

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL)	
REGULATION, BOARD OF MEDICAL)	
EXAMINERS,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 81-1015
)	
JACQUES R. CALDWELL, M.D.,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, this cause came on for administrative hearing before P. Michael Ruff, duly appointed Hearing Officer of the Division of Administrative Hearings on October 19, 1981 in Gainesville, Florida and November 19, 1981 in Tallahassee, Florida.

APPEARANCES

For Petitioner: Deborah J. Miller, Esquire
Assistant General Counsel
Department of Professional Regulation
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Tallahassee, Florida 32301

For Respondent: Leonard Carson, Esquire
Lewis State Bank Building
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This proceeding was initiated by an administrative complaint filed by the Department of Professional Regulation, Board of Medical Examiners against Jacques R. Caldwell, M.D., of Gainesville, Florida. The Respondent is charged with violating Section 458.1201(1)(h), Florida Statutes (Supp. 1978), as substantially reenacted in Section 458.331(1)(1), Florida Statutes (1979) which prohibits making deceptive, untrue or fraudulent misrepresentations in the practice of medicine. The Respondent is also charged with violating Section 458.1201(1)(j), Florida Statutes (Supp. 1978), which has been substantially reenacted as Section 458.331(1)(g), Florida Statutes (1979). This statutory provision prohibits aiding, assisting, procuring or advising an unlicensed person to practice medicine contrary to Chapter 458, Florida Statutes or the rules of the Board of Medical Examiners. The statutory violations charged emanate the Respondent's alleged violation of Section 458.13(4), Florida Statutes (1977)(substantially reenacted as Section 458.303(2), Florida Statutes (1979)), which in essence requires services rendered by a physician's trained assistant to be done under the supervision and control of a licensed physician.

The issues litigated in this proceeding involve whether, one Nick Tsacrios (the Petitioner's chief witness), engaged in the practice of medicine as defined by the above authority on June 7, 1979 and whether that practice of medicine was unlawful; whether the Respondent failed to provide responsible supervision and control of Tsacrios as his physician's trained assistant on that occasion; whether the Respondent violated the above authority by knowingly aiding, assisting, procuring or advising Tsacrios to practice medicine contrary to Chapter 458, Florida Statutes or the applicable Rules of the Board of Medical Examiners; whether the Respondent knowingly maintained a professional connection or association with Tsacrios on June 7, 1979 in violation of Section 458.1201(1)(j), Florida Statutes (Supp. 1978); and whether on June 7, 1979 the Respondent violated Section 458.1201(1)(h), Florida Statutes (Supp. 1978) by engaging in unethical, deceptive or deleterious conduct or practice harmful to the public.

The following issues were raised by a Motion to Dismiss filed by the Respondent subsequent to the hearing:

(a) Whether the prosecution of the Respondent is abated by the July 1, 1979 repeal of Sections 458.13 and 458.13(4), Florida Statutes (1977) and Sections 458.1201(1)(h) and 458.1201(1)(j), Florida Statutes (Supp. 1978)?

(b) Whether the derivative defense of "entrapment" of Nick Tsacrios by Investigator Gaffney lies in favor of the Respondent?

(c) Whether the Petitioner failed to make a probable cause determination as required by Section 455.225, Florida Statutes (1979)?

(d) Whether the petitioner failed to provide the Respondent with a meaningful informal conference as required by Section 120.60(6), Florida Statutes (1979)?

This Motion to Dismiss is recommended to be denied in its entirety. The reasons for the denial are set forth with particularity in the conclusions of law hereinbelow.

At the hearing, the Petitioner presented five (5) witnesses and the Respondent presented four (4) witnesses. Forty-seven exhibits were offered. All Exhibits were admitted into evidence. Subsequent to the hearing, the parties requested a transcript and an extended briefing schedule for filing motions and responses, proposed findings of fact and conclusions of law and briefs. Supplemental authority embodied in Exhibit 45 was filed April 11, 1982. The parties waived the requirements of Rule 28-5.402.

The parties submitted proposed findings of fact and conclusions of law. The Petitioner submitting 223 proposed findings of fact. All proposed findings, conclusions and supporting arguments for the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the findings, conclusions and views stated herein they have been accepted, and to the extent such proposed findings and conclusions of the parties and such arguments made by the parties are inconsistent therewith they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that testimony of various witnesses is not in accord with the findings herein, it is not credited.

FINDINGS OF FACT

1. Pursuant to its administrative complaint, filed February 16, 1981, the Department of Professional Regulation, Board of Medical Examiners, seeks to revoke, suspend or take other disciplinary action against the Respondent as a licensed physician in the State of Florida. The Respondent's alleged violation of the statutory authority cited in the administrative complaint is predicated upon the supposed diagnosis and treatment of Mr. Steven Gaffney by Mr. Nick Tsacrios, Jr., the Respondent's trained assistant. In essence it is charged that the Respondent failed to provide the requisite supervision and control over Mr. Tsacrios as a physician's trained assistant or, specifically, as an unlicensed physician.

2. Mr. Nick Tsacrios received a B.S. degree in zoology and chemistry from the University of Florida and ultimately received an M.D. degree with honors from the University of Florida in 1972. In approximately the year he received his degree, Mr. Tsacrios began using drugs and ultimately became addicted to opium. In 1972 he began an internship at Tulane University, School of Medicine and was licensed as an intern with specific authority to prescribe drugs and write prescriptions. Due in part to his drug addiction, he was unable to emotionally accommodate himself to the strain of the long hours of work involved in his internship, particularly emergency room duty, and so he quit his internship. He traveled for a time and then applied for a residency in psychiatry at Binghamton State Hospital in New York. During his residency there he was arrested for writing an illegal prescription for a morphine-derivative drug. The charges against him were dropped, he was dismissed from the residency program. Nick Tsacrios returned to Florida in 1974 and began a family practice residency at the University of Florida. He remained with that program for ten months, all of which time he continued to be addicted to opiates. During this time he was arrested for possession and sale of two ounces of cocaine, but managed to effect a successful plea bargain for probation, but was also dismissed from that residency program. He began at about that time his efforts to restore his medical integrity and get himself reestablished in the medical profession. He began working at the Department of Health and Rehabilitative Services outpatient clinic for a six county area, operating out of Columbia County as a Physician I (unlicensed) in pediatrics and general clinic. He had an excellent performance record in this position and enjoyed his work, although his drug addiction was continuing. His personal problems mounted and he began writing illegal prescriptions for Percodan. This activity was finally detected and he was terminated from his employment. He then went to Gainesville and obtained employment with the North Florida Evaluation and Treatment Center for the Criminally Insane. After being back in Gainesville for approximately one month, he was arrested for forging a prescription for Percodan. He was ultimately sentenced on March 11, 1977 to ten years imprisonment. He served six months of that sentence in the state prison at Raiford and then nine months in an outpatient drug program. He was then released on probationary status. He has never been licensed as a physician in Florida to date. He last injected opiates in September, 1976.

3. The Respondent received his M.D. degree from Johns Hopkins University in 1964, served in internship and residency programs at Johns Hopkins University and with the National Communicable Diseases Center in Atlanta in the mid 1960's. He served as chief resident and instructor at the University of Florida College of Medicine between 1968 and 1969, served as a Research Fellow in Clinical Immunology at Harvard Medical School between 1969 and 1971 in Immunology Research, Allergy and Arthritis Research and established the rheumatology and allergy division at the University of Florida College of Medicine. He served as

an Assistant Professor of Medicine and Chief of Rheumatology and Allergy in the Division of Infectious Diseases and Clinical Immunology through 1974. He was elevated to Associate Professor of Medicine, remaining as Chief of Clinical Immunology, Allergy and Rheumatology between 1974 and 1976. Dr. Caldwell was board certified by the American Board of Internal Medicine in the speciality of rheumatology in 1972 and the subspecialty of allergy in 1974.

4. Dr. Caldwell, in addition to his various teaching positions at the University of Florida College of Medicine, has been President of the Florida Society of Rheumatology, Vice-President of the Florida Arthritis Foundation and served on the State Board of Directors of the Florida Arthritis Foundation. He is currently chairman of the Medical Scientific Committee of the Florida Arthritis Foundation and is on the National House of Delegates of the American Arthritis Foundation. He is a member and officer of many other professional societies and associations, including the American Medical Association, Florida Medical Association and is the recipient of numerous awards for teaching excellence from the College of Medicine, as well as awards from various societies and associations to which he belongs in the field of arthritis and rheumatology. The doctor has considerable training and experience in medical research and has performed extensive research on new anti-inflammatory drugs for the management of arthritic diseases and allergies. This research is highly regulated by the Food and Drug Administration (FDA) and is performed under rigid drug protocols, with monthly monitoring and FDA field reviews. The Respondent has over 45 publications to his credit and has presented over 95 professional lectures and papers. He has run volunteer clinics for the Florida Arthritis Foundation in Sarasota and Ft. Myers in the last two years, as well as in the Daytona Beach area. He visits these clinics once a month and performs services for indigent patients without compensation.

5. Dr. Caldwell enjoys an excellent reputation for honesty and integrity and professional competence among his colleagues in the medical community. His standards of patient care are regarded as the most current, most knowledgeable and scientifically sound in his field, perhaps nationally. He is nationally known for his expertise in the field of arthritic disease and has been recognized in a book entitled "The Best Doctors in the United States." Dr. Caldwell's professional colleagues, including those whom he has supervised in the past, find him consistently conscientious and thorough in the manner in which he checks the findings of those whom he supervises.

6. Dr. Caldwell entered private practice in the field of rheumatology in Gainesville in 1976. Although he was well received at the university upon arriving in Gainesville in the early 1970's and during the course of his teaching and research career at the university, he incurred some professional jealousy upon his entry into private practice in Gainesville. He is an ambitious practitioner, running a practice which involves more than one city. He visits clinics he has set-up in other cities in the state. His practicing in more than one city, although headquartered in Gainesville, is unique to some degree. He employs more paramedical assistants than do most physicians. He has gotten extensive publicity through his work with the Arthritis Foundation and has written numerous articles for the foundation for publication, as well as numerous other published articles. In addition to employing more paramedical assistants than do most physicians, he employs a physician's assistant in each of his offices and has persons in each office who instruct patients on proper exercise and diet. He also employs a person in each office who does nothing but "drug study" work. The doctor contends that the use of such assistants streamlines his practice and allows him to spend more time in personally caring for patients and to provide more care, to more patients, in more geographical

areas. Other physicians in Gainesville have expressed resentment and disagreement with his conducting this type of "area practice" (transcript volume two, page 192-205; transcript volume three, page 61; see, also, Respondent's Exhibit one, page 58).

7. Dr. Caldwell's practice is exclusively a referral, consultative type practice, limited to the subspecialty areas of allergy and rheumatology. He only accepts referrals from physicians whose patients have not already responded to routine therapy. He restricts his practice to secondary medical care; he does no internal medicine or general medical practice. In short, Dr. Caldwell's practice is a statewide and even a regional practice in terms of the locations from which his patients originate. He practices in clinics in the above-named locations outside of Gainesville two days per week, but maintains consistent phone contact with his office during the times he is in the other locations. He expects his patients to see their local primary care physician for general health care and emergency problems.

8. In late 1978, Dr. Caldwell maintained offices in Gainesville and New Smyrna Beach. He placed a newspaper ad in the Gainesville newspaper for a medical assistant position in his Gainesville office. At that time he was looking for a medical assistant who could take blood pressure readings, escort patients to the examining room, help them to undress and write down and check their medication, as well as record all necessary patient information on patient charts. At that time Nick Tsacrios was working in a health food restaurant washing dishes and bussing tables. He was no longer addicted to drugs and his probation officer, Lana Arnold, considered him highly motivated and desirous of progressing toward entry into medical practice. His probation officer informed him that if he wanted to get off probation he should begin to live up to his potential in terms of intelligence and educational level. That desire led him to pursue the employment ads in the newspaper and resulted in him responding to Dr. Caldwell's ad by letter on November 22, 1978. He felt at the time that working as a medical assistant was an important step in helping him progress toward becoming a qualified physician and licensed doctor. He obtained an interview with Dr. Caldwell on December 4, 1978. In his letter Tsacrios expressed a strong desire to get back into the medical field. He candidly explained to Dr. Caldwell in the letter that he was an ex-addict and had been to prison for a time. He acknowledged that he had thus far made a shambles of his life, but was looking for an opportunity for a job and a chance to rehabilitate himself. The Respondent was very moved by the candid explanation in his letter and told Tsacrios that he needed someone in his office, but that Tsacrios had more to offer in the way of medical skills than just that of a medical assistant and that he wanted to help Tsacrios become licensed as a physician. At the conclusion of their interview, Dr. Caldwell lent Tsacrios several hundred dollars to buy some clothes and told him to report to his office on Monday. He explained to Tsacrios that he would talk with the Board of Medical Examiners to determine the extent to which Tsacrios could work for him as an unlicensed physician.

9. Dr. Caldwell then contacted Dr. George S. Palmer, then the Executive Director of the Board of Medical Examiners, as well as Dr. Hugh Hill, the Dean at the University of Florida College of Medicine. He also called Mr. Tsacrios' probation officers and checked on his credentials and his version of his background, both of whom were highly complimentary of him. Dr. Hill, of the College of Medicine, verified Tsacrios' high academic standing when he was at the University of Florida medical school, knew of his drug problem and told Dr. Caldwell essentially what Tsacrios had already told him. Dr. Palmer had known Tsacrios since he was a small boy and had indeed been his pediatrician when he

was a small child. He was acquainted with his family and gave Dr. Caldwell a substantial and significant amount of detailed information about Tsacrios' background. Dr. Palmer was the executive director of the Board of Medical Examiners until April 10, 1980 and thereafter became medical consultant to the Department of Professional Regulation. Palmer had seen Tsacrios at infrequent intervals after he had been his pediatrician. Through contacts with a family member, he had become aware over the years of Tsacrios' problems with the law and drugs. He had last seen Tsacrios sometime between 1976 and 1978 when Tsacrios and his father visited his office in Tallahassee to obtain Palmer's advice on trying to get back into medical practice. Palmer advised Tsacrios that it would be ideal if he could obtain a position with a private physician and thus rehabilitate himself such that he would be qualified to practice medicine in the eyes of the Board. In addition to his friendship with Tsacrios' family, Palmer felt a responsibility to help Tsacrios rehabilitate himself because he recognized him as a physician and a fellow professional to whom he owed a duty and responsibility.

10. Thus, when Dr. Caldwell began consideration of Tsacrios as an employee in his office, he initiated conversations with Palmer because he did not want an unlicensed doctor in his office unless approved by the Board. He wanted Dr. Palmer to lay down guidelines as to what Tsacrios could do in the capacity of an unlicensed physician. Dr. Caldwell was very careful not to hire Tsacrios under illegal or professionally inappropriate circumstances. In Dr. Caldwell's initial contact with Palmer he made it quite clear that he would not be in his office at all times, that he practiced in two communities. Dr. Palmer did not suggest during the course of those conversations that Caldwell needed to be present within the community where Tsacrios was employed at all times. Caldwell then gave Palmer a complete description of what his practice was like and how he would employ Tsacrios. Palmer then told Dr. Caldwell that the parameters of what was appropriate and legal for Tsacrios to perform were what Caldwell himself felt would be commensurate with Tsacrios' demonstrated ability and training. Palmer told the Respondent that he himself would be responsible for determining Tsacrios' level of training and his ability to handle situations. Palmer told Caldwell that Tsacrios could do anything Caldwell felt he was competent to do and anything compatible with his education and experience so long as it was performed under the Respondent's supervision.

11. According to Dr. Palmer, responsible supervision means that the employing physician must either be present in the office or reasonably available either in person or by telephone. The Respondent told Dr. Palmer that he went to New Smyrna Beach two days a week. Dr. Palmer never used a requirement of direct supervision (constant presense) in his conversation with Dr. Caldwell regarding his employment of Tsacrios. Dr. Caldwell asked Dr. Palmer to confirm their conversations in writing. Sometime subsequent to December 7, 1978, Dr. Palmer sent Caldwell a letter outlining the essence of the discussion they had had regarding the extent to which Tsacrios could perform or practice in Dr. Caldwell's office. The content of the letter from Dr. Palmer to Dr. Caldwell, dated December 7, 1978, contains the entire subject matter and content of the telephone conversation between Dr. Palmer and Dr. Caldwell (see Respondent's Exhibit 12). That letter constitutes an instruction from Dr. Palmer to Dr. Caldwell to the effect that if Tsacrios was employed as his assistant, then he could be delegated any duties and activities which the Respondent felt were commensurate with his ability and training; that he would be under the Respondent's supervision and responsibility just as any other office employee is and that he should in no way indicate that he is anything but an assistant in the Respondent's office.

12. In short, Dr. Palmer was attempting to ensure that Tsacrios had the opportunity to rehabilitate himself and that was his goal in assisting Tsacrios in obtaining employment with Dr. Caldwell and laying down guidelines for that employment. It was Palmer's understanding, in approving this arrangement, that Tsacrios would be performing the duties of a trained medical assistant such as preparing patients for examination, taking medical histories, examining, presenting the results to Dr. Caldwell, taking blood pressure, blood samples, giving injections, taking other body samples, performing laboratory procedures and even minor surgical procedures under the supervision of Caldwell. He was aware that Tsacrios would be performing appropriate procedures on patients and establishing diagnoses or a course of treatment in consultation with and under the approval and direction of Caldwell.

Functioning and Supervision of Tsacrios as a Physician's Assistant:

13. On the first day of Tsacrios' employment with Dr. Caldwell, a meeting was held between Dr. Caldwell, his office manager and Tsacrios. Firm guidelines were established at that meeting to govern Tsacrios' functioning as Caldwell's assistant. He was specifically told what functions he could perform and how they were to be performed, he was told that new patients were only taken on Monday and Tuesday when Dr. Caldwell was in the office, unless Caldwell had given prior approval otherwise. He was instructed that he was not to see a patient or initiate therapy without Caldwell's direction, supervision, and authorization. He was instructed not to independently write prescriptions. Dr. Caldwell specifically told Tsacrios not to ever write or refill a prescription for a controlled substance. In the course of his duties, Tsacrios gradually became more confident and more at ease with his reentry into the medical field and assumed more responsibility. He would inform Dr. Caldwell when he did not feel capable of performing a certain task. He was concerned about patients and would call for help from Caldwell when he was unsure of what course of action to take with regard to a patient. Other than the instance charged regarding the "patient" of June 7, 1979 (Gaffney), Tsacrios never initiated therapy without Dr. Caldwell's direction or concurrence, which was in accordance with his instructions from Caldwell.

14. When Tsacrios first went to work, Caldwell in effect "looked over his shoulder" because he was not entirely familiar with what medically related functions Tsacrios was still capable of performing. Initially he would not let Tsacrios enter a room with a patient without his own presence. Later he began to let Tsacrios examine patients by himself, but Caldwell would then go in to speak to the patient, check Tsacrios' work and findings and elaborate upon his work, if necessary. Additionally, during his entire employment he gave Tsacrios time to read, study and learn the workings of the office and gain a better knowledge of the rheumatology practice.

15. Gradually his capabilities increased and returned and he was given more responsibility in doing initial "work-ups" and physical examinations of patients. Because he was basically cautious and unsure of himself, he constantly checked with Caldwell regarding any questions he had concerning initial evaluations and initial diagnoses of patients. Tsacrios understood from Caldwell throughout his tenure in the office that his working with Caldwell was under a closely supervised structure. Dr. Caldwell periodically evaluated him and when he felt he was able to perform certain tasks or functions his duties were extended. Dr. Caldwell and Dr. Palmer adopted a practice whereby Caldwell submitted quarterly letters reporting on Tsacrios' progress in his rehabilitation. His first letter to Palmer of February 5, 1979 described Tsacrios as performing well in his duties during the initial few months in

Caldwell's office, that he had demonstrated a facile knowledge of medicine, related well to patients and had been an advantageous addition to Dr. Caldwell's staff. The report at that time showed that Dr. Caldwell continued to oversee all of Tsacrios' activities and that he did not operate independently in any way.

16. It was Dr. Caldwell's procedure to be in his Gainesville clinic on Mondays and Tuesdays. These were the days that he saw new patients and follow-up patients, excluding those who were the subjects of "drug studies", who were on a rigid, preset drug administering protocol supervised by the Food and Drug Administration. Tsacrios functioned as Dr. Caldwell's "physician extender". He would "work-up" the patient initially and then present the case to Dr. Caldwell, who would review his findings. Caldwell would then prescribe any necessary treatment. In short, Tsacrios' duties were essentially the same as they had been when he was an intern, a resident or working as an unlicensed physician in his job with the Public Health Service.

17. Gradually Tsacrios functioned more and more as a physician's assistant and began seeing patients along with Dr. Caldwell on the two days he was in his Gainesville office. On Wednesdays and Thursdays Caldwell was usually at his New Smyrna Beach clinic. On Fridays he was generally at his Gainesville clinic again or at the university or the arthritis foundation facility.

18. On days when Dr. Caldwell was not in the office, Tsacrios was only allowed to see drug study patients. These patients are the subject of studies strictly controlled by the Food and Drug Administration with very little leeway regarding possible prescriptions in the way of drugs or treatment. The patients were treated according to a printed booklet and Tsacrios' duty with regard to them only involved functioning as a technician (along with nurses) performing "joint counts". That is, he would count the number of swollen joints a patient exhibited and would sometimes conduct physical examinations and blood studies. He would then fill out the required form or report for later review by Dr. Caldwell. His other duties when Caldwell was not in the office involved laboratory follow-up work, reading EKGs, writing and reading reports regarding patients and periodic checkups for repeat patients who had originally been seen by Dr. Caldwell. He would examine such a patient according to Dr. Caldwell's established protocol and then check with Caldwell if he had any questions. He would call the Respondent to provide him with data he obtained from his examination. The Respondent would then advise Tsacrios what to do. Tsacrios never took it upon himself to go beyond what he knew or was capable of doing or what the Respondent had instructed him to do. Throughout their relationship both parties knew that if Tsacrios needed help or had a question he was to call Caldwell. There was a direct phone line between the Gainesville and the New Smyrna Beach clinics, which was always open. Tsacrios was always able to communicate with Caldwell at anytime when Caldwell was out of the office and they had telephone conversations on a regular basis several times a day to discuss procedures for handling patients. If a matter occurred which was within the protocol established by Caldwell and was within Tsacrios' expertise, training and capabilities, he would handle the matter as he deemed appropriate and report it for Caldwell's later review.

Caldwell's Drug Protocol:

19. The Respondent and Tsacrios had a definite protocol established as far as prescriptions and refills of them were concerned. Tsacrios was not (under any circumstances) to administer, prescribe, dispense, or refill any controlled substance. The Respondent gave him specific instructions regarding this. Tsacrios was not permitted to initiate a new prescription for a patient on his own. Many physicians establish a protocol which is sufficient to indicate approval of a prescription issued by someone not a physician. These are for situations where once the decision to prescribe a drug has been made it doesn't need to be made again, unless unusual circumstances occur. It is common practice in Gainesville for a physician's office staff to call in prescriptions and refills. Guidelines, instructions and protocol were laid down by Caldwell as to how medications would be dispensed or administered in the office. The only office medications Caldwell had available for dispensing were antihistamines and simple analgesics. No members of the staff were permitted to either dispense or administer medication without Caldwell's prior approval. That prior approval was obtained in two ways: either by personal contact with the Respondent or in accordance with a previous authorization or protocol which the Respondent established. Under Caldwell's protocol, Tsacrios was permitted to substitute one nonsteroidal anti-inflammatory drug for another.

20. It is common practice in Gainesville for physicians to stamp their signatures for routinely prescribed drugs rather than write their signature out. A rubber name stamp was kept in the drawer in Caldwell's office. The use of the stamp was strictly controlled and Tsacrios and the office staff were instructed in its use. They were informed that the stamp was to be used only for prescription renewal if the Respondent's prior approval had been obtained, in accordance with his instructions and protocol and only for return or ongoing patients, where the Respondent had initially prescribed a course of medication. It was never to be used for an initial prescription or for the initial determination as to type, amount or quantity of medication for a patient. It could only be used for drugs which a patient was taking on a chronic basis. The use of the stamp was comparable to a physician calling in refills on prescriptions. None of the Respondent's office personnel have ever used the stamp except in accordance with the procedure he established with the exception of the incident involving Tsacrios on June 7, 1979. Although Tsacrios was appropriately trained to alter patient medications and refill prescriptions (using the stamp for antihistamines and certain routine anti-inflammatory drugs) however, he generally always cleared such a procedure with Caldwell first and he always made an entry on the chart after prescribing such a medication for Dr. Caldwell's review and approval.

21. In April or May of 1979, Tsacrios began writing Percodan prescriptions for himself, including two to which he forged Dr. Caldwell's name. Dr. Caldwell had no knowledge of these prescriptions. Pharmacist Russ Blaser called the Gainesville Police Department on two occasions when he had reason to believe that Tsacrios was using forged prescriptions. Blaser never, however, alerted Dr. Caldwell regarding his suspicions of Tsacrios. An investigation of Tsacrios' prescription activity was initiated by the Gainesville Police Department, but at no time prior to June 7, 1979 did any of its personnel alert Dr. Caldwell to the fact that Tsacrios was under suspicion.

22. On June 7, 1979, Steven Gaffney, an investigator with the Board, received a call while he was at the office of the Alachua County Sheriff's Department during the course of which the anonymous caller alleged that Tsacrios appeared to be practicing medicine without a license at Dr. Caldwell's office. Gaffney called Dr. Caldwell's office and informed Ms. Susan Rhodes, the assistant office manager, that he was new in town and had been moving a bed up some stairs the night before and had injured his back severely. He asked to see a doctor and Ms. Rhodes informed him that Dr. Caldwell was not in the office. Gaffney demonstrated that he was in acute pain and insisted upon seeing a doctor. Ms. Rhodes felt that the problem was not to be handled by a rheumatologist and suggested that he visit an orthopedist in Gainesville, but his response was negative. She then informed Gaffney that Tsacrios was the only doctor in the office and Gaffney asked to see him. Ms. Rhodes tried to persuade him to go elsewhere, but finally agreed to take his name and number and have Tsacrios call him back. Gaffney called back on two or three occasions before reaching Tsacrios. At the time Gaffney attempted to call him Tsacrios was doing routine drug study work, record keeping and writing reports for Dr. Caldwell. He intended to finish those duties and leave for the day. When Ms. Rhodes informed him of Gaffney's request, he told her that he did not want to see him. She told Tsacrios that the caller was a new student who had hurt his back severely the night before, but Tsacrios reiterated that he wanted to leave the office and not see anyone. He pointed out to Ms. Rhodes that the caller was not a scheduled patient and should therefore not be seen that day. Tsacrios finally relented and agreed to talk to Gaffney. He returned Gaffney's call, determined that he was in distress and seemed very upset. Gaffney related the story of his strained back and that he had not been able to get anyone else in town to see him. He requested Tsacrios to see him due to the acuteness of his pain. Since Gaffney was new in town and had no family practitioner, Tsacrios agreed to see him on a limited basis if he could arrive at the office within a reasonable period of time. Tsacrios felt that the condition related by Gaffney was something that should be examined and taken care of immediately and he felt a duty to take care of Gaffney, who appeared to be in great distress.

23. Upon being examined by Tsacrios in the office, Gaffney maintained that he had had two low back strains in the past which were successfully treated with valium and robaxin. He claimed to be having lots of muscle spasms and pain. Upon examination, Tsacrios could find nothing objectively wrong. Judging from Gaffney's general appearance, Tsacrios presumed he was not abusing drugs and therefore accepted his assertions that he was having pain and determined to give him something to alleviate the pain. Since Gaffney had indicated he had responded to valium in the past, Tsacrios wrote a prescription for thirty tablets of 10 milligram valium (nonrenewable). He had it stamped with Dr. Caldwell's name stamp. He also gave Gaffney six sample bottles of parafonforte. If taken as prescribed, these drugs are considered fairly mild medication for the condition Gaffney professed to suffer.

24. The record is unclear about whether Ms. Rhodes or Tsacrios stamped the prescription for Gaffney. Ms. Rhodes had done so on other occasions when prescriptions prepared by Tsacrios had been approved in advance by Caldwell. There was a set procedure in the office permitting prescriptions to be handled that way. These included refills for nonsteroidal anti-inflammatory agents for regular patients. Only those patients could have prescriptions executed by the rubber stamp and only with Caldwell's advance approval. This was the first incident when Tsacrios had used the name stamp for a new patient. After Gaffney left, Tsacrios dictated his report to present to Dr. Caldwell on Monday when he would discuss that patient with him. Tsacrios generally believed that his examination and prescribing for Gaffney was within the bounds of duties outlined

to him by Dr. Caldwell and Dr. Palmer. While Tsacrios was dictating the report regarding Gaffney that afternoon, Gaffney and Detective Smith of the Gainesville Police Department arrived to arrest him for prescribing medicine without a license.

25. Tsacrios was acting against Dr. Caldwell's expressed orders by treating Gaffney on June 7th. He had been instructed by the Respondent not to see a new patient in the office without Caldwell's prior approval or without contacting Caldwell first. The only two other new patients Tsacrios had ever seen had been scheduled by Caldwell himself.

26. Following Tsacrios' arrest for practicing without a license, he was also charged with the criminal violations involving the forged Percodan prescriptions. In connection with this, he was also charged with violating his probation. Tsacrios spent some days in jail and was released on his own recognizance, but ultimately fled the state and resided for a time in West Virginia. Sometime in approximately July or August, 1981 when the case against the Respondent was progressing toward a hearing, negotiations were apparently started by the Petitioner with Tsacrios and his parents to obtain his testimony against Caldwell at the upcoming hearing in return for which the Petitioner would attempt to have the State Attorney nolle prosequi the criminal charges against Tsacrios. Ultimately, the State Attorney agreed to nolle prosequi all criminal charges with the exception of the charge of violating probation, which apparently is still pending.

27. Tsacrios' testimony is clearly not tainted by any ill will against Dr. Caldwell. He remains grateful to Dr. Caldwell for assisting him in his rehabilitation by employing him and he expressed surprise that Dr. Caldwell would be charged by the Board. Tsacrios' main objective in testifying on behalf of the Board is to obtain his freedom from criminal charges and to further his rehabilitation as a medical practitioner.

28. After the incident of June 7, 1979, the Board investigators asked Dr. Caldwell what the duties of his physician's assistant were and he told them, and in doing so, requested that they inform him if he was doing anything contrary to the law or the Board's rules since it was his wish to avoid doing anything illegal. He never received an answer. He asked the Supervisor of Investigations for the department to ascertain that he was not doing anything illegal with regard to his physician's assistants and again received no answer. His letter request in a similar vein to the Board of Medical Examiners received no response. Finally he filed a Petition for Declaratory Statement with the Board on June 3, 1981 requesting information regarding the meaning and applicability of the statutory and rule provisions governing physician's assistants. The Final Order of the Board of Medical Examiners on that petition was not entered until April 1, 1982, on April 16, 1982 the Respondent, through his counsel, filed a request for official recognition of that Order, denominated Respondent's Exhibit number 45. The Board in that Order cited the Petitioner (Respondent herein) to Section 458.347, Florida Statutes and the current Rules recently adopted and amended in Chapter 21M-17, Florida Administrative Code and found that the Petitioner was merely seeking legal advice or answer to questions propounded from curiosity (citing authority) and therefore denied the petition.

29. All of the functions which were performed by Tsacrios either when the Respondent was in or out of his office were previously presented to and approved by the Board in the various applications Dr. Caldwell submitted for certification of his physician's assistants.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of these proceedings.

31. Section 458.12(1), Florida Statutes (1977) provides as follows:

(1) Any person, accept as hereinafter provided, shall be deemed to be practicing medicine within the purview of this Chapter who holds himself out as being able to diagnose, treat, operate, or prescribe for any human disease, pain, injury, deformity, or physical or mental condition or who shall offer or undertake, by any means or method, to diagnose, treat, operate, or prescribe for any human disease, pain, injury, deformity or physical or mental condition.

(4) Nothing in this section shall be construed to prohibit service rendered by a physician's trained assistant if such service be rendered under the responsible supervision and control of a licensed physician.

32. Section 458.1201(1), Florida Statutes (Supp. 1978) provides:

(1) The Board shall have authority to deny any application for a license or to discipline a physician licensed under this chapter or any antecedent law who has been adjudged unqualified or guilty of any of the following:

(h) Engaging in any unethical, deceptive, or deleterious conduct or practice harmful to the public, in which preceding proof of actual injury need not be established.

(j) Knowingly maintaining a professional connection or association with any person who is in violation of this chapter or rules or regulations of the board or knowingly aiding, assisting, procuring, or advising any unlicensed person to practice medicine contrary to this chapter or to rules and regulations of the board.

33. The Respondent, in his motion to dismiss, raises the defense of entrapment in that he argues that Mr. Tsacrios was entrapped into allegedly committing the crime of practicing medicine without a license and that, derivatively, the Respondent is similarly blameless. The Respondent in effect maintains the Investigator Gaffney's persistent and repeated false complaints of pain and requests for immediate medical attention motivated Tsacrios to render medical treatment out of humanitarian motivations.

34. Entrapment is only available as a defense to the Respondent, if proven, with regard to the charge that he knowingly maintained a professional association or relationship with the person violating the medical practice act or appurtenant rules or knowingly aided, assisted or advised any unlicensed person to practice medicine contrary to Chapter 458 and related rules. Thus, if

proven, entrapment would only serve as a derivative defense for the Respondent as to count two of the Administrative Complaint. Count one relating to the Respondent's own alleged omission involving failure to provide responsible supervision and control of Tsacrios as his physician's trained assistant cannot be defeated by a successful entrapment defense for Tsacrios.

35. In *Story vs State*, 355 So.2d 1213 (Fla. 4th DCA 1978) the court noted that once evidence is introduced suggesting entrapment, the State must prove that the offender was predisposed to commit the act charged, which predisposition may be established in one of three ways: (1) by the introduction of evidence of prior convictions or the actor's reputation for having engaged in the alleged illicit conduct; (2) evidence of the officer's "reasonable suspicion" that the actor was engaged in illegal activity; (3) the actor's readiness or willingness to commit the act or offense. Although it is undisputed that Gaffney was insistent upon being seen by Tsacrios and falsely complained of severe back pain and it is undisputed that Tsacrios was hesitant to examine Gaffney, it was not because he was afraid of engaging in illegal activity, but rather because it was his afternoon off and he wanted to hurriedly leave the office.

36. In *Stiglitz v. State*, 270 So.2d 410 (Fla. 4th DCA 1972) the court outlined the elements which must be established for the defense of entrapment to lie. (a) The defense is available to one who is instigated or lured by an officer of the law to commit the act charged; (b) it must be for the purpose of prosecution; (c) it must be an act which he otherwise had no intention of committing. That defense is not available when the officer acts in good faith for the purpose of discovering or detecting a crime and merely furnished the opportunity for its commission by one who already had the requisite intent to commit it. The court in *Stiglitz* did find that insistent requests by a police officer satisfied the first element of inducement or luring as was the situation with Gaffney's remonstrances here. The second element, that the act or "crime" was committed has been satisfied in the case at bar in this one instance, since on June 7, 1979 (and only that date), Tsacrios exceeded the permissible practice of medicine under Chapter 458 as a physician's trained assistant (which the complaint alleges he was) since he acted beyond Dr. Caldwell's supervision, control, and guidelines set up in advance which precluded him from seeing a new patient and prescribing for him as he did with Gaffney. It is apparent, however, that Tsacrios possessed a predisposition to engage in this instance of unlicensed practice of medicine, however, and thus entrapment would not be an available defense, since Gaffney's entreaties to him seeking treatment had no direct, causal relationship to his predisposition. As he stated himself, he would have treated him had he come in in a police uniform and his only reluctance to see Gaffney was due to the fact that he wanted the afternoon off rather than any fear that what he was doing might be illegal. In fact, Tsacrios' unrefuted testimony reveals that he thought he was within the correct legal parameters in functioning as Caldwell's trained assistant in examining and prescribing for Gaffney. Thus, he was predisposed to treat and freely and voluntarily treated Gaffney, thus the third element of entrapment necessary to its use as a derivative defense to count two herein is not present.

37. The Respondent also alleges that the action herein is properly abated since the charging statutes were repealed on July 1, 1979. He alleges that the saving clause, Section 458.349, Florida Statutes (1979) is inapplicable because the administrative proceeding at issue was not pending on July 1, 1979, rather was only pending as of October 23, 1980 when notice of the intended action and informal conference was served on the Respondent.

38. Although the instant proceeding was not pending on July 1, 1979, this is immaterial because the charging statutes were all substantially reenacted in the 1979 law. In *Gewant vs. Florida Real Estate Commission*, 166 So.2d 230 (Fla. 3rd DCA 1964), the District Court of Appeals for the Third District held that:

When an existing statute is reenacted by a later statute in substantially the same terms, a repeal by implication is effectuated only of those provisions which are omitted from the reenactment while the included provisions which are reenacted in the new enactment are considered as having been continuously enforced. (emphasis in original)

166 So.2d at 233. In the instant case, the charging statutes have been substantially reenacted and only portions of the statutes have been repealed by implication due to their noninclusion in the 1979 law.

39. The Respondent was charged with violating Section 458.1201(1)(h) , Florida Statutes (Supp. 1978) , by engaging in unethical, deceptive, or deleterious conduct or practice harmful to the public. This provision was substantially reenacted in Section 458.311(1)(1) , Florida Statutes (1979) , which prohibits in part "making deceptive, untrue, or fraudulent misrepresentations in the practice of medicine...".

40. Section 458.1201(1)(j), Florida Statutes (Supp. 1978) has similarly not been abated inasmuch as this provision was also substantially reenacted in Section 458.331(1)(g) , Florida Statutes (1979), which prohibits ".... aiding, assisting, procuring or advising any unlicensed person to practice medicine..." contrary to Chapter 458, Florida Statutes or pendent rules that are substantially the same language contained in the charging statutory subsection. Additionally, to the extent that the Respondent is charged with failing to exercise responsible supervision and control of his physician's trained assistant as required by Section 458.13(4), Florida Statutes (1977), that Section, too, has been reenacted as Section 458.303(2), Florida Statutes (1979) which requires services rendered by a physician's trained assistant to be "under the direct supervision and control of a licensed physician". As the Petitioner has agreed, the terms "responsible supervision and control" and "direct supervision and control" are essentially the same. 1/

41. The Respondent has also raised an alleged failure by the Board to make a probable cause determination prior to issuing the administrative complaint. This ground for the motion to dismiss is without legal substantiation. Section 455.225(3) Florida Statutes (1979) permits the Board to provide by Rule that a determination of probable cause should be by the department. Pursuant to Rule 21M-18.06, Florida Administrative Code, the Board provided for a probable cause determination by the department which Rule was in full force and effect from December 5, 1979 until November 25, 1980. Probable cause was indeed found by the Secretary who reviewed the proposed administrative complaint and Notice of Informal Conference and authorized the complaint's issuance on October 23, 1980. Probable cause was shown to be determined prior to the issuance of the administrative complaint, which was not signed and filed until February 16, 1981. That constituted the actual institution of agency action subsequent to the finding of probable cause.

42. The Respondent has raised, in his motion to dismiss, an alleged failure to provide a meaningful informal conference pursuant to Section 120.60(6), Florida Statutes (1979). This ground for the motion to dismiss was denied by the undersigned in ruling on the motion to dismiss asserted at the hearing and that ruling is reaffirmed herein. Section 120.60(6), Florida Statutes (1979) is a procedural statute. This provision was amended effective July 1, 1981 to delete the informal conference requirement. The Supreme Court of Florida in Walker and la Berge v. Halligan, 344 So.2d 239 (Fla. 1977), recognized that no party has a vested right in any given mode of procedure and that statutory procedural changes have retroactive applicability even during the pendency of an appeal. 344 So.2d 242-243. The court cited its decisions in Sommerlin v. Tramill, 197 So.2d 53 (Fla. 1973) and Tele-service Company v. General Capital Corp., 227 So.2d 67 (Fla. 1969), where procedural statutory changes affecting the measure of damages and burden of proof were given retroactive application. The former informal conference requirement did not rise to the level of a substantive right. The Respondent's substantive rights are preserved by the formal or informal hearing proceeding available to him under Chapter 120 which must be complied with prior to disciplinary action directed against his license. The procedural change eliminating that informal conference requirement, applied retroactively, leaves the substantive rights available to him in protecting his licensure intact, therefore dismissal of the administrative complaint on this ground would have no practical effect. See, also, Department of Professional Regulation, Board of Architecture v. Jorge F. Miro, case number 81-1382. The motion to dismiss in its totality should be denied.

43. There is no question that the evidence in this record unequivocally supports the finding that (as the Petitioner in its administrative complaint has asserted) Tsacrios was a "physician's trained assistant" for the purposes of the above authority. Accordingly, as a physician's trained assistant he could lawfully engage in the practice of medicine provided it were under Caldwell's responsible supervision and control. Section 458.12(4), Florida Statutes (1977). Whether Tsacrios was subject to "responsible supervision and control" is the essential question to be resolved. Caldwell cannot be guilty under the above authority of knowingly aiding, assisting and procuring Tsacrios to practice medicine contrary to Chapter 458 or knowingly maintaining a professional connections or association with one in violation of Chapter 458 for unauthorized practice of medicine, if this question is resolved in his favor. Corrolarily it follows, then, that Caldwell could not be guilty of engaging in unethical, deceptive or deleterious conduct or practice harmful to the public for the purposes of the above authority if Tsacrios was engaged in the practice of medicine in that legitimate way.

44. The term "responsible supervision and control" as it relates to a physician's trained assistant, is nowhere defined in the Florida Statutes; nor has the Board of Medical Examiners defined the term by Rule. The Legislature has defined the term "supervision" only as it relates to physician's assistant, which Tsacrios was not. There, the term only requires - except in cases of emergency - "the easy availability or physical presence of a licensed physician for consultation and direction..." Section 458.135(2)(e), Florida Statutes (1977). The only definitive notice which Dr. Caldwell received from the Board of Medical Examiners regarding the meaning of "responsible supervision and control" was given to him by the Executive Director's letter of December 7, 1978 wherein he was informed that he could delegate any duties to Tsacrios he felt were commensurate with his demonstrated ability and training and that Tsacrios could not call himself a "physician's assistant". The record clearly reflects that the Respondent carefully adhered to the requirements of that communication

by the Board's executive director, which is in evidence herein, and there is no evidence that Tsacrios ever held himself out as a physician's assistant.

45. The evidence establishes that, before hiring Tsacrios, Caldwell carefully checked his background. He fully informed the Board regarding the nature of his practice and the duties he anticipated Tsacrios would perform. He requested the guidance of the Board which only provided guidance in the above-mentioned letter by Dr. Palmer. He set concrete guidelines for Tsacrios' duties and performance in his office at the outset of their employment relationship. Caldwell was either present in the office or in constant communication with Tsacrios over an open direct telephone line and he regularly evaluated Tsacrios' skills by personal observance and review of his reports and summaries, submitting a quarterly report of his progress to the Board of Medical Examiners. He constantly consulted with him regarding his work.

46. Tsacrios was an honors graduate from medical school, his qualifications were higher than those statutorily required for physician's assistants. All the functions he was allowed by Caldwell to perform had been previously presented to the Board of Medical Examiners when Caldwell sought certification for physician's assistants and those functions had been approved for employees in that category. Although a pharmacist, the Board of Medical Examiners and local law enforcement personnel had been aware of Tsacrios' alleged illegal drug activities and had reason to believe that Dr. Caldwell was unaware of them, no representative of these groups alerted Dr. Caldwell of their suspicions.

47. Accordingly in view of these considerations, enunciated in more detail in the above findings of fact, it must be concluded that Dr. Caldwell did not fail to provide the responsible supervision and control of Tsacrios as a physician's trained assistant which Section 458.13(4) requires.

48. Since Tsacrios could legitimately practice medicine as a physician's trained assistant under the responsible supervision and control of Dr. Caldwell, which the record reflects he did except for the incident of June 7, 1979 and the record reflecting that Dr. Caldwell did not have any knowledge of his activities on June 7, 1979 regarding supposed patient Gaffney until after the fact, it follows, therefore, that Caldwell cannot be charged Successfully with knowingly aiding, assisting and procuring or advising Tsacrios to commit the crime of unauthorized practice of medicine. It was conclusively shown that Caldwell had no knowledge of it, had instructed him against such conduct, and could not have assisted, procured or advised Tsacrios to commit it.

49. The only basis which remains by which it may be contended that the Respondent knowingly aided or assisted Tsacrios to unlawfully practice medicine concerns the presence and employment in Dr. Caldwell's office of the rubber name stamp for prescriptions, which Tsacrios or someone in the office allegedly used when Gaffney was given the prescription for valium. Unrefuted evidence establishes that Caldwell gave explicit instructions to Tsacrios that no new patients were to be seen without his prior approval and Tsacrios was not permitted to initiate any new prescriptions for patients independently. He was never to write a refill prescription for any controlled substance. Even though Tsacrios saw Gaffney as a new patient and used the rubber stamp to prescribe a controlled substance, there is simply no evidence in the record to indicate that Caldwell knowingly aided or assisted him in doing so. The First District Court of Appeal in *Bach v. Florida State Board of Dentistry*, 378 So.2d 34 at pages 36 and 37 stated:

Before one may infer that a principal ratified an unauthorized act of his agent, the evidence must demonstrate that the principal was fully informed and that he approved of the act. [Citations omitted] It is generally the rule that the doctrine of constructive knowledge does not apply to bring about ratification. The principal is charged only upon a showing of full knowledge, and not because he had notice which should have caused him to make inquiry, which in turn would have brought to his attention the knowledge of the unauthorized act of the employee. [Citations omitted] The finding by the hearing officer that Dr. Bach knew or should have known of his employee's acts because they were performed openly and without any attempt to conceal them on two separate occasions is not consistent with the law of agency. There is no duty imposed upon the principal to make inquiries as to whether his agent has carried out his responsibilities. The principal "has a right to presume that his agent has followed instructions, and has not exceeded his authority."

50. Accordingly, Dr. Caldwell could not be concluded to have violated Section 458.1201(1)(j), Florida Statutes (Supp. 1978) by knowingly aiding, assisting, procuring or advising Tsacrios to practice medicine contrary to Chapter 458, Florida Statutes or related Rules in this regard either.

51. Similarly since the record reflects that Dr. Caldwell did not know of the June 7, 1979 incident until after it occurred and did not know, therefore, that Tsacrios might possibly be in violation of Chapter 458 or the rules of the Board of Medical Examiners, it cannot be concluded that Caldwell knowingly maintained a professional connection or association with Tsacrios in violation of Section 458.1201(1)(j), Florida Statutes (Supp. 1978). *Bach v. Florida State Board of Dentistry*, (Supra)

52. Section 458.1201(1)(h) by which Dr. Caldwell was charged with engaging in unethical, deceptive or deleterious conduct or practice harmful to the public was construed by the First District Court of Appeal in *Gentry v. Department of Professional and Occupational Regulation, State Board of Medical Examiners*, 293 So.2d 95 (Fla. 1st DCA 1974). The Court there held that for a violation of this provision to lie, the record must support a finding that there was a willful or intentional violation of the above subsection. There is no evidence to suggest that the Respondent willfully or intentionally engaged in unethical, deceptive or deleterious conduct or practices harmful to the public.

53. Wholly aside from the above considerations which absolve the Respondent, it must also be concluded that although Tsacrios engaged in the practice of medicine as defined by then Section 458.13, Florida Statutes (1977) on June 7, 1979, that the department has failed to present sufficiently persuasive evidence to prove that that practice of medicine was unlawful. The evidence supports the good faith belief of Tsacrios that he was presented with a situation of potential emergency. (See then Section 458.13(2)(d), Florida Statutes (1977).) Tsacrios was proven to be fully qualified by experience and

training to deal with a medical emergency as presented and he handled it in a medically appropriate manner. The medical practice act and the rules of the Board are silent as to the meaning of "responsible supervision and control" as it relates to a physician's trained assistant, and to the legally permissible activities of a physician's trained assistant in an emergency. Eg., to what extent may a physician's trained assistant prescribe or dispense drugs in an emergency and what constitutes such an emergency? The First District Court of Appeal in *Anheuser-Busch, Inc. v. Department of Business Regulation*, 393 So.2d 1177 (Fla. 1st DCA 1981) stated:

This, then, is not a case in which licensee discipline is sought for violation of an explicit statute or rule, or for an act tainted by standards which are commonly understood though only generally expressed by statute. This is rather a case in which licensee discipline is imposed for violation of rather general, morally neutral, and somewhat technical statutory standards which the order makes explicit only retrospectively and only in terms of the discrete facts at hand.

Thus, since there was no clear showing that Tsacrios unlawfully engaged in the practice of medicine on June 7, 1979 and since it was affirmatively shown that Caldwell provided "responsible supervision and control" of Tsacrios as a physician's trained assistant throughout his tenure with Caldwell's office and since Caldwell was not shown to have known that his instructions were exceeded on June 7, 1979, it must be concluded that none of the charges against the Respondent have been proven and the complaint in its totality should be dismissed.

RECOMMENDATION

Having considered the foregoing findings of fact and conclusions of law, the evidence in the record, the candor and demeanor of the witnesses and the pleadings and arguments of counsel, it is therefore,

RECOMMENDED

That the complaint against Jacques R. Caldwell, M.D. be DISMISSED.

DONE and ENTERED this 7th day of May, 1982 in Tallahassee, Florida.

P. MICHAEL RUFF, Hearing Officer
Division of Administrative Hearings
The Oakland Building
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Tallahassee, Florida 32301
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of May, 1982.

ENDNOTE

1/ Webster's New World Dictionary (2nd College Edition 1972) at 1430.

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AGENCY FINAL ORDER

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THE BOARD OF MEDICAL EXAMINERS

DEPARTMENT OF PROFESSIONAL
REGULATION, BOARD OF MEDICAL
EXAMINERS,

Petitioner,

vs.

CASE NO. 81-1015

JACQUES R. CALDWELL, M.D.,
License No. 17631,

Respondent.

_____ /

FINAL ORDER OF
THE BOARD OF MEDICAL EXAMINERS

This matter came for final action by the Board of Medical Examiners pursuant to Section 120.57(1)(b)9., F.S., at a public meeting on August 7, 1982, in Palm Beach, Florida, for review of the recommended order of the hearing officer entered herein, and the exceptions filed by the Petitioner, Department of Professional Regulation; and the exceptions filed by the Respondent, Jacques R. Caldwell, M.D.; Respondent filed its Exceptions timely. The Petitioner, however, filed its Exceptions five (5) days after the period provided for by Rule 28-5.103 and Rule 28-5.404, F.A.C. Respondent filed a Motion to Strike Petitioner's Exceptions and Petitioner filed a Response thereto. Respondent showed no evidence as to how this delay prejudiced him, therefore, Respondent's Motion to Strike Petitioner's Exceptions was denied and Petitioner was allowed to argue its Exceptions to the Board. See Department of Business Regulation, Division of Parimutuel Wagering, State of Florida v. Hyman, Sup. Ct. of Fla., Case No. 60,947, July 15, 1982. A transcript of the proceedings is available, if necessary.

FINDINGS OF FACT

1. As to the Respondent's Exceptions to the findings of fact contained in Paragraph two (2) and three (3) of the Recommendations in the Nature of Written Exceptions to the Hearing Officer's Recommended Order, Section 120.57 (1)(b)9., F.S., expressly provides that:

"The agency may adopt the recommended order as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order, but may not reject or modify the findings of fact

unless the agency first determines from a review of the complete 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 requirement of law" (Emphasis supplied.)

While a record of this proceeding was preserved by a certified court reporter pursuant to Section 120.57(1)(b)6, F.S., Respondent has chosen not to bear the cost of and furnish a written transcript of the hearing for our consideration. See Rule 28-5.306, F.A.C. Thus, we are without the authority to change, modify, or amend the hearing officer's finding of fact. See Booker Creek Preservation, Inc., v. State of Florida, Department of Environmental Regulation, 1st DCA, Case No. AF-80-May 18, 1982.

2. Following a review of the complete record, the Board hereby adopts and incorporates by reference the Findings of Fact of the hearing officer.

CONCLUSIONS OF LAW

1. The Board hereby rejects the hearing officer's conclusion of law contained in Conclusions of Law in Paragraph two (2) on page 25 of the Recommended Order that the Respondent had no notice of the supervision required, because the statute did not define "responsible supervision and control" and the Board had not done so by rule.

2. The Board hereby rejects the hearing officer's conclusion of law contained in Conclusions of Law in Paragraph four (4) on page 28 and 29 of the Recommended Order that Mr. Tsacriss did not engage in the unlawful practice of medicine when he rendered treatment to Mr. Steven Gaffney.

3. The Board hereby accepts the Petitioner's Exceptions to the Conclusions of Law contained in Paragraphs one (1) through four (4) of the Petitioner's Exceptions.

4. The Respondent's exceptions to the Conclusions of Law contained in Paragraph four (4) of the Recommendations in the Nature of Written Exceptions to the Hearing Officer's Recommended Order are found to be without merit and are rejected.

5. The Board does, however, adopt the remainder of the hearing officer's conclusions of law not inconsistent with the above and adopts and incorporates them herein by reference.

6. The Board hereby adopts and incorporates by reference the Recommendation of the hearing officer. Accordingly, based upon a review of the complete record by the Board, the Findings of Fact and the Modified Conclusions of Law, IT IS THEREFORE

ORDERED AND ADJUDGED that the complaint against the license to practice medicine in the State of Florida of Jacques R. Caldwell, M.D., be and hereby is dismissed. This Order shall take effect on the date of filing.

DONE AND ORDERED this 20th day of August, 1982.

BOARD OF MEDICAL EXAMINERS

By: _____
Alberto M. Hernandez, M.D.
Chairman

cc: All Counsel of Record.
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