF REVIEW

6. Parties may file exceptions to findings of fact and conclusions of law contained within the ALJ's recommended order. § 120.57(1)(k), Fla. Stat. (2024). Exceptions shall identify the disputed portion of the recommended order by page number or paragraph, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record. Id.; r. 28-106.217(1) Fla. Admin. Code.

7. The Board is vested by the laws of Florida with the authority to interpret and apply such laws, regulations, and policies as are applicable to programs within the Board's regulatory sphere. The Board may reject or modify an ALJ's Recommended Order as provided in section 120.57(1)(l), Florida Statutes (2024):

> 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 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. 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.

8. The Board may reject or modify an ALJ's conclusions of law and interpretations of administrative rules if the Board has substantive jurisdiction. See, e.g., § 120.57(1)(l); Barfield v. Dep't of Health, 805 So. 2d 1008 (Fla. 1st DCA 2001); Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140 (Fla. 2nd DCA 2001). "Jurisdiction" has been interpreted to mean "administrative authority" or "substantive expertise." See Deep Lagoon Boat Club, Ltd., 784 So. 2d at 1142.

9. The determination of whether or not a licensee has violated the laws and rules regulating the profession, including a determination of the reasonable standard of care, is a conclusion of law to be determined by the Board and is not a finding of fact to be determined by an administrative law judge. § 456.073(5), Fla. Stat. (2024).

10. While the ALJ recommends interpretations of law and/or administrative rules, the Board has ultimate discretion over matters of substantive jurisdiction. However, the Board may only reject or modify the ALJ's conclusions of law if the Board:

a. states with particularity its reasons for rejecting or modifying such conclusions of law or interpretation of administrative rule; and

b. makes a finding that the substituted conclusions of law or interpretation of administrative rule is as reasonable or more reasonable than that which was rejected.

§ 120.57(1)(l); Barfield, 805 So. 2d at 1011.

11. It is well-settled that matters that are susceptible to ordinary methods of proof, such as determining the credibility of witnesses or the weight to accord evidence, are factual matters to be determined by the hearing officer. However, matters infused with overriding policy considerations are left to agency discretion. Baptist Hosp. Inc. v. State Dep't of Health & Rehab. Servs., 500 So. 2d 620 (Fla. 1st DCA 1986).

12. The Board has "the discretion to increase the recommended penalty as long as: (1) the agency complies with section 120.57; (2) the statute under which the agency operates provides guidelines for imposing penalties; and (3) the increased penalty falls within the guidelines established by its statute." Phillips v. Dep't of Health, 884 So. 2d 78, 80 (Fla. 4th DCA 2004) (citing Crim. Just. Standards & Training Comm'n v. Bradley, 596 So. 2d 661, 663 (Fla. 1992); Dep't of Law Enf't v. Hood, 601 So. 2d 1194, 1195 (Fla. 1992)).

13. Additionally, "it is a primary function of professional disciplinary boards to determine the appropriate punishment for the misconduct of the professionals it regulates." Crim. Just. Standards & Training Comm'n v. Bradley, 596 So. 2d 661, 663 (Fla. 1992).

14. If the penalty recommendation is infused with an overriding policy consideration, modification of that recommendation is left to the agency's discretion. Gross v. Dep't of Health, 819 So. 2d 997, 1002 (Fla. 5th DCA 2002). "The various

administrative boards have far greater expertise in their designated specialties and should be permitted to develop policy concerning penalties within their professions." Bradley, 596 So. 2d at 664.

III. PETITIONER'S EXCEPTIONS

Petitioner's Exception One – Conclusions of Law

15. Petitioner takes exceptions to the conclusions of law found in paragraphs 49 and 50 of the Recommended Order.

16. In paragraph 49, the ALJ concluded that:

> The Administrative Complaint alleges a single violation of section 458.331(1)(g), stating, "[b]ased on the foregoing, Respondent violated section 458.331(1)(g)." Although the Department, in its Proposed Recommended Order, concedes that the procedures performed by Respondent were "not charged in the Administrative Complaint as separate counts," it argues that "each abortion performed by Respondent in violation of section 390.0111 clearly constitutes a separate offense." The Department, however, did not charge 193 separate violations. Although there were 193 procedures performed between April 25 and May 7, 2022 (while both the Clinic and Respondent were unaware that the 24-hour Wait Period was in effect), only a single violation of section 458.331(1)(g) was alleged.

17. In paragraph 50, the ALJ concluded that:

> This proceeding is predicated on the allegations set forth in the Administrative Complaint. *See Trevisani v. Dep't of Health*, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005). Due process prohibits the Department from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instruments, unless those matters have been tried by consent. *See Shore Vill. Prop. Owner's Ass'n v. Dep't of Env't Prot.*, 824 So. 2d 208, 210 (Fla. 4th DCA 2002). Accordingly, disciplinary action in this case is limited to the one violation of section 458.331(1)(g) charged in the Administrative Complaint.

18. As acknowledged by the ALJ, the Board has promulgated disciplinary guidelines in Rule 64B8-8.001, Florida Administrative Code, which include mitigating and

aggrevating circumstances that may be considered in deviating from the standard range of penalties. Recommended Order, p. 12. Rule 64B8-8.001(3)(c) provides that one such factor is "[t]he number of counts or separate offenses established."

19. In paragraphs 49 and 50, the ALJ concludes that, because the Administrative Complaint only charged Respondent with one count of violating section 458.331(1)(g), Petitioner failed to provide sufficient notice to Respondent that the 193 violations of section 390.0111 can be considered as separate offenses. This conclusion is illogical and unsupported by either case law or a plain text reading of the rule.

20. Since the filing of the Administrative Complaint, Respondent has been on notice that the Department is seeking discipline based on her performing 193 abortion procedures between April 26, 2022, and May 7, 2022, without waiting the 24 hours required by section 390.0111(3).

21. Prior to the formal hearing, Respondent stipulated that she performed these 193 abortions in violation of section 390.0111(3), as alleged, and that she thereby violated section 458.331(1)(g). Joint Pre-Hearing Stipulation, pp. 5, 7.

22. In the Recommended Order, the ALJ found that Respondent performed these 193 abortions without complying with section 390.0111(3) and concluded that Respondent thereby violated section 458.331(1)(g) and was subject to discipline. Recommended Order, pp. 8-9, 11-12.

23. Respondent was aware of the findings of the Agency for Health Care Administration ("AHCA") survey of the Clinic on May 11, 2022, and did not dispute those findings. Recommended Order, pp. 8-9. Nor did Respondent ever suggest that she was

unable to defend herself because the Administrative Complaint was not sufficiently specific as to the facts or violations alleged.

24. According to the ALJ's reasoning, the Department would have to plead 193 separate counts in its Administrative Complaint in order for the Board to consider the number of offenses as an aggravating factor. This would result in an entirely unwieldly and repetitive pleading for the parties and the ALJ to muddle through, and it would fail to provide Respondent with any additional meaningful notice of the charges against her.

25. In support of his position, the ALJ cites two cases; however, neither case actually supports that position.

26. In Trevisani, the Department charged the respondent—in pertinent part—with violating section 458.331(1)(m), Florida Statutes, by failing to create medical records. 908 So. 2d at 110. The ALJ found that the respondent had indeed created medical records for the patient but had not retained them; therefore, he could not be found in violation of section 458.331(1)(m). Id. The Board rejected this finding and disciplined the respondent for failing to maintain the medical records. Id. at 1108-09. However, the district court reversed the Board's final order, holding that because the administrative complaint "did not contain any specific factual allegations that [the respondent] failed to retain possession of the medical records," a general citation to section 458.331(1)(m) was not sufficient to place the respondent on notice that he might be disciplined for failing to maintain medical records. Id.

27. Trevisani is entirely inapplicable here because the Department is not seeking discipline based on any facts not specifically pled in the Administrative Complaint.

Nor has the Department sought to deviate from the guideline penalty based on any facts not pled in the Administrative Complaint. Indeed, Respondent admitted these very facts.

28. The other case cited by the ALJ is similarly distinguishable. In Shore Village Property Owner's Association v. Florida Department of Environmental Protection, a property owners' association appealed the trial court's ruling finding that the association's riparian rights did not include the building of a dock. 824 So. 2d at 209. The association argued that the trial court exceeded its authority by ruling on the rights to build a dock, which was not pled. Id. at 210. The district court affirmed the trial court's order, finding that the parties tried the issue by consent. Id. The court explained that:

> The general rule is that a judgment based upon matters entirely outside the pleadings cannot stand. This record, however, is replete with written motions, evidence, and argument concerning this issue, which was not objected to by the plaintiffs. Clearly, this issue was tried by the consent of the parties.

Id. (internal citations omitted).

29. Again, the specific number of abortions performed by Respondent and the Department's intent to seek discipline based, in part, on that fact was pled from the start in the Administrative Complaint. Even if there were some ambiguity in the pleading, it is apparent that this issue was ultimately tried by the consent of the parties, as the Joint Pre-Hearing Stipulation makes clear.

30. There is simply no reasonable basis by which Respondent might have thought that, even though she was charged with performing 193 abortions in violation of the law, her license would be subject to no more discipline than if she had performed only one such illegal procedure.

31. Each of these 193 abortions was a separate medical procedure performed on a separate patient, and the procedures occurred over the span of two weeks. It would not be sensible to treat this series of independent procedures as a single transaction or course of treatment.

32. Rule 64B8-8.001(3)(c) allows the Board to consider the number of counts **or separate offenses** established at the hearing in deciding whether to deviate from the guideline penalty for an offense. A common sense reading of the plain text of this rule indicates that the Board did not intend to limit this aggravating factor only to separately pled counts.

33. The interpretation of its own disciplinary guideline rule is clearly within the Board's substantive jurisdiction because it has authority to create and modify the rule and the expertise to determine appropriate penalties for its licensees. See Deep Lagoon Boat Club, Ltd., 784 So. 2d at 1142; Bradley, 596 So. 2d at 664.

34. The Board may reject or modify the conclusions of law over which it has substantive jurisdiction if it states with particularity the reasons for doing so and finds that the substituted conclusions are as or more reasonable than the conclusions of the ALJ. See § 120.57(1)(l) Fla. Stat.

35. The Department requests that the Board substitute the following conclusions of law in place of the ALJ's conclusions of law in paragraphs 49 and 50:

> 49. The Department's Administrative Complaint alleges, and Respondent admitted, that she performed 193 abortion procedures at the Clinic between April 25 and May 7, 2022, without waiting the required 24 hours. Each abortion performed by Respondent in violation of section 390.01111 constitutes a separate offense for purposes of determining aggravating circumstances under the Board's disciplinary guidelines.

> 50. The sheer number of abortions performed by Respondent in violation of section 390.01111 is a weighty aggravating circumstance that cannot be ignored. Far from an isolated incident, Respondent repeated the same serious error an average of 19 times per day over 10 working days, affecting almost 200 patients.

36. The Department's proposed alternative conclusions of law are as or more reasonable than the conclusions of the ALJ because they correctly recognize that the high number of abortion procedures performed by Respondent should be considered in determining an appropriate penalty. The proposed conclusions correctly interpret Rule 64B8-8.001(3)(c) and do not impose an erroneous and illogical requirement for the Department to plead a separate count for each of the multitude of procedures.

Petitioner's Exception Two – Conclusions of Law

37. Petitioner takes exceptions to the conclusions of law found in paragraphs 61 and 62 of the Recommended Order.

38. In paragraph 61, the ALJ concluded that:

> In any event, here, Respondent is not being excused from compliance with the law, but rather her unsuccessful efforts to comply are only considered as mitigators for the penalty. Considering those applicable mitigating circumstances under rule 64B8-8.001(3) listed above, the similar extenuating factors considered by ALJ Culpepper in DOAH Case No. 22-2684, and the fact that both the Clinic and Respondent were misinformed while making reasonable efforts to find out the effective date of the law, it would be inappropriate to impose the ultimate penalty of revocation against Respondent's license in this case.

39. In paragraph 62, the ALJ concluded that:

> Rather, in light of these circumstances, but also considering this is Respondent's second disciplinary proceeding (although unrelated to the violation in this case), the maximum fine of $10,000.00, as conceded by Respondent in her Proposed Recommended Order, is appropriate.

40. These conclusions by the ALJ fail to consider the number of abortions performed by Respondent as an aggravating factor and thereby incorrectly conclude that revocation is inappropriate.

41. The ALJ found multiple mitigating circumstances in the Recommended Order, centering on Respondent's efforts to comply with the law, the difficulty of obtaining information, her self-correction of the violation, and lack of physical harm to patients. Recommended Order, pp. 13-15.

42. Despite Respondent's efforts and intentions, she nonetheless performed almost 200 abortions without obtaining the required informed consent of the patient. This is an extraordinary number of serious medical procedures to perform without proper informed consent.[1] The ALJ's reasoning here amounts to saying that, because Respondent had good intentions, eventually complied with the law, and was fortunate enough not to harm any patient, there should be no major consequences for her. While not rising to the level of excusing the violation outright, these conclusions treat the violation as a single minor error, instead of as a lengthy series of major errors.

43. The penalty in this case should recognize that repeatedly failing to perform one's legal duty as a physician, especially a duty as important as obtaining a woman's informed consent prior to performing an abortion, warrants a severe penalty that cannot be escaped through ignorance of the law and good luck.

[1] Although not included by the ALJ in the Findings of Fact, Respondent admitted at the hearing that abortions are irreversible medical procedures that carry potentially life-threatening risks to patients. Respondent also admitted that it is important for a physician to obtain a patient's informed consent before treating them and that this process helps the patient make an informed decision about their healthcare. Tr., pp. 18-19, 34-35.

44. The Board may reject or modify the conclusions of law over which it has substantive jurisdiction if it states with particularity the reasons for doing so and finds that the substituted conclusions are as or more reasonable than the conclusions of the ALJ. See § 120.57(1)(l) Fla. Stat.

45. The Board may increase the recommended penalty in a recommended order after stating with particularity its reasons and by citing to the record in justifying the action. §120.57(1)(l); Bradley, 596 So. 2d at 663.

46. Since the penalty recommendation in this case is infused with overriding policy considerations and the Board has special expertise in determining appropriate penalties for its licensees, modification of the penalty is within the Board's discretion. See Gross, 819 So. at 1002; Bradley, 596 So. 2d at 664.

47. The Department requests that the Board substitute the following conclusions of law in place of the ALJ's conclusions of law in paragraphs 61 and 62:

> 61. Respondent's unsuccessful efforts to comply with the 24-hour waiting period cannot serve to excuse her repeated noncompliance and can only mitigate the penalty. However, the mitigating circumstances identified above, and the similar extenuating factors considered by ALJ Culpepper in DOAH Case No. 22-2684, are outweighed by the aggravating factors that Respondent committed 193 separate offenses and has been disciplined previously by the Board.
>
> 62. In light of the particularly high number of abortions performed by Respondent without waiting the required 24 hours and Respondent's prior history of discipline, the appropriate penalty in this case is revocation of Respondent's medical license.

48. The Department's proposed alternative conclusions of law are as or more reasonable than the conclusions of the ALJ because they correctly consider the

aggravating factor of the number of separate offenses proven, as well as Respondent's prior disciplinary history, in determining the appropriate penalty.

Petitioner's Exception Three – Penalty

49. Upon adopting Petitioner's Exception One, relating to the conclusions of law in paragraphs 49 and 50, and Petitioner's Exception Two, relating to the conclusions of law in paragraphs 61 and 62, the Board should modify the penalty recommendation of the ALJ in light of this proper weighing of the aggravating and mitigating factors.

50. The ALJ recommended that the Board enter a final order "imposing a $10,000.00 fine, a reprimand, a requirement that Respondent take continuing education in the laws and rules governing the practice of medicine in Florida, and assessing costs of investigation and prosecution of this case." Recommended Order, p. 18.

51. The Board may increase the recommended penalty in a recommended order after stating with particularity its reasons and by citing to the record in justifying the action. §120.57(1)(l); Bradley, 596 So. 2d at 663.

52. Since the penalty recommendation in this case is infused with overriding policy considerations and the Board has special expertise in determining appropriate penalties for its licensees, modification of the penalty is within the Board's discretion. See Gross, 819 So. at 1002; Bradley, 596 So. 2d at 664.

53. Rule 64B8-8.001(2)(g) provides that, for a first-time violation of section 458.331(1)(g), "based upon the severity of the offense and the potential for patient harm" the penalty should range from "a letter of concern to revocation or denial, and an administrative fine from $5,000.00 to $10,000.00...."

54. As set forth above in Petitioner's Exceptions One and Two, Respondent did not just violate section 458.331(1)(g) a single time, or even a handful of times, but one hundred and ninety-three (193) times. This aggravating circumstance outweighs all of the various mitigating circumstances found by the ALJ.

55. Moreover, this case involves the legal duty of a physician to obtain informed consent from a woman before terminating her pregnancy. The Florida Legislature made a determination that, as part of this process, the women must be given at least 24 hours to consider the information provided to her by the physician—including the nature and risks of the procedure being contemplated. See § 390.0111(3) Fla. Stat.

56. Despite the ALJ's findings that no patients were harmed, each of these women was exposed to the potential for very serious harm, by not receiving the required 24-hour waiting period. See r. 64B8-8.001(3)(a) Fla. Admin. Code ("Exposure of patient or public to injury or potential injury, physical or otherwise: none, slight, severe, or death").

57. Regardless of her efforts and intentions otherwise, Respondent provided abortions to a large number of women without obtaining their informed consent. The Board should determine that a failure on this scale, and with this great potential for harm, is entirely unacceptable for a Florida physician. The Board should also recognize that Respondent does not present with an unblemished record but has received prior discipline against her license.

58. In light of the inherent severity of Respondent's violation, the potential for harm to her patients, and the aggravating circumstances discussed above, the Board should determine that revocation of Respondent's license is the appropriate penalty. The

Board should also assess costs of the investigation and prosecution of this case, as recommended by the ALJ and mandated by section 456.072(4), Florida Statutes (2024).

Petitioner's Exception Four – Penalty

59. In the alternative to Petitioner's Exception Three, the Department requests that the Board modify the penalty recommendation of the ALJ based on the following considerations.

60. The ALJ recommended that the Board enter a final order "imposing a $10,000.00 fine, a reprimand, a requirement that Respondent take continuing education in the laws and rules governing the practice of medicine in Florida, and assessing costs of investigation and prosecution of this case." Recommended Order, p. 18.

61. The Board may increase the recommended penalty in a recommended order after stating with particularity its reasons and by citing to the record in justifying the action. §120.57(1)(l); Bradley, 596 So. 2d at 663.

62. Since the penalty recommendation in this case is infused with overriding policy considerations and the Board has special expertise in determining appropriate penalties for its licensees, modification of the penalty is within the Board's discretion. See Gross, 819 So. at 1002; Bradley, 596 So. 2d at 664.

63. Rule 64B8-8.001(2)(g) provides that, for a first-time violation of section 458.331(1)(g), "based upon the severity of the offense and the potential for patient harm" the penalty should range from "a letter of concern to revocation or denial, and an administrative fine from $5,000.00 to $10,000.00...."

64. Rule 64B8-8.001(1) provides, in pertinent part, that "[t]he purposes of the imposition of discipline are to punish the applicants or licensees for violations and to deter

them from future violations; to offer opportunities for rehabilitation, when appropriate; and to deter other applicants or licensees from violations."

65. The ALJ's recommended penalty is woefully inadequate to address the severity of the violation in this case and the potential for harm that it caused, or to deter Respondent or other physicians from future violations. Indeed, the recommendation sends the message to Florida physicians that their responsibility to know and comply with the laws governing their profession may simply be outsourced to others, and that they may avoid major consequences if this leads to them breaking the law.

66. This case involves the legal duty of a physician to obtain informed consent from a woman before terminating her pregnancy. The Florida Legislature made a determination that, as part of this process, the women must be given at least 24 hours to consider the information provided to her by the physician—including the nature and risks of the procedure being contemplated. See § 390.0111(3) Fla. Stat.

67. Respondent admitted that obtaining a patient's informed consent before performing a procedure is an important part of assisting the patient to make informed decisions about their care and is required by the prevailing standard of care in Florida. Tr., pp. 18-19. Respondent also admitted that abortion procedures are irreversible and carry potentially deadly risks to the patient. Tr., pp. 34-35.

68. Although Respondent was charged with violating a statutory requirement for informed consent, it is no less important than the requirements of the prevailing standard of care. Indeed, the fact that the Legislature felt the need to codify this general requirement and place certain additional specific requirements indicates a strong public

policy toward ensuring that women are adequately informed and given sufficient time to consider such a weighty decision.

69. Respondent's violation was inherently severe because it deprived women of their right to make a fully informed decision about whether to terminate their pregnancy. It also exposed the women to significant potential harm—even if no actual harm resulted. These patients proceeded with a medical procedure that could lead to excessive bleeding, infection, organ perforation, adverse reactions to medications, and even death, without having the full amount of time required to consider these risks.

70. Moreover, Respondent's violation involved Respondent performing a total of 193 abortions without obtaining the necessary informed consent. Joint Pre-Hearing Stipulation, pp. 5, 7; Recommended Order, pp. 8-9, 11-12. The violation is much more severe due to the great number of patients involved and the potential for harm to each of them. Respondent made the same grave error almost 200 times, exposing each of these patients to potential harm.

71. Rule 64B8-8.001(3), provides in pertinent part that "[b]ased upon consideration of aggravating and mitigating factors present in an individual case, the Board **may** deviate from the penalties recommended above" (emphasis added).

72. In light of the severity of the violation and the potential for harm to patients, the Board should determine that, notwithstanding the mitigating circumstances found by the ALJ, revocation of Respondent's license is the appropriate penalty. Such a penalty is within the Board's penalty guidelines for a violation of section 458.331(1)(g); therefore, consideration of aggravating and mitigating circumstances is not necessary.

73. The Board has been charged with regulating the practice of medicine in Florida to protect the public health and safety. See § 458.301 Fla. Stat. (2024). As part of this duty, the Board is expected to employ its unique expertise to determine what penalties that should be imposed on physicians who violate the laws governing their practice. See Gross, 819 So. at 1002; Bradley, 596 So. 2d at 664.

74. Revocation of Respondent's license based on a single violation of section 458.331(1)(g) is entirely within the Board's discretion, because the penalty is within the established guidelines. See Phillips, 884 So. 2d at 80.

75. An appellate court cannot substitute its judgment for that of the Board, so long as it has imposed a penalty within the permissible range of penalties. Mendez v. Fla. Dep't of Health, 943 So. 2d 909, 911 (Fla. 1st DCA 2006). Imposition of a penalty is a complex task that ultimately rests within the Board's discretion. Aldrete v. Dep't of Health Bd. of Med., 879 So. 2d 1244, 1246 (Fla. 1st DCA 2004).

76. Especially where the Board's decision involves a public policy issue, its determination that revocation is appropriate is entitled to deference. See Phillips, 884 So. 2d at 81. The Board may even choose to make an example of a physician to discourage others from committing similar violations. See id.

77. In this case, the Board should not simply defer to the recommendations of the ALJ, who lacks the Board's intimate knowledge and familiarity with the practice of medicine and the dangers it can pose; rather, as the ultimate authority, it should impose the penalty that it believes is necessary to protect the Florida public. This should include not only a consideration of what penalty will sufficiently punish Respondent and deter her

from future violations, but also what penalty will place other Florida physicians on notice of the gravity with which the Board views violations such as this one.

78. The Board should send a clear message to Respondent and every other physician in Florida that knowing and complying with the laws governing their practice is not optional, and serious breaches of this duty will be met with serious consequences.

79. The Department requests that, instead of imposing the ALJ's recommend penalty, the Board revoke Respondent's license and assess the costs of the investigation and prosecution of this case, pursuant to section 456.072(4), Florida Statutes (2024).

WHEREFORE, Petitioner requests that the Board grant relief in accordance with the foregoing exceptions to the Recommended Order and impose a penalty in accordance with the disciplinary guidelines, which may include that recommended by Petitioner.

Respectfully submitted this 4th day of October, 2024.

/s/ Andrew J. Pietrylo, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing has been furnished via electronic mail to counsel for Respondent, Julie Gallagher, Esq., via electronic mail at j.gallagher@gfblawfirm.com, on this 4th day of October, 2024.

/s/ Andrew J. Pietrylo, Jr.
Andrew J. Pietrylo, Jr.
Chief Legal Counsel

STATE OF FLORIDA
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

PETITIONER,

v. **CASE NO. 2022-41532**

CANDACE SUE COOLEY, M.D.,

RESPONDENT.
_____/

ADMINISTRATIVE COMPLAINT

Petitioner, Department of Health (Department), files this Administrative Complaint before the Board of Medicine (Board) against Respondent, Candace Sue Cooley, M.D., and in support thereof alleges:

1. Petitioner is the state agency charged with regulating the practice of medicine pursuant to section 20.43, Florida Statutes, and chapters 456 and 458, Florida Statutes.

2. At all times material to this Complaint, Respondent was licensed to practice as a medical doctor within the State of Florida, having been issued license number ME 77965.

3. Respondent's address of record is 4464 Canyonbrook Drive, Highlands Ranch, Colorado 80130.

4. At all times material, the Center of Orlando for Women (Clinic) was an abortion clinic located in Orlando, Florida.

5. Section 390.0111(3), Florida Statutes (2021), provides that a termination of pregnancy may not be performed or induced except with the voluntary and informed written consent of the pregnant woman. Except in the case of a medical emergency, consent to a termination of pregnancy is voluntary and informed only if the physician who is to perform the procedure, or the referring physician, has, at a minimum, orally, while physically present in the same room, and at least 24 hours before the procedure, informed the woman of:

a. The nature and risks of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a knowing and willful decision of whether to terminate a pregnancy;

b. The probable gestational age of the fetus, verified by an ultrasound, at the time the termination of pregnancy is to be performed; and

c. The medical risks to the woman and fetus of carrying the pregnancy to term.

6. Section 390.011(1), Florida Statutes (2021), defines an abortion as the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.

7. On or about May 11, 2022, the Agency for Health Care Administration (AHCA)[1] conducted a survey of the Clinic.

8. The survey found that between April 26, 2022, and May 7, 2022, approximately 193 abortion procedures were performed at the Clinic without waiting the required 24 hours after the initial physician visit and consultation.

9. Respondent is the physician who performed the approximately 193 abortion procedures between April 26, 2022, and May 7, 2022.

10. Section 458.331(1)(g), Florida Statutes (2021), authorizes discipline for failing to perform any statutory or legal obligation placed upon a licensed physician.

11. Between April 26, 2022, and May 7, 2022, Respondent performed approximately 193 abortion procedures at the Clinic without obtaining the voluntary and informed written consent of the pregnant woman, as required by section 390.0111(3).

[1] AHCA is the licensing and regulatory agency that oversees abortion clinics in Florida pursuant to Chapter 390, Florida Statutes, and Chapter 408, Part II, Florida Statutes.

12. Based on the foregoing, Respondent violated section 458.331(1)(g).

WHEREFORE, Petitioner respectfully requests that the Board 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 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 28th day of July, 2023.

Joseph A. Ladapo, MD, PhD
State Surgeon General

/s/ Andrew J. Pietrylo, Jr.
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FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK: *Elizabeth Eubanks*
DATE: July 28, 2023

PCP Meeting: July 28, 2023
PCP Members: Georges El-Bahri, M.D.; Scot Ackerman, M.D.; Nicolas Romanello

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. A request or petition for an administrative hearing must be in writing and must be received by the Department within 21 days from the day Respondent received the Administrative Complaint, pursuant to Rule 28-106.111(2), Florida Administrative Code. If Respondent fails to request a hearing within 21 days of receipt of this Administrative Complaint, Respondent waives the right to request a hearing on the facts alleged in this Administrative Complaint pursuant to Rule 28-106.111(4), Florida Administrative Code. Any request for an administrative proceeding to challenge or contest the material facts or charges contained in the Administrative Complaint must conform to Rule 28-106.2015(5), Florida Administrative Code.

Mediation under Section 120.573, Florida Statutes, is not available to resolve this Administrative Complaint.

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.