RE: I/M/O Chowdhury Azam, M.D.
License #MA06382200
FINAL DECISION AND ORDER FILED SEPT. 8, 2010

EFFECTIVE DATE: February 7, 2011

THIS FINAL DECISION AND ORDER OF THE BOARD WAS STAYED BY THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, ON SEPTEMBER 1, 2010, PENDING FURTHER ORDER. THE COURT HAD ORDERED THE CONTINUED STAY OF THE BOARD'S ORDER AND, AS OF SEPTEMBER 20, 2010, DR. AZAM WAS RESTRICTED TO TREATING MALE PATIENTS ONLY, WITH AN APPROVED PRACTICE MONITOR. DR. AZAM IS NOW ACTIVELY SUSPENDED EFFECTIVE FEBRUARY 7, 2011, BASED ON THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION'S AFFIRMATION OF THE BOARD'S FINAL DECISION AND ORDER DECIDED FEBRUARY 7, 2011.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0414-10T4

IN THE MATTER OF THE SUSPENSION
OR REVOCATION OF THE LICENSE OF

CHOWDHURY AZAM, M.D.
LICENSE NO. MA06382200

TO PRACTICE MEDICINE AND SURGERY
IN THE STATE OF NEW JERSEY.

Argued January 24, 2011 - Decided February 7, 2011

Before Judges Grall and LeWinn.

On appeal from the New Jersey State Board of Medical Examiners, Docket No. BDS 03939-09.

Robert J. Conroy argued the cause for appellant Chowdhury Azam (Kern Augustine Conroy & Schoppmann, P.C., attorneys; Steven I. Kern, of counsel; R. Bruce Crelin, on the brief).

David M. Puteska, Deputy Attorney General, argued the cause for respondent New Jersey State Board of Medical Examiners (Paula T. Dow, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Mr. Puteska, on the brief).

PER CURIAM

Chowdhury Azam, a psychiatrist, appeals from a decision of the New Jersey State Board of Medical Examiners suspending his license to practice medicine. Following a hearing in the Office

of Administrative Law (OAL) on a complaint filed by the Attorney General and contested by Azam, the Board determined that Azam violated N.J.A.C. 13:35-6.3(h), which prohibits a licensee from sexually harassing a patient, and N.J.A.C. 13:35-6.3(c), which prohibits a licensee from having sexual contact with a patient. Pursuant to N.J.A.C. 13:35-6.3(j), sexual harassment and sexual contact "constitute gross or repeated malpractice" and "professional misconduct" warranting denial, suspension or revocation of a license under N.J.S.A. 45:1-21(c)-(e) and sanctions authorized by N.J.S.A. 45:1-25. Accordingly, the Board also found that gross and repeated malpractice and professional misconduct were established. As authorized by N.J.S.A. 45:1-25, the Board awarded the State $27,263.05 for costs and fees and, because this was Azam's second suspension,[1] imposed a $15,000 civil penalty. We affirm substantially for the reasons stated by the Board in its written decision of September 8, 2010.

The administrative charges against Azam were filed after one of Azam's patients reported his conduct to the police. He was also indicted and charged with criminal sexual contact, N.J.S.A. 2C:14-3b, but a jury acquitted him of that crime.

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[1] In 1998 the Board suspended Azam's license for two years because he failed to disclose a prior criminal conviction when he applied for his license.

The evidence presented at the administrative hearing can be summarized as follows. The patient was seeing Azam for psychotherapy to address an addiction to medications prescribed for her chronic neck and back pain. Between her first and last sessions, a surgeon removed a cyst from her breast.

According to the patient, during one psychotherapy session, Azam asked her to expose her breast and display her surgical scar. At the end of her next and final session with Azam, the patient stood to leave, but Azam told her that she looked stressed and asked her to sit down. Azam then approached the patient and, without her consent, massaged her shoulders and placed his hand under her clothing and grabbed her breast.

Although Azam testified that the patient spontaneously exposed her breast and that he touched her by mistake or accident when conducting a physical examination, he made statements in phone conversations with the patient and to the police that undermine his account. Indeed, there was evidence that Azam had made statements suggesting otherwise in a telephone conversation with the victim and during a post-arrest interview that were recorded and admitted into evidence.

During conversations with the patient after the incident, Azam apologized, admitted his attraction and acknowledged his

weakness. He told her that he felt sorry for her and "kind of lost it."

After his arrest, Azam was asked about his apology. He explained that it was an apology for touching the patient's shoulder. He denied having touched her breast, but he followed that denial with a demonstration of how such a touching could happen "accidentally" or by "mistake" while he massaged her neck. In his testimony at the administrative hearing, however, Azam denied massaging the patient and explained that he touched her while performing trigger-point examinations for fibromyalgia.

The Administrative Law Judge (ALJ) found the patient's testimony credible and discredited Azam's denial and explanation. For reasons set forth in the Board's opinion, its members accepted the ALJ's findings and rejected Azam's exceptions to the ALJ's resolution of questions dependent on credibility. The Board agreed with and adopted the ALJ's determination that Azam's asking the victim to display the scar on her breast, massaging of her shoulders and placing his hand under her clothing to touch her breast were inappropriate. Relying on their professional expertise and training, the Board agreed that his conduct could not be explained with reference to the treatment the patient sought from Azam and amounted to

sexual harassment and sexual contact constituting gross or repeated malpractice and professional misconduct. The Board permitted Azam to present evidence in mitigation of his penalty but declined to follow the ALJ's recommendation for a one-year suspension and concluded that a five-year suspension was warranted.

On Appeal Azam argues:

I. THE ALJ'S EXPLANATION OF HER CREDIBILITY DETERMINATIONS WAS INADEQUATE AND IN DIRECT CONFLICT WITH THE EVIDENCE ADDUCED.

II. THE BOARD ABUSED ITS DISCRETION IN RELYING UPON THE ALJ'S FINDINGS, IN THAT THEY WERE NOT SUPPORTED BY THE EVIDENCE AND WERE CONTRARY TO LAW.

III. THE BOARD ERRED IN FAILING TO REMAND THE ACTION TO THE OFFICE OF ADMINISTRATIVE LAW, IN LIGHT OF MATERIALLY INCONSISTENT STATEMENTS MADE BY THE COMPLAINING WITNESS IN THE ADMINISTRATIVE PROCEEDING AND IN DR. AZAM'S CRIMINAL TRIAL.

IV. THE BOARD FAILED TO GIVE CONSIDERATION TO DR. AZAM'S ACQUITTAL IN THE CRIMINAL TRIAL.

V. THE PROSECUTING COUNSEL ENGAGED IN SERIOUS MISCONDUCT DURING THE HEARING BEFORE THE ALJ.

We first address the objection raised in Point IV. Azam claims the Board should have considered the fact that he was acquitted of criminal sexual contact. He overlooks the obvious

difference in the burden of proof applicable in administrative and criminal proceedings and the difference in the elements required to establish the regulatory and criminal offenses.

Criminal sexual contact "means an intentional touching . . . for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor." N.J.S.A. 2C:14-1d (emphasis added). In contrast, the Board's regulation defines sexual contact to include "the knowing touching of a person's body directly or through clothing, where the circumstances surrounding the touching would be construed by a reasonable person to be motivated by the licensee's own prurient interest or for sexual arousal or gratification." N.J.A.C. 13:35-6.3(b)(4) (emphasis added). Thus, proof of a prohibited purpose beyond a reasonable doubt is required to establish criminal sexual contact but not sexual contact prohibited by the regulation. Accordingly, the Board did not err by discounting the significance of Azam's acquittal.

Azam's remaining objections to the Board's determinations "are without sufficient merit to warrant discussion in a written opinion." R. 2:11-3(e)(1)(E). The arguments raised in Points I and III are adequately addressed in the Board's decision. We reject the argument presented in Point II because the Board's

decision "is supported by sufficient credible evidence in the record as a whole." R. 2:11-3(e)(1)(D).

We also reject Azam's claim of prejudice based on misconduct on the part of the State's attorney. The Board's decision demonstrates its members' careful and impartial consideration of the evidence; it leaves us with no doubt that any impropriety in the arguments presented by the State's attorney was harmless. R. 2:10-2. In short, the Board members were not inflamed or distracted and Azam received a fair hearing and decision based on the evidence. State v. DiFrisco, 137 N.J. 434, 474 (1994), cert. denied, 516 U.S. 1129, 116 S. Ct. 949, 133 L. Ed. 2d 873 (1996).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

FILED

SEPTEMBER 8, 2010

NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS
DKT NO. BDS 03939-09

In the Matter of the Suspension or Revocation of the License of:	:	Administrative Action
CHOWDHURY AZAM, M.D. **LICENSE NO. MA06382200**	:	FINAL DECISION AND ORDER
To Practice Medicine and Surgery In The State of New Jersey	:	

This matter was returned to the New Jersey State Board of Medical Examiners (the "Board") following a three day hearing at the Office of Administrative Law and the entry of an Initial Decision by A.L.J. Candido on May 7, 2010. Within that decision, ALJ Candido concluded that respondent's actions in inappropriately touching patient E.Y.'s breast constituted gross negligence and professional misconduct (I.D. at p.20); that his asking to see the scar on E.Y.'s breast and massaging E.Y.'s shoulders without her permission, running his hand under E.Y.'s shirt, and touching her breast, constitute in the aggregate, repeated acts of negligence (I.D. at pp. 20- 21), and that respondent's actions over two patient visits on August 5 and October 16, 2008 constituted sexual contact and harassment (in violation of the Board's sexual misconduct rule, N.J.A.C. 13:35-6.3, which is deemed to constitute gross or repeated malpractice or professional misconduct pursuant to N.J.S.A. 45:1-21 (c), (d), and (e))(I.D. at p. 20).

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Based on these findings, the ALJ recommended sanctions including the suspension of respondent's license for a one year period, six months active, with the remainder to become a period of probation; a civil monetary penalty of $15,000, and the payment of all costs and attorney fees.

Following receipt of the ALJ's recommended decision of May 27, 2010, written exceptions were filed by both respondent and the Attorney General. Upon review by the Board on August 11, 2010 of exceptions, oral arguments of counsel, and the record in this matter,[1] the Board has concluded that cause exists to adopt in their entirety, all findings of fact and conclusions of law made by ALJ Candido. Following our review of the findings and conclusions, the record on which they were based, and the mitigation presentation, we have determined to modify the recommendations regarding sanctions made by the ALJ, and instead order that

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[1]After 3:30 P.M. the day prior to the hearing on exceptions, Respondent faxed to the Board office a motion to reopen and remand this matter to the ALJ, based upon claimed inconsistencies in the testimony of E.Y. at a criminal trial held more that 6 months after her testimony at the Office of Administrative Law. Despite the untimeliness of the Motion, and the failure of respondent to provide the Board with two transcripts of E.Y.'s testimony, totaling over 270 pages until a copy was e-mailed to the Executive Director of the Board during the proceedings, the Board nonetheless heard respondent's Motion after considering that the Attorney General had no objection. Following review of all portions of the transcripts claimed by respondent to require re-opening and a remand, and those raised by the State in response, the Board denied the Motion finding that contrary to respondent's claims, E.Y. did not recant and given her testimony as a whole, there were no fundamental discrepancies in E.Y.'s testimony which required a remand.

respondent's license be suspended for a period of five years, the first year of which is to be served as an active suspension period, and the remainder stayed and to be served as a period of probation; that prior to reinstatement of his license on probation respondent shall successfully complete courses in appropriate professional boundaries and in ethics. We also adopted the recommendations of the ALJ as to monetary penalties and imposition of costs. We have set forth below a brief summary of the procedural history of this matter, the reasons we have determined to adopt the recommended findings of fact and conclusions of law and to modify the recommended sanctions, and the specific sanctions that we impose upon respondent.

PROCEDURAL HISTORY

The procedural history of this matter is briefly set forth in the Initial Decision (ALJ Candido's Opinion except as modified below, is incorporated herein). A one count administrative complaint filed in December 2008 sought the imposition of disciplinary sanctions against respondent, and an answer was then filed on January 13, 2009 denying the charges. The Attorney General alleged inter alia in the administrative complaint that respondent, a psychiatrist, who was treating patient E.Y. for substance abuse issues, inappropriately massaged the shoulders and touched the breast of patient E.Y. during the course of a session on October 16, 2008, that on that day and at a previous session

respondent asked E.Y. to show him a recent surgical scar on her breast, and these actions were alleged to constitute gross or repeated negligence; professional misconduct; engaging in sexual contact or sexual harassment, or sexual abuse of a patient and/or demonstrate a failure to be of good moral character required for licensing as a physician; all pursuant to N.J.S.A. 45:1-21 (c); (d), (e), (f), and (h), N.J.A.C. 13:35-6.3 and N.J.S.A. 45:9-6, respectively.

The matter was transferred to the Office of Administrative Law for plenary hearing as a contested case[2], and hearings were held on December 17, and 21, 2009 and February 5, 2010. Following post-hearing submissions the record closed on April 13, 2010. ALJ Candido issued a 22 page Initial Decision on May 7, 2010. The ALJ sustained the allegations of the complaint and recommended sanctions as outlined above. The Attorney General filed limited exceptions on June 8, 2010, in which she took exception only to the sanction recommendations of the ALJ; Respondent's exceptions were dated June 10, 2010; and the Attorney General's reply was dated June 15, 2010. Respondent requested and was granted an adjournment of the hearing on exceptions scheduled for July 14, 2010.

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[2]Prior to such transfer an application for temporary suspension of respondent's license was heard by the Board on January 4, 2009. An Order was subsequently entered restricting respondent's license to treating male patients only, with an approved practice monitor. Respondent has practiced under those limitations to the present time.

The matter was set down for oral argument before the Board on August 11, 2010. On that date, Steven I. Kern, Esq. And Matthew Streger, Esq. appeared for respondent Dr. Azam and Deputy Attorney General David Puteska appeared for the State. Following argument on the motion to reopen the record and remand, and denial of that motion, Mr. Kern and D.A.G. Puteska were provided an opportunity for oral argument on their filed exceptions. Following the oral argument, we voted to adopt, in their entirety, the findings of fact and conclusions of law set forth by ALJ Candido in her Initial Decision. A mitigation hearing followed, at which respondent and several other witnesses testified. We then announced on the record our determination regarding sanctions to be imposed upon respondent. Following consideration of an application for a stay made by the respondent's counsel, we announced our determination that the suspension of Respondent's license would begin 30 days after the hearing - that is after the close of business on September 10, 2010 - and a stay after that date was denied.

DETERMINATION TO ADOPT
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon review of the Initial Decision, record, and arguments of counsel in this matter, we conclude that cause exists to adopt in their entirety the findings of fact and conclusions of law made by the ALJ in her Initial Decision. Simply put, the findings of fact with regard to the allegations of sexual misconduct in the complaint are findings which are fundamentally underpinned by and

dependent upon credibility determinations. The testimony offered by E.Y. and by Dr. Azam offer very different accounts of the events that occurred, it cannot be the case that both are being truthful. ALJ Candido addresses the credibility issues and explains why she found E.Y. to be "exceedingly credible in her testimony" and respondent not to be credible. Having directly witnessed the testimony offered, the ALJ described E.Y. as "straight forward and compelling. She recalled details and was consistent throughout her testimony." (I.D. at p.11) In contrast, the ALJ found respondent lacked credibility:

> "...because of his inconsistencies. For example, he testified that he did not request to see the scar on E.Y.'s breast on August 5, 2008. However, he told the police in his recorded statement that he did ask to see the scar at the session prior to October.
>
> Furthermore, his tone and manner in which he spoke during the intercepted conversation was convincing that he intentionally touched E.Y.'s breast. He stated that he "lost it." He frequently asked E.Y. for forgiveness and admitted to becoming "so regretful and so depressed, ashamed" when interviewed by the police. (Intercepted conversation between Azam and E.Y., page 7, lines 4-5). During his testimony he stated that he may have inadvertently brushed her breast which was at odds with the intercept. Simply put, he was not believable." (I.D. at p. 11)

Having reviewed the record ourselves, we find her explanation and reasoning persuasive, and reach the very same conclusions as did the ALJ. Indeed, there are numerous other inconsistencies in respondent's testimony when reviewed with other evidence in the record which support the credibility findings of the ALJ. For

example, the transcript of respondent's statement to the police indicates that initially he told the police that as E.Y. had pain he said "let me help you to relax, so I just touched her neck, her shoulder but I, but I didn't touch the breast or anything. ..." (P-5 at page 5, lines 14-17). Later in his statement he acknowledges that he was giving E.Y. a massage - "As I said I was giving a massage" (P-5 at page 11, line 14), eventually acknowledging he may have "accidentally" touched her chest - "it could have" (P-5 at page 11, lines 18-20) and finally acknowledging putting his hand down her bra in the following exchange.

> [Police]: Q: So if you were to see her right now what would you tell her [E.Y.]?
>
> [Respondent] A: I would say I am sorry.
>
> Q: Okay what are you sorry about...
>
> A: Yeah I'm sorry that I let her down in that way because she had respect for me in that position that she showed and in a moment of stupidity I made a mistake.
>
> Q: Would you tell her I'm sorry or I shouldn't have put my hand down your shirt, would you say that to her?
>
> A: Definitely.
>
> Q: When you put your hand down her bra did you squeeze her chest, did you say anything to her, did you ask her any questions?

> A: No.[3]
>
> Q: Was it, did you put both of your hands down her bra or just one.
>
> A: I just, I was massaging her and then I went like this then I pulled it back. (P-5 at page 19 line 20 to page 20 line 18).

We have reviewed the video recording of this last response during the police statement showing respondent demonstrating on himself how one of his hands went down to E.Y.'s breast. Yet at the trial respondent testified not that he touched E.Y.'s breast during a massage, or put his hand down her bra, but that during an exam for fibromyalgia tender points E.Y. "flinched" and arched back and "my hand slid down." (2T at p.95, lines 17-25)

Respondent also acknowledged in his police statement that he asked to see the scar on E.Y.'s breast, as he responded to a question as to whether he "...ask[ed] her to show you where she had the surgery today?" (P-5 at page 9 lines 14-5) as follows:

> A: Not today, when she came before it was a couple of months ago.
>
> Q: Did you ask her to look at the scar or see how that's healing?
>
> A: Yeah [P-5 at page 9, lines 14-19]

Yet in his testimony before the ALJ, he insisted that E.Y.

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[3]The video recording shows respondent shaking his head "no" as to each of these inquiries.

spontaneously showed him the scar on her breast without a request.

We point out that, our collective expertise as physicians supports these credibility findings, as an exam for fibromyalgia tender points involves not a "massage" but rather the discrete application of pressure with one finger on each of 20 separate points. A psychiatrist treating and counseling a patient would ordinarily not even perform a physical exam given the nature of their work regarding the innermost thoughts and issues of patients, and particularly given the possibility of misinterpretation by a vulnerable patient. Yet respondent admitted "massaging" patient E.Y. claiming it was in part to alleviate pain. Respondent acknowledged several times during his statement to the police (P-5) that he was "massaging" E.Y. at the time the touching of her breast occurred. His belated claim that he was performing a tender point exam at the time, touching that is so vastly different, is simply not believable.

Moreover, the intercepted phone conversation (P-3) provides further support for the credibility findings of the ALJ. In our expertise as physicians we find it incomprehensible that a trained psychiatrist apologizing about what he claims was the inadvertent touching of his patient's breast would explain in response to the patient's question as to why it occurred:

A. I don't know I was nervous and kind of

Q. What?

A. Very attracted towards you and uh (P-3 at page 3, Lines 10-13)

Just as astounding and supportive of E.Y.'s testimony of respondent's reaching into her bra and touching her breast inappropriately, were respondent's statements in response to the patient about the touching during the intercepted phone call:

> "I think uh, you [k]now there was a moment of weakness ..." (P-3 at page 6 lines 5-6)

and after acknowledging that he was:

> "so regretful and so depressed, ashamed" (P-3 at page 7 lines 4-5)

his response to the patient's inquiry as to whether he had done this before includes a denial and the statement:

> "... because I felt real bad for you, sorry for you and then, kind of lost it." (P-3 at page 7 lines 14-19).

That respondent would apologize and attempt to gain the patient's trust to get her back to treatment would be expected. His statements however went far beyond such apologies to acknowledgments of his conduct which undergird the credibility of the testimony of the patient. In our expertise as physicians we agree that respondent's explanation of even these statements as attempts to get the patient to return to treatment as not credible[4]

In essence we are being asked to consider whether the ALJ's conclusion that E.Y. was being truthful and respondent not truthful

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[4]And we thus reject respondent's exception that this conversation was simply a therapeutic intervention.

is one that is supported on this record. ALJ Candido had the first hand opportunity to not only consider the testimony of both E.Y. and respondent, but also to directly observe the manner in which that testimony was offered. ALJ Candido found E.Y.'s testimony straightforward and consistent with the version of events she gave throughout the investigation, while respondent's changing story was not. ALJ Candido's conclusions upon credibility were clearly in part, based on her direct witnessing of the testimony offered, and having reviewed the record we agree with her credibility conclusions and find no reason to disturb them.[5]

We also are satisfied that the findings of fact made and adopted herein fully support the conclusions of law that were alleged by the State and made by the ALJ, that Dr. Azam's conduct constituted sexual misconduct and sexual harassment in violation of N.J.A.C. 13:35-6.3 and therefore in violation of N.J.S.A. 45:1-21(h), and constitutes grounds for imposition of penalties pursuant to N.J.S.A. 45:1-21; and that his actions constitute gross and repeated negligence, and engaging in professional misconduct in violation of N.J.S.A. 45:1-21(c),(d) and (e), and that the conduct constitutes grounds for the imposition of penalties pursuant to

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[5]Respondent's lengthy exceptions, that this is not a case of credibility but rather that it is a question of whether respondent's examination of patient E.Y. is thus rejected - credibility is most assuredly involved in this case, and we find the examination as performed by Dr. Azam, acting as her psychiatrist, to have been inappropriate.

N.J.S.A. 45:1-21. We therefore adopt in their entirety the findings of fact and conclusions of law set forth in ALJ Candido's Initial Decision.

PENALTY

After having adopted the findings of fact and conclusions of law in this case, we afforded respondent a mitigation hearing, allowing him to present testimony and evidence in mitigation of penalty. Initially, respondent entered six letters of support into the record (P-7). Two voicing approval of his professionalism and compassion to program participants, were authored by an office manager and a program director at Medallion Care, a behavioral health program at which Dr. Azam works. Two others were submitted by the office administrator and a physician at Pinnicle Behavioral Health, LLC, an outpatient psychiatric and behavioral health facility respondent has worked with for several years, which is involved in part in addiction treatment. The office administrator wrote of his "develop[ing] new business and marketing strategies while expanding referral networks for the practice" as well as respondent's "dedication and commitment" to the recovery process of patients. The physician (Dr. Periasamy), who has covered respondent's patients, wrote approvingly of his clinical skills, professionalism, and satisfaction verbalized by his patients. The one patient letter submitted, was authored by Ms. Tasevski, who also testified before the Board and the ALJ. She sought

psychiatric care with him ten years ago, and she attested to her positive experience, that he changed her life "dramatically," leading her to help others in her community, and to refer other patients to him. She contrasted his treatment with experiences her brother had with other psychiatrists who treated him "like a number." The last letter was authored by Dr. Charles Trigani, who also testified before the ALJ. He is the Medical Director of Hampton Behavioral Health Center, and reports that respondent, who was an attending at Hampton, is a "competent, knowledgeable, diligent, efficient and caring physician"and positively reports on his patient rapport and ethical conduct.

In addition to Ms. Tasevski's testimony, Ms. Williams, a foster care provider, testified regarding the good outcomes she has had taking foster and adoptive children with behavioral issues to see Dr. Azam for several years. A social worker, Mr. Follansby, who practiced in the same suite of offices and referred clients to him, appeared and testified to respondent's ability with medication and in particular praised his work with children having attention deficit disorder. Mr. Follansby has never been aware of any complaints or inappropriate behavior on respondent's part, and stated that if he is not allowed to practice, a large number of people will be hurt. Nuran Nabi, Ph.D., who has known respondent as a community leader and in various offices of the Bangladesh Association of New Jersey, attested to his good work in that

community, social and fundraising activities, and the respect and faith his community has in him. He gave his opinion that discipline of respondent's license would have a negative impact on the Bangladesh American community and his patients. Finally, Mr. Hussain testified regarding community events respondent and his wife hold in their home, charitable work, and the impact on the community should he lose his license.

Dr. Azam also addressed the Board. He testified that his life has been a "nightmare" since the allegations were made against him, that due to the restrictions placed on his license he had difficulty getting work and he and his family have had emotional and financial distress. He complained that the investigation of the allegations and of the patient was not thorough enough. He asserted that he came to believe the patient felt rejected by him and experienced "transference." He explained the intercepted phone call as an attempt to placate the patient's feelings, and asserted he made no admissions during the call. He took the position that the Attorney General wishes to punish him because he has defended himself and refused to admit wrongdoing. He described his situation as defending himself from the

> "false accusation of a drug-addicted, psychologically disturbed patient, whose only position was that I touched her breast for one second when asking her if she had pain."

Finally he asked the Board to restore his license.

The presentation made in mitigation by respondent in no way

dissuades us from the fundamental proposition that the misconduct involved in this matter warrants a severe penalty. Sexual misconduct by any physician shatters the trust reposed in him as a licensee of this Board. However, that misconduct is magnified by the fact that respondent is a psychiatrist treating a vulnerable patient who came to him for substance abuse treatment. The patient record is replete with his psychiatric assessment of the patient (P-5). Respondent and his counsel repeatedly state that this case is about the one second touching of a patient's breast. Rather, of most concern is the judgment that led a psychiatrist treating a patient who was depressed, in a turbulent relationship, in financial distress and even with the conditions respondent claims, to "lose it," massage her shoulders, reach down her bra and touch her breast. He took advantage of the patient's trust to engage in sexual misconduct. Clearly, the conduct did not involve any legitimate medical practice, and constitutes violations of the Board's sexual misconduct rule.

We have considered the ALJ's penalty recommendations and determined that they are insufficient to address the misconduct herein as the suspension recommended does not sufficiently take into account that the sexual misconduct was engaged in by a psychiatrist, a category that is held to a singularly high standard due to the vulnerability of the patient population, and the nature of their practice; and as this is a second offense by respondent

who was disciplined by this Board previously in a matter in which his license was suspended due to dishonesty on a license application (P-9). The measure of discipline imposed in this matter should reflect not only punishment, but guidance to the regulated community and the public as to the standards of conduct expected of the medical and particularly the psychiatric profession.

After weighing the misconduct proven, the context of treatment by a psychiatrist, this respondent's prior record, and factoring in the testimony offered by character witnesses on respondent's behalf, we have determined to amend the ALJ's recommendation to impose a longer period of suspension while offering respondent an opportunity to restore his career. We find the sexual misconduct proven in this case to warrant significant disciplinary sanction but weigh all of the circumstances in determining appropriate punishment. We conclude that a penalty of five year suspension, one year of which is to be served actively and the remainder to be stayed as a period of probation, with the ability to impose any necessary protections upon reinstatement of license, is appropriate.

On the issue of monetary penalties, we find the ALJ's recommendation that respondent be assessed a monetary penalty of $15,000 to be reasonable, particularly as this is a second offense, and affirm that recommendation. Finally with regard to costs, the

full amount requested by the State, supported by certifications and without any objection by respondent as to reasonableness of the cost application, is hereby imposed.[6]

WHEREFORE, IT IS ON THIS 8TH **DAY OF SEPTEMBER 2010**

ORDERED:

1. The license of respondent Chowdhury Azam, M.D. to practice medicine and surgery in the State of New Jersey shall be suspended for a period of five years. The suspension of respondent's license shall commence at the close of business on September 10, 2010. The first year of the period of suspension, from September 11, 2010 through September 10, 2011, shall be served as a period of active suspension. The remainder of the period of suspension, from September 11, 2011 through September 10, 2015, may be stayed and served as a period of probation, provided that respondent complies with all conditions of the Board imposed herein and provided further that, before resuming any practice during the period of probation, respondent shall be required to appear before a Committee of the Board and then demonstrate that he has complied with the conditions of this order and that he is fit and competent to resume the practice of medicine. The Board expressly reserves the right to impose any conditions or limitations upon respondent's practice during the period of probation or thereafter, to include,

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[6]Respondent did not submit any documentation to support a claim of indigency as required by letter previously supplied to his counsel.

without limitation, a requirement that his practice be chaperoned, or the patient population limited.

2. Respondent is hereby assessed a civil penalty in the amount of $15,000 based on the findings herein and as this matter represents a second offense. Such penalty shall be paid within 30 days of the date of this Order, by certified check or money order payable to the Treasurer, State of New Jersey and delivered to Mr. William Roeder at the office of the Board of Medical Examiners.

3. Respondent is assessed costs in the amount of $27,263.05 representing attorney's fees and transcript costs.[7] Such costs shall be paid within 30 days of the date of this Order, by certified check or money order payable to the Treasurer, State of New Jersey and delivered to Mr. William Roeder at the office of the Board of Medical Examiners.

4. During the period of active suspension, respondent shall be required to successfully complete a course pre-approved by and acceptable to the Board in professional ethics and a course

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[7]We have reviewed the extensive certifications submitted in support of cost assessments and find the amounts sought to be reasonable in the context of this important matter, with regard to the detail submitted, the number of hours of attorney time and the rates of compensation for that time. Attorney's fees are the subject of a memo detailing the rates charged by the Division of Law for a DAG with 10 or more years of experience - $175 per hour, which we have considered and approved many times in the past, and note is well below the community standard. The application is sufficiently detailed to permit our conclusion that the amount of time spent, and the overall fees sought, are objectively reasonable. (See Poritz v. Stang, 288 N.J. Super 217 (App. Div. 1996).

regarding boundary issues.

5. Respondent shall comply with all parts of the Board's directives applicable to disciplined licensees, whether or not attached hereto.

NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS

By: _____
Paul T. Jordan, M.D.
Board President

DIRECTIVES APPLICABLE TO ANY MEDICAL BOARD LICENSEE WHO IS DISCIPLINED OR WHOSE SURRENDER OF LICENSURE HAS BEEN ACCEPTED

APPROVED BY THE BOARD ON MAY 10, 2000

All licensees who are the subject of a disciplinary order of the Board are required to provide the information required on the Addendum to these Directives. The information provided will be maintained separately and will not be part of the public document filed with the Board. Failure to provide the information required may result in further disciplinary action for failing to cooperate with the Board, as required by N.J.A.C. 13:45C-1 et seq. Paragraphs 1 through 4 below shall apply when a license is suspended or revoked or permanently surrendered, with or without prejudice. Paragraph 5 applies to licensees who are the subject of an order which, while permitting continued practice, contains a probation or monitoring requirement.

1. Document Return and Agency Notification

The licensee shall promptly forward to the Board office at Post Office Box 183, 140 East Front Street, 2nd floor, Trenton, New Jersey 08625-0183, the original license, current biennial registration and, if applicable, the original CDS registration. In addition, if the licensee holds a Drug Enforcement Agency (DEA) registration, he or she shall promptly advise the DEA of the licensure action. (With respect to suspensions of a finite term, at the conclusion of the term, the licensee may contact the Board office for the return of the documents previously surrendered to the Board. In addition, at the conclusion of the term, the licensee should contact the DEA to advise of the resumption of practice and to ascertain the impact of that change upon his/her DEA registration.)

2. Practice Cessation

The licensee shall cease and desist from engaging in the practice of medicine in this State. This prohibition not only bars a licensee from rendering professional services, but also from providing an opinion as to professional practice or its application, or representing him/herself as being eligible to practice. (Although the licensee need not affirmatively advise patients or others of the revocation, suspension or surrender, the licensee must truthfully disclose his/her licensure status in response to inquiry.) The disciplined licensee is also prohibited from occupying, sharing or using office space in which another licensee provides health care services. The disciplined licensee may contract for, accept payment from another licensee for or rent at fair market value office premises and/or equipment. In no case may the disciplined licensee authorize, allow or condone the use of his/her provider number by any health care practice or any other licensee or health care provider. (In situations where the licensee has been suspended for less than one year, the licensee may accept payment from another professional who is using his/her office during the period that the licensee is suspended, for the payment of salaries for office staff employed at the time of the Board action.)

A licensee whose license has been revoked, suspended for one (1) year or more or permanently surrendered must remove signs and take affirmative action to stop advertisements by which his/her eligibility to practice is represented. The licensee must also take steps to remove his/her name from professional listings, telephone directories, professional stationery, or billings. If the licensee's name is utilized in a group practice title, it shall be deleted. Prescription pads bearing the licensee's name shall be destroyed. A destruction report form obtained from the Office of Drug Control (973-504-6558) must be filed. If no other licensee is providing services at the location, all medications must be removed and returned to the manufacturer, if possible, destroyed or safeguarded. (In situations where a license has been suspended for less than one year, prescription pads and medications need not be destroyed but must be secured in a locked place for safekeeping.)

3. Practice Income Prohibitions/Divestiture of Equity Interest in Professional Service Corporations and Limited Liability Companies

A licensee shall not charge, receive or share in any fee for professional services rendered by him/herself or others while barred from engaging in the professional practice. The licensee may be compensated for the reasonable value of services lawfully rendered and disbursements incurred on a patient's behalf prior to the effective date of the Board action.

A licensee who is a shareholder in a professional service corporation organized to engage in the professional practice, whose license is revoked, surrendered or suspended for a term of one (1) year or more shall be deemed to be disqualified from the practice within the meaning of the Professional Service Corporation Act. (N.J.S.A. 14A:17-11). A disqualified licensee shall divest him/herself of all financial interest in the professional service corporation pursuant to N.J.S.A. 14A:17-13(c). A licensee who is a member of a limited liability company organized pursuant to N.J.S.A. 42:1-44, shall divest him/herself of all financial interest. Such divestiture shall occur within 90 days following the the entry of the Order rendering the licensee disqualified to participate in the applicable form of ownership. Upon divestiture, a licensee shall forward to the Board a copy of documentation forwarded to the Secretary of State, Commercial Reporting Division, demonstrating that the interest has been terminated. If the licensee is the sole shareholder in a professional service corporation, the corporation must be dissolved within 90 days of the licensee's disqualification.

4. Medical Records

If, as a result of the Board's action, a practice is closed or transferred to another location, the licensee shall ensure that during the three (3) month period following the effective date of the disciplinary order, a message will be delivered to patients calling the former office premises, advising where records may be obtained. The message should inform patients of the names and telephone numbers of the licensee (or his/her attorney) assuming custody of the records. The same information shall also be disseminated by means of a notice to be published at least once per month for three (3) months in a newspaper of

general circulation in the geographic vicinity in which the practice was conducted. At the end of the three month period, the licensee shall file with the Board the name and telephone number of the contact person who will have access to medical records of former patients. Any change in that individual or his/her telephone number shall be promptly reported to the Board. When a patient or his/her representative requests a copy of his/her medical record or asks that record be forwarded to another health care provider, the licensee shall promptly provide the record without charge to the patient.

5. Probation/Monitoring Conditions

With respect to any licensee who is the subject of any Order imposing a probation or monitoring requirement or a stay of an active suspension, in whole or in part, which is conditioned upon compliance with a probation or monitoring requirement, the licensee shall fully cooperate with the Board and its designated representatives, including the Enforcement Bureau of the Division of Consumer Affairs, in ongoing monitoring of the licensee's status and practice. Such monitoring shall be at the expense of the disciplined practitioner.

(a) Monitoring of practice conditions may include, but is not limited to, inspection of the professional premises and equipment, and Inspection and copying of patient records (confidentiality of patient identity shall be protected by the Board) to verify compliance with the Board Order and accepted standards of practice.

(b) Monitoring of status conditions for an impaired practitioner may include, but is not limited to, practitioner cooperation in providing releases permitting unrestricted access to records and other information to the extent permitted by law from any treatment facility, other treating practitioner, support group or other individual/facility involved in the education, treatment, monitoring or oversight of the practitioner, or maintained by a rehabilitation program for impaired practitioners. If bodily substance monitoring has been ordered, the practitioner shall fully cooperate by responding to a demand for breath, blood, urine or other sample in a timely manner and providing the designated sample.

NOTICE OF REPORTING PRACTICES OF BOARD REGARDING DISCIPLINARY ACTIONS

Pursuant to N.J.S.A. 52:14B-3(3), all orders of the New Jersey State Board of Medical Examiners are available for public inspection. Should any inquiry be made concerning the status of a licensee, the inquirer will be informed of the existence of the order and a copy will be provided if requested. All evidentiary hearings, proceedings on motions or other applications which are conducted as public hearings and the record, including the transcript and documents marked in evidence, are available for public inspection, upon request.

Pursuant to 45 CFR Subtitle A 60.8, the Board is obligated to report to the National Practitioners Data Bank any action relating to a physician which is based on reasons relating to professional competence or professional conduct:

(1) Which revokes or suspends (or otherwise restricts) a license,
(2) Which censures, reprimands or places on probation,
(3) Under which a license is surrendered.

Pursuant to 45 CFR Section 61.7, the Board is obligated to report to the Healthcare Integrity and Protection (HIP) Data Bank, any formal or official actions, such as revocation or suspension of a license(and the length of any such suspension), reprimand, censure or probation or any other loss of license or the right to apply for, or renew, a license of the provider, supplier, or practitioner, whether by operation of law, voluntary surrender, non-renewability, or otherwise, or any other negative action or finding by such Federal or State agency that is publicly available information.

Pursuant to N.J.S.A.45:9-19.13, if the Board refuses to issue, suspends, revokes or otherwise places conditions on a license or permit, it is obligated to notify each licensed health care facility and health maintenance organization with which a licensee is affiliated and every other board licensee in this state with whom he or she is directly associated in private medical practice.

In accordance with an agreement with the Federation of State Medical Boards of the United States, a list of all disciplinary orders are provided to that organization on a monthly basis.

Within the month following entry of an order, a summary of the order will appear on the public agenda for the next monthly Board meeting and is forwarded to those members of the public requesting a copy. In addition, the same summary will appear in the minutes of that Board meeting, which are also made available to those requesting a copy.

Within the month following entry of an order, a summary of the order will appear in a Monthly Disciplinary Action Listing which is made available to those members of the public requesting a copy.

On a periodic basis the Board disseminates to its licensees a newsletter which includes a brief description of all of the orders entered by the Board.

From time to time, the Press Office of the Division of Consumer Affairs may issue releases including the summaries of the content of public orders.

Nothing herein is intended in any way to limit the Board, the Division or the Attorney General from disclosing any public document.