

FILED

Department of Professional Regulation
AGENCY CLERK

DEPARTMENT OF PROFESSIONAL REGULATION
BOARD OF MEDICINE

CLERK _____

DATE 2-18-91

DEPARTMENT OF PROFESSIONAL
REGULATION,

Petitioner,

-vs-

DONALD LEE RIFE, M.D.,

Respondent.

DPR CASE NUMBER: 0094772
DOAH CASE NUMBER: 89-6816
LICENSE NUMBER: ME 0042228

FINAL ORDER

This cause came before the Board of Medicine (Board) pursuant to Section 120.57(1)(b)10, Florida Statutes, on December 1, 1990, in Kissimmee, Florida, for the purpose of considering the Hearing Officer's Recommended Order, and Respondent's Exceptions to the Recommended Order (copies of which are attached hereto as Exhibits A and B, respectively) in the above-styled cause. Petitioner, Department of Professional Regulation, was represented by Larry G. McPherson, Jr., Attorney at Law. Respondent was not present, but was represented by John D.C. Newton, II, Attorney at Law.

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

RULINGS ON EXCEPTIONS

1. Respondent's Exception 1 is rejected. (It is noted that the Motion To Dismiss the Administrative Complaint was narrowed at the Division of Administrative Hearings hearing (see pages 7-9

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of the Transcript).) The Board finds that this exception is not an exception to a finding of fact, but simply an intent to preserve an issue for appeal. On the merits, the Board agrees with, accepts, and adopts the Hearing Officer's ruling on Respondent's Motion To Dismiss as a correct ruling on the law.

2. Respondent's Exception 2 is granted on the basis that there is no competent substantial evidence or reasonable inference from the evidence to support the Hearing Officer's ruling. A rejection of this Exception would be to accept the premise that photographs found in a person's home were necessarily taken by that person; the Board rejects this premise.

3. The Board rejects Respondent's Exception 3 on the basis that there is competent substantial evidence to support the finding of the Hearing Officer. The evaluation of whether testimony is "self-serving" is part of the evaluation of the credibility of the witness and credibility of witnesses is within the province of the Hearing Officer.

4. Respondent's Exception 4 is rejected on the basis that there is competent substantial evidence to support the finding of fact by the hearing officer. Furthermore, even if the position expressed in Respondent's exception were correct, the point raised is immaterial. See, Rule 21M-18.004(2), Florida Administrative Code.

5. Respondent's Exception 5 is rejected on the basis that there is competent substantial evidence in the record to support the finding of fact of the Hearing Officer. The determination that testimony is "self-serving" is a determination related to

credibility of the witness and credibility of witnesses is within the province of the Hearing Officer. Even unrebutted testimony can be rejected on the basis of lack of credibility of the witness giving the testimony.

6. Respondent's Exception 6 is rejected on the basis that there is competent substantial evidence to support the finding of fact of the Hearing Officer. A judgment with regard to the credibility of the witness is within the province of the Hearing Officer.

7. Respondent's Exception 7 is rejected on the basis that there is competent substantial evidence to support the finding of the Hearing Officer. The determination as to credibility of witnesses is within the province of the Hearing officer.

8. Respondent's Exception 8 is rejected on the basis that there is competent substantial evidence to support the finding of the Hearing Officer. Whether someone is "dangerous" is an issue in this proceeding to the extent that "dangerous" equates with the person's inability to practice medicine with reasonable skill and safety.

9. Respondent's Exception 9 is rejected on the basis that there is competent substantial evidence to support the finding of fact of the Hearing Officer. The Hearing Officer's finding is based on the evidence and reasonable inferences which may be drawn from the evidence.

10. Respondent's Exception 10 is granted insofar as Respondent takes exception to the conclusions about the acceptability of Respondent's personal life on a "traditional

cultural scale of values." The rest of Respondent's Exception number 10 is rejected on the basis that there is competent substantial evidence in the record to support the remaining findings of the Hearing Officer which are placed at issue in this exception.

11. Respondent's Exception 11 is rejected on the basis that there is competent substantial evidence in the record to support the Hearing Officer's findings of fact.

12. Respondent's Exception 12 is rejected on the basis that there is competent substantial evidence in the record to support the Hearing Officer's findings of fact. As found by the First District Court of Appeal in the case of Major vs. Department of Professional Regulation, Board of Medicine, 531 So.2d 411 (Fla. 3rd DCA 1988). The Board is not required to wait until there is proof of actual harm to a patient in making findings based on a physician's ability to practice medicine with reasonable skill and safety.

13. Respondent's Exception 13 is rejected on several bases. One is that while it is true that the burden of proof is not on Respondent, once the Petitioner meets its burden of going forward with the evidence to establish that Respondent is unable to practice due to reasonable skill and safety, then the burden of persuasion properly shifts to Respondent to counter that evidence. Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778 (Fla. 1st DCA 1987). It is a misstatement of the Hearing Officer's finding of fact to state that the Hearing Officer placed the burden of proof on Respondent. Second, the

issue of Respondent's having had sexual relationships with minor males is relevant to this proceeding and is relevant to the issue of whether Respondent is able to practice medicine with reasonable skill and safety to patients, particularly in light of the fact that Respondent practices the specialty of child psychiatry. Third, to the extent this exception takes issue with the Hearing Officer's findings related to credibility of certain witnesses, the Board finds that credibility of witnesses is within the province of the Hearing Officer.

14. Respondent's Exception 14 is rejected on the basis that the Board finds that the Hearing Officer has not improperly placed the burden of proof on Respondent; the Hearing Officer's rulings, which are based on competent substantial evidence, essentially find that Respondent's affirmative defense was not persuasive. (See ruling on Exception 13 above)

15. Respondent's Exception 15 is rejected on the basis that there is competent substantial evidence to support the ruling of the Hearing Officer. This exception essentially contests the Hearing Officer's rulings on the credibility of witnesses and the credibility of witnesses is within the province of the Hearing Officer.

16. Respondent's Exception 15 is rejected on the basis that the Hearing Officer's conclusion of law number 6 is a correct statement of law and is based on competent substantial evidence in the record. The definition of "mental condition" is based on the evidence and reasonable inferences therefrom. ~~It is not~~ non-rule policy, but simply a matter of statutory interpretation.

Although Respondent would focus attention on the alleged conclusion that homosexual relationships outside the practice of medicine amount to a "condition," as the term is used in Section 458.331(1)(s), Florida Statutes (1989), the Board would point out that the Hearing Officer's ruling and the ruling of this Board focus on the fact that Respondent's sexual relationships are with minors, notably minors with whom he has a custodial relationship. The fact that the relationship with male minors is relevant insofar as Respondent provides psychiatric care to male minors.

17. The Board rejects Respondent's exception to the proposed recommended penalty on the basis that the reprimand is authorized by the Board's rule relating to disciplinary guidelines and the restrictions are relevant to the violation found and are necessary to protect the public.

FINDINGS OF FACT

1. With the exception of the findings of fact rejected by this Board's rulings on Respondent's Exceptions number 2 and ten, the findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein.

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

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.

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3. There is competent substantial evidence to support the conclusions of law.

PENALTY

Upon a complete review of the record in this case, the Board determines that the penalty recommended by the Hearing Officer be ACCEPTION and ADOPTED. WHEREFORE,

IT IS HEREBY ORDERED AND ADJUDGED that

1. Respondent's license to practice medicine is REPRIMANDED.

2. Respondent's license to practice medicine in Florida is restricted such that Respondent shall not provide direct patient care to male patients eighteen years old and younger for a minimum period of two years and until such time as Respondent is able to demonstrate that he is able to practice medicine with reasonable skill and safety; furthermore, Respondent must successfully complete board approved outpatient psychiatric treatment during the period of restriction.


3. Following the completion of the period of restriction, Respondent's license to practice medicine in the State of Florida is placed on PROBATION for a period of 2 years, subject to terms and conditions imposed at the time Respondent is placed on probation.

This order takes effect upon filing with the Clerk of the Department of Professional Regulation.

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DONE AND ORDERED this 12th day of February, 1991.

BOARD OF MEDICINE


ZACHARIAH P. ZACHARIAH, M.D.
CHAIRMAN

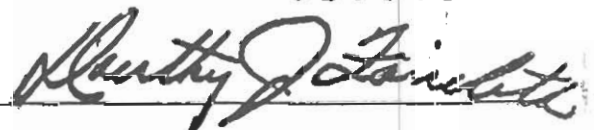
NOTICE OF RIGHT TO JUDICIAL REVIEW

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 PROFESSIONAL REGULATION 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 Order has been provided by certified mail to Donald Lee Rife, M.D., 27 Biscayne Heights, Colchester, Vermont 05446; John D.C. Newton, II, Attorney at Law, Post Office Box 11307, Tallahassee, Florida 32302; and Leonard A. Carson, Attorney at Law, Carson & Linn, P.A., Mahan Station, 1711-D Mahan Drive, Tallahassee, Florida 32308; by U.S. Mail to Ella Jane P. Davis, Hearing Officer, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-1550; and by interoffice delivery to Larry G. McPherson, Attorney at Law, Department of Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-0792 at or before 5:00 P.M., this 18 day of February, 1991

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL)
REGULATION, BOARD OF MEDICINE,)
)
Petitioner,)'
)
vs.) CASE NO. 89-6816
)
DONALD LEE RIFE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Upon due notice, this cause came on for formal hearing on May 29 and 30, 1990 in Tallahassee, Florida, before Ella Jane P. Davis, a duly assigned Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

FOR PETITIONER: Larry G. McPherson, Jr., Esquire
Department of Professional
Regulation
Suite 60
1940 North Monroe Street
Tallahassee, Florida 32399-0792

FOR RESPONDENT: Leonard A. Carson, Esquire
John D.C. Newton, II, Esquire
Carson & Linn, P.A.
Mahan Station
1711-D Mahan Drive
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

The administrative complaint charges Respondent with a violation of Section 458.331(1)(s) F.S. 1989 [being unable to practice medicine with reasonable skill and safety to patients by reason of illness or use of alcohol, drugs, narcotics, chemicals or any other type of material or as a result of any mental or physical condition]. However, by pretrial stipulation, the

charges were refined to address only Respondent's alleged inability to practice medicine with reasonable skill and safety to patients by reason of illness or mental or physical condition.

PRELIMINARY STATEMENT

At the commencement of formal hearing, Respondent was permitted to argue his motion to dismiss the administrative complaint, which motion attacked the probable cause proceedings in this cause and which motion was filed less than five days prior to formal hearing. The motion was ultimately denied.

(TR-6-15)

Petitioner presented the oral testimony of E. Michael Gutman, M.D., and Donna E. Suereth. Petitioner offered twenty-seven exhibits (P-18 is in two parts, A and B). Exhibit P-28, a police report, was withdrawn (TR-219). All other exhibits except Exhibits P-4 and P-5 were admitted in evidence. Petitioner's requests for official recognition were granted.

Respondent presented the oral testimony of Phillip Cushman, M.D., and Walter Afield, M.D. The deposition testimony of Robert Simpson, Amelia Stevens M.D., John P. Kempf, M.D., and Sherry Cope (excerpt only) was admitted in evidence. Respondent offered eleven exhibits inclusive of the depositions, and all exhibits except Exhibit R-1, a police report, were admitted in evidence.

All exhibits marked for identification were retained by the Hearing Officer.

At the close of the Petitioner's case-in-chief, the Respondent moved to dismiss the pending charge as unproved. This motion was also considered and denied. (TR-268-274)

By stipulation of the parties, provisions were made to protect the identities of persons whose names might come up in the course of formal hearing who had been minors while involved with Respondent.

A transcript of proceedings was filed in due course, and pursuant to an order upon unopposed motion, the date for filing proposed recommended orders was extended to July 13, 1990. The parties' stipulation that Respondent's Corrected Proposed Recommended Order filed July 20, 1990 be substituted for his timely-filed but typographically flawed proposal is here acknowledged and ratified. The respective proposed findings of fact of the parties have been ruled upon in the Appendix to this Recommended Order, pursuant to Section 120.59(2) F.S.

FINDINGS OF FACT

1. At all times material, Respondent was licensed as a medical physician in the state of Florida, having been issued license number ME 0042228.

2. Respondent has been a psychiatrist for twenty-eight years. He has been certified by the American Board of Medical Examiners since 1961. He has been certified in general psychiatry since 1969 and certified in the specialty of child psychiatry since 1970 by the American Board of Psychiatry and Neurology.

3. The practice of child psychiatry is a specialty in the field of psychiatric medicine which concerns the treatment of children of both genders between the ages of birth and eighteen years.

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4. Until 1987, the Respondent's medical career was successful and free from either public, criminal, or professional censure. However, while serving as an assistant professor in psychiatry at the University of Florida's School of Medicine and as chief of student mental health services for the University, he was reported to the Gainesville, Florida police by a neighbor who feared he had sexually assaulted her seven-year-old son.

5. The mother presented the police with a photograph of her son, L.W., bare-chested but wearing full-length trousers. In the photograph, L.W. is holding a stuffed toy frog of the type commonly sold as gag gifts from gimmick stores. The frog has been fashioned with human male genitalia, and in the photograph, L.W. appears to be deliberately placing the toy's perpetually erect penis in his mouth. The mother discovered the photograph in Respondent's home when, according to an agreement between herself and the Respondent, she entered to check his mail while Respondent was out of town on a business trip. For several months prior, the Respondent had enjoyed a close friendship with the neighbors, and despite Respondent's acknowledgment to the mother that he was a homosexual, she had entertained no concern over L.W.'s close friendship with Respondent nor did she oppose L.W.'s visiting alone with Respondent in Respondent's home. L.W. never, at any time, was a patient of Respondent.

6. Until very recently, Respondent kept the fact that he is a homosexual as confidential as possible.

7. The Gainesville police obtained a search warrant for Respondent's home and conducted a search of his house and

premises. In the course of this authorized search, they found and seized three photograph albums stored in open view on a bookshelf in the master bedroom. They also found and seized loose photographs, correspondence, and the stuffed frog.

8. Although interrogated and criminally charged, Respondent was apparently never tried for a crime involving his activities with L.W. Respondent did not testify at formal hearing and neither did L.W. or his mother. The totality of all the evidence presented at formal hearing, including that type of hearsay evidence admitted pursuant to Section 120.58(1) F.S. and which the undersigned is also able to assess as both credible and probative of any material fact at issue, does not support a finding of any criminal sexual assault on L.W. by Respondent.

9. Nonetheless, it is found that Respondent and L.W. indulged in games in Respondent's jacuzzi. Respondent was always wearing swim trunks during each of these games with L.W. One game consisted of Respondent holding L.W., at times while the boy was nude and at times while he was wearing swim trunks, above Respondent's head and, while facing Respondent, sliding the boy down his body, using the adult's body as a kind of "human slide" for the boy's body. At times, Respondent and L.W. took turns pushing on each other's bathing suits, including the crotch areas, so as to force the air out of the swim trunks.

10. Dr. Cushman, who was not qualified in child psychiatry, characterized this activity as the result of Respondent's willingness to play, engendered by his training in child psychiatry (TR-297-298). Both Dr. Cushman and Dr. Afield,

who was accepted as qualified in both adult and child psychiatry, characterized the hot tub games as mere "horseplay" (TR-282, 289, 371-372). Dr. Gutman, also qualified in both types of psychiatry, on the one hand characterized these games as "horseplay" (TR-232-233) but also considered them to have "strong pedophilic tendencies," to be "sexually provocative" (TR-211-213), and to exhibit Respondent's poor judgment in dealing with one whom Dr. Gutman characterized as a "temporary social ward" (TR-258). All three psychiatrists concurred that the Respondent's games with L.W. were poor judgment, either induced or contributed to by Respondent's alcohol consumption. [See Finding of Fact 23 to the effect that alcohol is not at issue in these proceedings.]

11. Respondent snapped the photograph of L.W. described in Finding of Fact 5 and most of the photographs contained in the three photograph albums described in Finding of Fact 7 and hereafter. The undersigned also infers that Respondent snapped Petitioner's Exhibit(s) 18-A and -B, photographs of an adult man wearing a dress, a woman's hat, and platform shoes. The undersigned accepts as more credible the testimony of Drs. Cushman and Afield that this loose photograph is not a picture of Respondent "in drag," over the testimony of Donna Suereth that it is, because the undersigned had the opportunity to reach the same conclusion that it is not a picture of Respondent during the course of the formal hearing by comparing the Respondent, who was present, with the photograph. In making this finding of fact, the undersigned has not failed to consider Respondent's recent illness and loss of weight.

12. Of the three photograph albums seized from Respondent's home, one was labelled "Joe," one was labelled "Cayman, Jamaica, Mardi Gras '83," and one was labelled "R.D. 70-76." [By stipulation, initials have been substituted here for the full name spelled out on the album.]

13. The first album, labelled "Joe," is divided into two parts. The first part is very much like any typical family photograph album except that it concentrates on a single male child. The second part is limited to posed nude photographs of a young male with his genitalia exposed. The second album, labelled "Cayman, Jamaica, Mardi Gras '83," contains photographs of the same young man on a cruise in April 1983 with Respondent and is unremarkable in any way. "Joe" is Respondent's adopted nephew with whom he maintained an amorous homosexual relationship for several years beginning when Joe was twelve years old, but post-pubescent. Joe has never been a patient of Respondent, but was occasionally entrusted to Respondent's care, custody, and control by the boy's parents when they were not aware of the pederastic nature of Respondent's relationship with their son.

14. According to the testimony of Drs. Cushman and Afield, there is no evidence to suggest that Respondent is impulsive or compulsive in either the medical or sexual sense (TR-297,388), but the tone and extent of the correspondence found in Respondent's home suggests a recent and continuing interest in contact with and traveling with Joe, even in 1986, after Joe had ended their affair.

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15. The third album, labelled "R.D. 70-76," is generally unremarkable except for one posed shot of a young man in his undershorts and a camouflage hat which is clearly intended to be simply silly. The album also shows the same young man graduating from Champlain High School. Respondent was psychiatric consultant to this Vermont high school from 1970 to 1983, but the evidence falls short of establishing that R.D., the focal subject of the third album, was a patient of Respondent. Rather, it has been proven that R.D. was post-pubescent at fourteen or fifteen when he entered into an amorous homosexual relationship with Respondent and that their close relationship otherwise began when R.D. was somewhat younger and R.D.'s mother placed R.D. in Respondent's care, custody, and control and allowed him to live with Respondent while she lived temporarily in Canada. There is no evidence to suggest that this parent was aware of the pederastic nature of Respondent's relationship with her son, either.

16. Respondent has also admitted to an early homosexual relationship with a post-pubescent male named "Nelson" when that person was under eighteen. Nelson also has never been a patient of Respondent.

17. There is no clear and convincing evidence in this record to establish that the Respondent has ever been amorously involved with a patient.

18. Of the three expert psychiatrists who evaluated Respondent and testified orally herein, ~~two~~ ^{two} are heterosexual and one is admittedly homosexual in his personal sexual orientation

and life-style. Since all three psychiatric physicians' primary diagnoses as to mental illness were rendered within reasonable medical certainty and are grossly similar, their respective personal sexual bents are not significant in assessing their credibility with regard to the primary diagnosis that Respondent suffers from no mental illness. To the extent it is significant, individual sexual orientation and credibility of the respective experts is discussed infra. In reaching their unanimous primary diagnosis, all three psychiatrists utilized the Diagnostic and Statistical Manual of Mental Disorders III [Revised] (DSM III-R). The DSM III-R is a universally recognized standard of psychiatric assessment, a common psychiatric diagnostic tool. None of the three psychiatrists found Respondent to be suffering from a mental "disease," "illness," or "disorder," as defined therein. "Homosexuality" per se is not a mental disease, illness, or disorder according to that text. The American Psychiatric Association has cast a vote to similar effect. "Pedophilia" is such a mental disease, according to the DSM III-R, and each of the three testifying physicians has accepted Respondent's self-serving representations that he is not attracted to pre-pubescent human males (which attraction would categorize him as a "pedophiliac"), but rather, each psychiatrist has accepted the premise that Respondent is attracted only to post-pubescent males, which limited attraction categorizes him as a "pederast." Pederasty is not considered a mental illness diagnosis.

19. Nevertheless, Dr. Gutman, who was tendered and accepted as an expert medical physician qualified in both

psychiatry and child psychiatry, opined that Respondent's sexual involvement with, and preferential sexual inclination toward, post-pubescent adolescent boys and the absence of good judgment inherent in repeatedly "acting out" his preference with minors represents an impediment, impairment, or disability to Respondent's continued practice of child psychiatry (TR-211-212, 215-216, 227-228, 238-239). Although Dr. Gutman did not use the magic word, "condition," he repeatedly emphasized that Respondent's "sickness" (TR-259), "deviant sexual interest involving minor children" (TR-260-262), "predilection" (TR-198-199, 228, 236, 240, 258), "inclination" to boys and pornography involving boys (TR-199-200, 212, 229, 252), "preference" (TR-212-214), "yen" (TR-254), "special flaw area" or "special area of difficulty" (TR-216) impairs Respondent's ability to practice child psychiatry with reasonable skill and safety to his patients, and this opinion was rendered in terms of "reasonable medical certainty" (TR-211, 238-239). Admittedly, Dr. Gutman only reached this opinion after rendering two prior opinions that despite Respondent's pederastic preference or predilection, Respondent remained fit to practice psychiatry with all ages, provided alcohol were not a factor. However, the undersigned is satisfied with Dr. Gutman's reasons given on the record for why he changed his opinion. Dr. Cushman, tendered and accepted only in psychiatry, and Dr. Afield, qualified and accepted in both psychiatry and child psychiatry, declined to describe Respondent as having a mental "condition" at all. (TR-125, 26, 376) 00-1050

However, Dr. Cushman, who has treated Respondent [see Finding of

Fact 29] went so far as to describe Respondent's pederastic bent as "some aspect of what is most erotic to that person" and as "one characteristic of him" (TR-324-326) and no expert had difficulty recognizing this pederastic aspect or interest of Respondent's as inherent in his personality. Dr. Cushman further described Respondent's interest in post-pubescent minors as "not common" (TR-287).

20. Drs. Cushman and Afield, who accepted Respondent's representations at face value, described Respondent's three acknowledged amorous homosexual affairs with minors over a long period of time (thirty years) as being relatively few (TR-285, 387-388). Both Drs. Afield and Dr. Cushman further accepted at face value Respondent's own self-serving representations that he has never been amorously involved with a patient, has never acted as a predator but has always been propositioned by younger men, and has abstained from all sexual activity since two years before these disciplinary charges arose. Dr. Gutman likewise accepted most of Respondent's representations at face value but was less inclined to view Respondent as innocent in his pederastic affairs or as adequately self-governing in recent years. Based on past performance, Dr. Gutman mistrusted Respondent's ability to control himself or limit his sexual appetites through newly acquired good judgment. This approach renders Dr. Gutman's opinion as more credible than that of the other experts. [See Findings of Fact 28-31]

21. Dr. Cushman and Dr. Afield ⁰⁰¹⁰⁵¹ opined that within reasonable medical certainty Respondent can practice child

psychiatry with reasonable skill and safety to patients. In rendering their opinions, each considered Respondent's past flawed personal life but emphasized his unsullied professional performance, on which performance they did do some further investigation with persons who did not necessarily know of Respondent's relationships with minors. Dr. Cushman stated that he believes that there is no evidence that sexual preference of a child can be altered after the age of three and emphasized that as Respondent becomes older, Respondent's own interest in sex will diminish. He further suggested that as Respondent becomes less attractive to younger males, he will have less opportunity for pederastic liaisons and that a sexual relationship between an adult male and an adolescent is not harmful to the post-pubescent adolescent male unless the adult male is exploitive or the adolescent male does not give consent. [See Findings of Fact 24 and 31]. Due to the unsupported and uncorroborated nature of Dr. Cushman's foregoing pronouncements as to non-altering of sexual preference and absence of harm to the adolescent in a pederastic relationship, the speculative nature of such pronouncements, the fact that Dr. Cushman does not practice child psychiatry himself, and his activism and open advocacy on behalf of homosexual psychiatrists and patients, his assessment that Respondent is now fit to practice among the adolescent male population is biased and not persuasive in and of itself. This is particularly so in light of Dr. Afield, who is qualified in child psychiatry, opining that the three areas of greatest concentration in adolescent child psychiatry are sexual

relationships, peer relationships, and parental and career issues (TR-378). Dr. Afield concurred in Dr. Cushman's opinion that Respondent presents no predatory sexual danger to male patients of any age. Dr. Afield also was of the opinion that Respondent's methods of treatment do not present any more danger to any age or gender of patient because of Respondent's attraction to post-pubescent males than would a strongly libidinous heterosexual male psychiatrist present a danger to young female patients. Dr. Afield further opined that Respondent is no more dangerous to any patient because of his sexual orientation than a psychiatrist with strong political opinions on controversial topics or one who holds deep religious convictions different from those held by some patients might present in his methods of treating those patients. Dr. Afield's and Dr. Cushman's reasoning behind their opinions was based almost exclusively upon their absolute reliance on the effectiveness of the training all psychiatrists receive requiring them to separate their private opinions and life-style from their professional practice, assessments, and treatment of patients. Neither Dr. Cushman nor Dr. Afield foresaw any likelihood that Respondent's poor judgment with L.W. or his pederastic personal life-style would transfer to his child psychiatry practice because each expected that the extensive training psychiatrists undergo to prevent transference/counter-transference problems may be presumed to prevent such problems in Respondent's practice. This shared view of Drs. Cushman and Afield that Respondent's training is a sufficient safeguard is discounted and held less credible than Dr. Gutman's contrary view for the reasons set out infra.

22. Petitioner's psychiatry and child psychiatry expert, Dr. Gutman, expressed the belief within a reasonable degree of medical certainty that Respondent does present a danger to his child psychiatry patients (TR-211, 215, 238-242, 258). Dr. Gutman reasoned that because Respondent has previously exhibited poor judgment in dealing with adolescent males, both pre- and post-pubescent, he may do so in the future (TR-211-212, 215-216, 228-229, 232, 259). He advocated as minimal protection for Respondent's future post-pubescent male patients that Respondent be required to make full disclosure to all adolescent patients (both male and female) and their families of the nature of his personal sexual predilection and that Respondent be permitted to practice child psychiatry only after receiving informed parental consent (TR-213-215). He emphasized the opportunities for risk occasioned by the special climate of privacy and trust inherent in the practice of child psychiatry with regard to both genders (TR-212-216) and that it is not reasonable from a medical standpoint to allow Respondent to police himself (TR-215). However, Dr. Gutman had no explanation for his concern for Respondent's future treatment of adolescent females (TR-252, 259-262) and no evidence to initiate such a concern as to actual treatment of females [but see Finding of Fact 31] exists in this record. It was Dr. Gutman's assessment that a person need not have an illness, disorder, or condition catalogued by the DSM III-R to be dangerous (TR-238-239), and he further opined that it was because Respondent could be predicted in the future to allow his preferential sexual inclinations

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toward post-pubescent male minors to outweigh the demands of morality and professional activities (TR-212), that he represents a patient "security risk" (TR-212-213). Rendered in terms of reasonable medical certainty (TR-211, 215, 238-239), and supported by evidence of Respondent's previous sexual liaisons with minors, this opinion of Dr. Gutman's is reasonable and not merely speculative.

23. All three experts are satisfied that alcohol abuse is no longer a factor in Respondent's life, and alcohol abuse has been specifically excluded from consideration in this case due to the parties' stipulation. It is noted, however, that no expert has suggested that Respondent's involvement with Joe, R.D., or Nelson was solely inspired by alcohol.

24. The record is clear that Respondent's unwavering preference or attraction is to post-pubescent adolescent males, that he has admittedly "acted out" with such persons in three long term, illicit, clandestine relationships, and that the practice of child psychiatry brings him into regular contact in authoritative doctor-patient relationships with those types of persons to whom he has been consistently attracted. The weight of the three expert psychiatric opinions is that sexual relations between an adult male and any younger male in this age group is abnormal, uncommon, inappropriate, and illegal, and is at least potentially harmful to the post-pubescent adolescent male, Dr. Cushman's qualifiers about adult exploitation and the minor's consent notwithstanding. [See Finding of Fact 21]

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25. Respondent's attraction has endured over thirty years. Whether he may be termed a "predator" or not may depend upon moral judgments not appropriately the subject of this proceeding, but the evidence herein shows that he has a history of placing himself where "prey" or at least young men subject to recruitment are easily accessible. This is clearly poor judgment and self-indulgent behavior. Respondent's choices of professional practice locations and affiliations have included pediatric clinics, high schools, and youth correctional programs in Concord, Massachusetts; Burlington, Vermont; and Virginia Beach, Virginia. Throughout his career, Respondent has consistently shown an interest in forensic child psychiatry. He is currently board eligible in forensic psychiatry. As recently as 1986-1987, while serving under Dr. Kempf as an assistant professor of psychiatry at the University of Florida School of Medicine, Respondent initiated a program involving the University Hospital's residents and fellows with youngsters in the juvenile justice system of Alachua County, Florida, thereby placing himself in a professional situation of trust and authority with potentially vulnerable male minors at approximately the same time as he was socializing inappropriately with L.W.

26. On at least two occasions, Respondent has either seduced or allowed himself to be seduced by adolescent males to whom he had a legal obligation to act in loco parentis (Joe, R.D.) as well as to whom he owed a traditional, if not moral, duty to protect and guide. Assuming, ~~around~~ ²⁰¹⁰⁵⁶ that Respondent has been totally truthful that in both of these relationships he

was the one seduced instead of the seducer, Respondent's amorous relationships with Joe and R.D. still would each have constituted child sexual abuse pursuant to Chapter 415 F.S. had they occurred in Florida subsequent to passage of that legislation, regardless of the adolescent's alleged "consent." Each of these relationships would also have subjected Respondent to criminal prosecution, provided it could be established the acts occurred in Florida and the statute of limitations had not run, neither of which factors was proven herein. [See, Sections 794.041, and 800.04 F.S.] That each of these pederastic relationships between Respondent and custodial adolescents stretched over several years makes them more, rather than less, reprehensible on a traditional cultural scale of values. The absence of explicit evidence in the record to show exactly how long ago these events occurred and the probability that they occurred outside of Florida in such a clandestine manner as to avoid criminal prosecution does not alter the nature of these illicit liaisons.

27. Photographs and correspondence (be it authored by Respondent or not, which as regards some items, was never determined) found in Respondent's home in 1987 indicate Respondent's continuing interest in the specific males with whom he had prior romances while they were adolescents, continuing interest in adolescents in the criminal justice system, and continuing interest in other adolescents subject to foster care. All the members of the foregoing categories are persons who are vulnerable to adults in authoritarian positions such as a psychiatrist. The photographs and correspondence also indicate

Respondent's continuing and recent interest in adolescent male nudity. [See Findings of Fact 7 and 11-15]

28. Although puberty occurs in human males normally between the ages of ten and fifteen or ten and seventeen, on the average puberty occurs in human males at age thirteen. Since the practice of the recognized specialty of child psychiatry spans the age range of birth to eighteen years in both males and females, that leaves a very high percentage of the male child psychiatry patient population as potential targets of Respondent's continuing sexual interest and criminal sexual predilection and as potential recruits for his homosexual life-style. The risk Respondent presents to this patient population is substantial since child psychiatry requires privacy and trust in the doctor-patient relationship. The fact that no patient involvement was revealed by Respondent's self-serving statements to the three evaluating psychiatrists is not a very reliable predictor of Respondent's future safety to practice child psychiatry. Although a treating physician may be required to accept a patient's representations at face value in order to render treatment, the undersigned is not. Also, Dr. Gutman and Dr. Afield saw Respondent for purposes of evaluation only. Dr. Gutman's opinion that self-policing is not medically reasonable or responsible is accepted.

29. It has been suggested that Respondent began to alter his life-style two years before the L.W. situation arose, upon the advice of a psychiatric colleague, but the dated documentary evidence strongly suggests otherwise. Although

Respondent had limited psychiatric treatment for "anxiety" (an adjustment disorder) by Dr. Cushman immediately after his home was searched and he was charged with regard to L.W. in 1987, there is no clear evidence that he has sought true therapy with regard to his deviant sexual interest/predilection toward young men in the intervening three years. His self control engendered by his professional training/judgment is not satisfactory insurance that he will not "act out" with young men again. The inferences in Dr. Cushman's and Dr. Afield's evaluations, which are more recent than that of Dr. Gutman, are not persuasive that Respondent's life-style or predilection has altered in the years intervening since Dr. Gutman's 1988 evaluation, since they have accepted all of Respondent's representations at face value or have based their opinions in part on materials received from persons not fully informed of Respondent's acts with minors.

30. In light of Dr. Gutman's more credible and common sense concerns, the undersigned rejects as not credible the testimony of Dr. Afield and Dr. Cushman that Respondent's sexual predilection will not influence his future psychiatric evaluations, treatment, and opinions in clinical practice, the juvenile justice system, child forensic custody evaluations, and a host of other situations arising in the practice of child psychiatry, and that his pederastic bent, through mere self control engendered by professional training/judgment, would not influence, to some degree at least, Respondent's interaction with those post-pubescent male minors who become his psychiatric patients and who are, according to Dr. Afield, usually dealing with sexual and peer relationships.

31. Respondent's self control engendered by professional training/judgment was not effective in preventing his criminal (but unprosecuted) involvement with minors Joe and R.D. in the past. Good judgment does not seem to have played a significant role in Respondent's involvement with L.W., either. Therefore, self control and good judgment, professional or otherwise, cannot be relied upon to control Respondent's behavior with non-patients in the future. The concepts that because Respondent is not using alcohol and is gradually becoming less desirable as he ages also do not provide any reasonable assurance that his psychiatric treatment of patients of either sex will not be disrupted and the doctor-patient relationship will not be eroded by criminal arrests and prosecution with regard to non-patients in the future. Considering that there has been no clear showing that alcohol significantly affected Respondent's relationship with Joe or R.D. and that attractiveness is purely a subjective perception in the eye of the beholder, Respondent's age and alcoholic abstinence do not insure a reasonably safe child psychiatric practice.

32. There is no evidence in this record to suggest that Respondent presents any danger to adolescent males or anyone else in a strictly didactic (lecture) psychiatric teaching position, an element of Respondent's licensed professional skill which was rated highly by Dr. John P. Kempf, M.D., his supervisor at the University of Florida Hospital. [Deposition of Dr. Kempf (R 10)]

33. There is no clear and convincing evidence in this record to suggest that the Respondent presents any predatory danger to females of any age.

34. Respondent has continued to successfully function in the field of child and adult psychiatry with persons of both genders and all ages for more than two years since these charges arose. [Depositions of Robert Simpson (R-8) and Amelia Stevens M.D. (R-9)] There is no evidence from any source that Respondent has performed less than exemplary professional work, despite close administrative oversight, team consultation, and quality assurance reviews during that period of time, but it is also clear that during this period of time Respondent's colleagues were not fully aware of the number and intensity of his relationships with minors.

35. All three psychiatric experts concur that Respondent is currently able and fit to practice adult psychiatry.

CONCLUSIONS OF LAW

1. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this cause. See, Section 120.57(1) F.S.

2. In license disciplinary proceedings, the burden of proof to establish the charges by clear and convincing evidence is upon the agency. See, Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

3. Respondent is charged pursuant to the following language of Section 458.331(1)(s) F.S.:

(1) The following acts shall constitute grounds for which . . . disciplinary actions . . . may be taken:

(s) Being unable to practice medicine with reasonable skill and safety to

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patients by reason of illness or . . . as a result of any mental or physical condition. [Emphasis supplied]

4. Accordingly, in order to prevail, Petitioner must show by clear and convincing evidence that Respondent is unable to practice medicine with reasonable skill and safety to patients by reason of illness or by reason of mental condition.

5. All the expert psychiatric testimony herein holds that Respondent suffers from no illness which diminishes his professional skill or the safety of his patients.

6. No case law exists to define "mental condition" pursuant to Section 458.331(1)(s), and the Department of Professional Regulation has put on no expert testimony by which the undersigned can assess the Board of Medicine's interpretation of that statutory term. No expert medical testimony herein has interpreted that term in any standard medical sense, either. However, Dr. Gutman's expert testimony is sufficient to show that a "condition," be it referred to as a "sickness," "deviant sexual interest involving minor children," "predilection," "inclination," "preference," "yen" "special flaw area," or "special area of difficulty," diminishes Respondent's professional skill and his patients' safety if those patients happen to be post-pubescent male minors. That all three experts can unanimously recognize and describe this component of Petitioner's erotic makeup, that their descriptions match the definition of the practice known as "pederasty," and that Dr. Cushman can call this component an "aspect" or "characteristic" of Respondent reinforces the conclusion that

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this component is not an act or incident of behavior by Respondent but is, rather, a condition of Respondent. Falling short of mental illness, this mind set of Respondent's is still a "mental condition," which term, in the context of the statute, seems intended by its drafters to be a broader term than "illness." Also, in light of the clear and convincing evidence of Respondent's criminal but unprosecuted conduct in his role of caregiver to the post-pubescent minors Joe and R.D. and his lack of judgment in exercising this authoritative role with regard to them and with regard to the pre-pubescent L. W., which several incidents of lack of judgment or warped judgment relate directly to Respondent's ability to practice child psychiatry upon male minors with good judgment and with reasonable skill and safety, it is concluded that Respondent currently should not be practicing child psychiatry with post-pubescent male minors. See, Greenwald v. Department of Professional Regulation, 501 So. 2d 740 (Fla. 3d DCA 1987), in essence affirming the Recommended Order in DOAH Case Nos. 85-1989 and 89-1990, Recommended Order entered April 10, 1986), and Rush v. Department of Professional Regulation, 448 So. 2d 26 (Fla. 1st DCA 1984).

7. Petitioner has asserted that if the elements of Section 458.331(1)(s) F.S. are deemed proved, Respondent should be penalized by reprimand and restriction of his license to practice medicine from direct patient care of patients eighteen years old and younger for a minimum of two years and until such time as he can demonstrate that he can practice medicine with skill and safety, with the further requirement ~~that~~ he

successfully complete board-approved outpatient psychiatric treatment during the period of restriction and that following the completion of restriction he be placed on probation for two years, the terms of the probation to be determined by the Board of Medicine.

8. Upon the foregoing findings of fact and conclusions of law, the elements of Section 458.331(1)(s) F.S. are deemed proved, and the penalty requested by the Department of Professional Regulation is found to be within the parameters of applicable Rule 21M-20.001 F.A.C. However, in light of the absence of clear and convincing evidence of any direct predatory risk presented by Respondent to females, a modification of the requested penalty which reflects that situation is appropriate.

RECOMMENDATION

Upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Medicine enter a Final Order reprimanding Respondent, restricting his license to practice medicine from direct patient care of male patients eighteen years old and younger for a minimum of two years and until such time as he can demonstrate that he can practice medicine with reasonable skill and safety, with the further requirement that he successfully complete board approved outpatient psychiatric treatment during the period of restriction and that following the completion of restriction, he be placed on

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probation for two years, the terms of the probation to be determined by the Board of Medicine.

DONE and ENTERED this 7th day of November, 1990, at Tallahassee, Florida.

Ella Jane P. Davis

ELLA JANE P. DAVIS, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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(904) 488-9675

Filed with the Clerk of the Division
of Administrative Hearings this 7th
day of November, 1990.

Copies furnished to:

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Case No. 89-6816

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APPENDIX TO RECOMMENDED ORDER
CASE NO. 89-6816

The following constitute specific rulings pursuant to Section 120.59(2) F.S. upon the parties' respective proposed findings of fact (PFOF):

Petitioner's PFOF:

- 1-4 Accepted.
5 Accepted as modified to reflect Dr. Kempf's description by deposition which is deemed most probative.
6 Accepted.
7-9 Accepted as modified to more accurately reflect the record as a whole, "posing" being in the eye of the beholder and not proved by clear and convincing evidence, and to show L.W.'s out of court statements being used only for supplementation of other direct evidence, mostly Respondent's admissions, per s. 120.58 F.S.
10-30 Accepted as modified to more accurately reflect the record as a whole and exclude subordinate, unnecessary, or cumulative factual details, argumentation, and conclusions of law. The substance is discussed in the RO.
31-32, 35, 36, 38 Rejected as mere argumentation upon unreconciled testimony and, in part, as immaterial. Substance covered in the RO.
33-34, 37 Rejected as mere legal argument and immaterial. The competency and credibility of each expert is covered at length within the RO. Specifically, Dr. Afield's arm's-length acquaintanceship with the Respondent alone and by itself is no impediment to his credibility. Dr. Cushman's credibility is weighed in the RO.
39 Accepted in substance, but rejected as a Conclusion of Law. See COLs of RO.

Respondent's Corrected PFOF:

- 1-2 Except as subordinate, unnecessary, or cumulative, accepted.
3, 5-6 Subordinate and not dispositive of any material issue at bar.
4 Accepted.
7 Up to the last two sentences, subordinate and not dispositive of any material issue at bar. The last two sentences are accepted.

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- 8 Accepted, except as to competency for the reasons stated in the RO.
- 9-10 Accepted.
- 11, 13-14 Accepted as to twenty-eight years of practice. The remainder is rejected as not dispositive of any material issue at bar.
- 12 Rejected as not supported by the credible record as a whole.
- 15-16, 18 Immaterial.
- 17 Subordinate.
- 19-20 Accepted in part. The remainder is rejected as subordinate.
- 21 Accepted in part and rejected in part upon credibility grounds and for the reasons set out in the RO
- 22 Cumulative.
- 23-33 Except as subordinate, unnecessary, cumulative, or not supported by the greater weight of the credible evidence, accepted. What is rejected is rejected for the reasons set out in the RO, mostly upon credibility grounds.
- 34-36 Except as subordinate, unnecessary, cumulative, or argumentation, accepted.
- 37 Sentence one is rejected as contrary to the credible record as a whole. Sentence two is rejected as subordinate and unnecessary, but substance is discussed in RO.
- 38-39 Rejected as not supported by the credible record.
- 40 Sentence one is accepted as the consensus of the three psychiatrists. The remainder is rejected as mere recitation of testimony out of context, not representative of the record as a whole, and/or mere legal argument.
- 41-45, 47 Except for mere argumentation and those matters which are subordinate, unnecessary, or cumulative, accepted. Although accepted, some proposals have been significantly modified to more accurately reflect the record as a whole and eliminate argumentation and characterizations of what is and is not pornographic.
- 46 Accepted as modified to more accurately reflect the record as a whole and to exclude argumentation.
- 48-49, 53, and 55 Subordinate, unnecessary, or cumulative and not dispositive of any material issue at bar.
- 50-51 Accepted in part and rejected in part upon the evidence and for the reasons set forth in the RO.
- 52 Accepted as modified to more accurately reflect the record as a whole.
- 54 Rejected as not proven. The age in the record is 13.
- 56-58 Accepted in substance but rejected for use because cumulative and argumentation.
- 59 Substance discussed within the RO. Rejected for use as not a credible admission but as a self-serving statement of Respondent.

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60-61 Rejected partly as not proven or not credible and partly as not dispositive of the issue at bar.

62-63, 65-68, and 71-73 The RO discusses the substance of these proposals but they are rejected as mere recitation of unreconciled or nonpersuasive expert testimony or testimony taken out of context, as cumulative to other proposals and facts as found, and/or as mere argumentation upon incredible self-serving statements.

64 Accepted.

69 Cumulative.

70 Cumulative and not dispositive of any material fact at bar. Rejected as a conclusion of law.

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STATE OF FLORIDA
DEPARTMENT OF PROFESSIONAL REGULATION
BOARD OF MEDICINE

DEPARTMENT OF PROFESSIONAL
REGULATION,

Petitioner,

DPR CASE NO. 0094772

vs.

DONALD LEE RIFE, M.D.

Respondent.

ADMINISTRATIVE COMPLAINT

COMES NOW the Petitioner, Department of Professional Regulation, hereinafter referred to as "Petitioner", and files this Administrative Complaint before the Board of Medicine against Donald Lee Rife, M.D., hereinafter referred to as "Respondent", and alleges:

1. Petitioner is the state agency charged with regulating the practice of medicine pursuant to Section 20.30, Florida Statutes; Chapter 455, Florida Statutes; and Chapter 458, Florida Statutes.

2. Respondent is and has been at all times material hereto a licensed physician in the State of Florida, having been issued license number ME 0042228. Respondent is Board Certified in Child Psychiatry. Respondent's last known address is 27 Biscayne Heights, Colchester, Vermont 05446.

3. On or about May 28, 1987, the Gainesville Police Department filed a sworn complaint charging the Respondent with a lewd and lascivious or indecent assault or act upon ⁰⁰¹⁰⁶⁹ in the presence of a child.

4. The alleged victim of the assault was a seven year old male, L.W.

5. On or about May 28, 1987, a search warrant was issued to search Respondent's residence in Gainesville, Florida.

6. The search revealed several letters and photographs of an adult white male and a white male juvenile, including a photograph of L.W. holding up to his mouth a toy frog with a penis and testicles.

7. Several of the letters referred to a homosexual relationship between Respondent and a twelve year old boy.

8. Petitioner ordered the Respondent to undergo a mental examination by a psychiatric expert to obtain examination reports, expert opinion and testimony concerning Respondent's ability to practice medicine with reasonable skill and safety.

9. Petitioner's expert examined the Respondent and determined that clear and convincing evidence exists to believe that Respondent is impaired in his ability to practice Child Psychiatry with that level of skill and treatment which is recognized by a reasonable, similar, prudent physician as being acceptable under similar conditions and circumstances.

10. Petitioner's expert recommends that the Respondent be restricted from practicing psychiatry on patients under the age of eighteen (18).

11. Respondent is unable to practice medicine with reasonable skill and safety to patients by reason of illness or use of alcohol, drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical condition in

that: Respondent's amorous homosexual involvements with minors impairs his ability to practice Child Psychiatry on patients under the age of eighteen (18).

12. Based on the preceding allegations, the Respondent violated Section 458.331(1)(s), Florida Statutes, in that Respondent is unable to practice medicine with reasonable skill and safety to patients by reason of illness or use of alcohol, drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical condition.

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

SIGNED this 20th day of October, 1989.

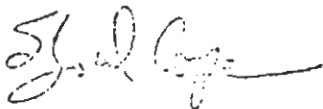
Larry Gonzalez
Secretary



By: Stephanie A. Daniel
Chief Medical Attorney

FILED

Department of Professional Regulation
AGENCY CLERK



CLERK

DATE October 20, 1989

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