

**IOWA BOARD OF CHIROPRACTIC**

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<b>IN THE MATTER OF:</b>	)	<b>CASE NO. 08-005 &amp; 08-013</b>
	)	<b>DIA NO. 10DPHCB001</b>
<b>RONALD PEHL, D.C.</b>	)	
	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW,</b>
<b>RESPONDENT</b>	)	<b>DECISION AND ORDER</b>

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On January 14, 2010, the Iowa Board of Chiropractic (Board) filed a Notice of Hearing and Statement of Charges against Ronald Pehl, D.C. (Respondent) charging him with:

Count I: Unethical conduct by engaging in improper sexual contact with or making suggestive, lewd, lascivious or improper remarks or advances to a patient, client, or coworker in violation of Iowa Code sections 147.55(3), 151.9(3), 272C.10(3) and 645 IAC 45.2(28)(b).

Count II: Professional incompetency, in violation of Iowa Code sections 147.55(2), 151.9(2), 272C.10(2) and 645 IAC 45.2(2)(a)-(d).

The alleged violations are based on complaints filed by two of Respondent's former patients: JO (Case No. 08-005) and VM (Case No. 08-013). On February 12, 2010, Respondent filed an Answer denying all of the factual allegations made by the complainants and asking for dismissal of the complaint in Case No. 08-005 as untimely.

On April 21, 2010, Respondent filed a Motion to Dismiss, or in the alternative, Motion for Summary Judgment in Case No. 08-005. Respondent also submitted a Statement of Undisputed Facts, Respondent's Affidavit, and Brief in Support. On June 24, 2010, Respondent filed a Second Motion to Dismiss, or in the alternative, Motion for Summary Judgment in Case No. 08-013. Respondent also submitted a Statement of Undisputed Facts, Brief in Support, and attached Exhibits A-H.

On July 7, 2010, the state filed a Resistance to Respondent's Motions To Dismiss and Motion for Summary Judgment and Memorandum in Support of Resistance. For Case No. 08-005, the state filed its Response to Respondent's Statement of

Undisputed Facts and Statement of Disputed Facts with attached Exhibit 1 (Investigative Report with attachments). For Case No. 08-013, the state also filed its Response to Respondent's Statement of Undisputed Facts and Statement of Disputed Facts with attached Exhibit 1. Respondent filed a Motion to Strike the State's Resistances but later withdrew that motion. Following a motion hearing, the Board issued its Rulings, which denied both the Motions to Dismiss and Motions for Summary Judgment.

The hearing on the merits was held on January 12, 2011 before the following Board members: Michael Powell, D.C., Chairperson; John Calisesi, D.C.; Bradley Brown, D.C.; Dori Rammelsberg-Dvorak, D.C.; Rex Jones, D.C.; Leslie J. Duinink and Sharon Tate, public members. Respondent was represented by attorneys David Dutton and Farl Greene. The state of Iowa was represented by Assistant Attorney General Julie Bussanmas. The hearing was closed to the public at Respondent's request, pursuant to Iowa Code section 272C.6(1)(2009), and was recorded by a certified court reporter. Administrative Law Judge Margaret LaMarche assisted the Board in conducting the hearing and was instructed to draft the Board's Decision and Order, in conformance with their deliberations.

## **THE RECORD**

The record includes the Notice of Hearing and Statement of Charges, Answer, Respondent's Motions to Dismiss and for Summary Judgment, State Resistances, Board Rulings on Motions to Dismiss and Motions for Summary Judgment; Rescheduling Order; testimony of the witnesses; State Exhibits 1-21; and Respondent Exhibits A-D. Portions of Exhibit D (pp. 33-36 to line 3 and 69-70 to line 18) were excluded as irrelevant and were only submitted as an offer of proof.

## **FINDINGS OF FACT**

### ***Respondent's Licensure and Disciplinary History***

1. Respondent Ronald Pehl was initially issued license number 04420 to practice chiropractic in the state of Iowa on December 17, 1974. Respondent has practiced chiropractic in Ames, Iowa since 1975. (Testimony of Respondent; State Exhibit 7)
2. Respondent has had several prior complaints and disciplinary proceedings before the Board. (State Exhibit 8)

a. On April 28, 1988, the Board charged Respondent with professional incompetency and unethical conduct arising out of his treatment of a female patient in 1986. On September 2, 1988, the Board issued Findings of Fact, Conclusions of Law, and Order following an evidentiary hearing. The Board concluded that Respondent's treatment and adjustments of a female patient while she was unclothed from the waist up were unnecessary, inappropriate, and constituted unethical conduct. The Board also concluded that Respondent made an improper remark to the patient at her last appointment. The Board suspended Respondent's license for six weeks, fined him \$1,000, and placed his license on probation for a period of four years. (State Exhibits 9, 10)

b. On October 11, 1991, Respondent and the Board entered into a Settlement Agreement<sup>1</sup> in lieu of initiating a contested case hearing. The first numbered paragraph of the Settlement Agreement stated the Board's allegation that Respondent violated 645 IAC 40.24(3)(b), 40.24(17), and 40.51(2)<sup>2</sup> in his treatment of a patient in 1983. Respondent denied the allegations but agreed to the terms of the Settlement Agreement.

The Settlement Agreement extended Respondent's probationary period for an additional year and imposed additional conditions of probation. The Settlement Agreement required Respondent: to have a female staff member present during his examination and treatment of female patients, to be evaluated by a professional counselor and comply with any treatment recommendations, and to file quarterly reports of compliance. A subsequent letter clarified that Respondent would remain on probation until October 27, 1993. (State Exhibit 11)

Paragraph 4 of the Settlement Agreement stated: "It is the Board's opinion that it has taken all necessary precautions to remedy and correct any violations of this nature occurring prior to 1988. Should the Board receive any allegations of violations of 40.24(17) occurring prior to September 1988, the Board will take into consideration this Settlement in determining what action, if any to take." (State Exhibit 11, p. 74)

c. The Board filed another Statement of Charges against Respondent

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<sup>1</sup> The Settlement Agreement, like the Board's final Decisions and Orders, is a public document. See Iowa Code section 258A.6(4)(1991).

<sup>2</sup> These were the same rules cited in the 1988 Statement of Charges that led to the Board's September 2, 1988 Decision and Order.

on October 18, 1999 (State Exhibit 12) but later dismissed those charges in a Decision and Order dated January 22, 2001. The Decision and Order concluded that the state failed to prove, by a preponderance of the evidence, that Respondent's treatment of two female patients in 1999 constituted professional incompetence, unethical conduct, or practice harmful or detrimental to the public. (State Exhibit 13)

d. On October 18, 2001, the Board issued Respondent a Confidential Letter of Education to address and resolve a complaint filed by a female patient. The Board's letter advised Respondent, in part, that a chiropractic physician must always be sensitive to and considerate of a patient's dignity and must always respect the patient's privacy when providing care and treatment. The Board further advised Respondent that it is critical for a chiropractic physician to ensure the dignity and respect the privacy of the patient by explaining procedures, asking the patient's permission to remove clothing, and providing explanation for the necessity to touch areas of the patient's body which are commonly viewed as private or sensitive. (State Exhibits 14, 15)

#### *Allegations of Patient JO*

3. On February 21, 2008, patient JO filed a written complaint with the Board in which she alleged that Respondent asked her to take off her top and bra as he needed to check something and then looked at and fondled her breasts. JO wrote that she was shocked but thought it was necessary. JO indicated that she did not complain to Respondent but never went back to him for further treatment. The complaint did not specify when the alleged incident occurred. (State Exhibit 3)

4. Upon receipt of JO's complaint, the Board asked the Department of Inspections and Appeals (DIA) to investigate. DIA Investigator Corey Powell interviewed JO on March 27, 2008 and Respondent on March 28, 2008. Mr. Powell recorded the interviews and also prepared an Investigative Report containing his summary of the interviews. (Testimony of Corey Powell; State Exhibit 5) The state submitted the actual recording of Respondent's interview as rebuttal evidence. (State Exhibit 21).

JO and Respondent agreed that they were (rural) neighbors and that Respondent provided chiropractic care to JO for neck and back pain over a period of several years. (State Exhibit 5, pp. 8, 12) However, neither of them could recall exactly when Respondent treated JO. (State Exhibits 5, 21)

a. *JO's Interview in March 2008.* JO provided varying estimates of the timeframe when she received chiropractic care from Respondent. Initially, JO estimated that Respondent treated her approximately 20 years earlier, which would have been around 1988. Later in the interview JO estimated that it was probably closer to 15 years earlier, which would have been around 1993. JO also estimated that she received chiropractic care from Respondent over a period of approximately 3 years and last received chiropractic care from him 10 years earlier, which would have been 1998. JO estimated that she visited Respondent's office once or twice a month and that she had 30 or 40 appointments with him before her last appointment, when she alleged that Respondent conducted the inappropriate examination of her breasts. (Testimony of Corey Powell; State Exhibit 4, p. 8)

JO told Corey Powell that during her last appointment, Respondent asked her remove her clothing from the waist up and change into a gown that opened in the front because he wanted to "check something." According to JO, Respondent did not elaborate on what he was going to do or the reasons for his actions. JO further reported that Respondent watched her change into the gown, looked at her exposed breasts, felt or fondled her breasts in an inappropriate manner, stood back and looked at her breasts again, and then fondled her breasts again. JO reported that Respondent had never asked her to remove clothing at any previous appointment. JO further reported that there were no witnesses and the examination room door was closed during the appointment, although Respondent's wife was working in the reception area. JO reported that after the examination Respondent did not explain what he had done or why he looked at and touched her breasts. (State Exhibit 4, pp. 9-10)

JO admitted she did not report the alleged incident to anyone immediately after it occurred, although she told her husband at some point. JO told Mr. Powell that she did not report the alleged incident for a variety of reasons, including her fear of retaliation by Respondent, her embarrassment and/or humiliation, the possibility that the Respondent performed a necessary chiropractic service, and because she was raised not to talk about her body or sexually related incidents. (State Exhibit 4, p. 10)

JO told Mr. Powell that after her last appointment with Respondent she read a news article that indicated Respondent had been disciplined for a similar incident. JO said the news article was published in the Ames Tribune 8-10 years

earlier and outlined an incident similar to the one she experienced. She also thought there was a second news article referencing another incident or victim. JO did not indicate when the second article was published.<sup>3</sup> (Testimony of Corey Powell; State Exhibit 4, pp. 10-11)

JO also told Mr. Powell that she started seeing another chiropractor, Dr. Rod Rebarcak, shortly after she terminated treatment with Respondent. In February 2008, JO told Dr. Rebarcak about Respondent's examination during her last visit to his office and asked Dr. Rebarcak if Respondent's conduct was necessary and/or appropriate. Upon hearing JO's allegations, Dr. Rebarcak encouraged her to file a complaint with the Board. (State Exhibit 4, pp. 10-11)

b. *Respondent's Interview in March 2008.* Respondent answered "no" when Corey Powell asked him if he had any idea when he last saw JO. Respondent told Mr. Powell that he typically keeps patient records for at least 7 years following the last appointment, that he had searched his records and his computer, and that he no longer had any treatment records for JO. When Mr. Powell asked Respondent if he had any estimate of when he last saw JO, Respondent replied "8, 9, 10 years ago." Mr. Powell asked Respondent if he could estimate how long he provided treatment to JO, such as 1 year, 5 years, or 10 years? Respondent replied, "I don't know, maybe 5." Respondent did not know why JO terminated her chiropractic care with him, and he never asked her why. During his interview, Respondent repeatedly told Mr. Powell that he could not recall anything specific with respect to JO's care without his medical records. Respondent did not recall that he ever observed or touched JO's breasts. (State Exhibit 4, pp. 12-13; State Exhibit 21)

Respondent also told Corey Powell that after his discipline in 1988, he kept his examination room door open at all times unless an office assistant was standing next to him. He further reported that he became very fearful [of patient complaints] after 1988 and would only have performed a breast examination upon patient request. Respondent denied that he would have asked JO to remove her top, that he would have watched her undress, or that he would have fondled her breasts. When specifically asked by Mr. Powell if it was "possible" that he performed a breast examination, Respondent conceded it was "possible"

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<sup>3</sup> There could have been a newspaper article in January 2001 reporting the Board's dismissal of the October 1999 charges against Respondent. (See State Exhibits 12, 13) However, the only public discipline of Respondent for violations relating to his examination of patients occurred in 1988 and 1991. (See State Exhibits 10, 11).

that he had performed a breast examination on JO, but that he would not have performed it in the way that JO described. Respondent emphasized that prior to performing a breast examination he would have been very “upfront” with the patient and would have asked the patient if she wanted to see her medical doctor for the problem. (Testimony of Corey Powell; State Exhibits 4, p. 18; State Exhibit 21)

5. *JO’s Deposition in December 2010 and Testimony at Hearing.* At her deposition, JO estimated that she received treatment from Respondent 15-20 years earlier, which would have been between 1990-1995. When asked what period of time she saw Respondent, JO answered “probably 10, maybe eight.” (Respondent Exhibit A, p. 14) This was significantly different from her earlier estimate that she was treated by Respondent for 3 years. (State Exhibit 4, p.8) JO did not keep any records of her appointments with Respondent. (Respondent Exhibit A, p. 15).

When asked for the date of her [last] appointment with Respondent, JO replied “I have no idea, I don’t remember.” (Respondent Exhibit A, p. 22) JO recalled that Respondent always closed the door to the examination room. (Respondent Exhibit A, p. 42) JO could not recall when she read the article in the paper about Respondent’s discipline by the Board and could not recall if the article said what inappropriate things Respondent had done to female patients. (Respondent Exhibit A, pp. 19-20) This was different than her earlier statement to Mr. Powell that the article outlined a similar incident to what she experienced. (State Exhibit 4, p. 11)

JO has had a long history of lower back and neck problems. She has had two broken vertebrae and is currently being treated by a pain clinic in addition to receiving chiropractic care. She has had a number of falls and a number of surgeries, including 7 surgeries in one year (either 2004 or 2005). She is currently taking multiple medications for various medical issues. (Respondent Exhibit A, pp. 12-14, 16-17, 33-35; Testimony of JO)

At hearing, JO could not recall how long ago she was treated by Respondent. At her deposition, JO thought that Richard Nixon may have been president at the time she was receiving treatment from Respondent. When asked about this response at hearing, JO testified that she still thought that Richard Nixon may have been president, although she was not positive about that. JO reported that she started seeing Dr. Rebarcak within a few months of leaving Respondent’s

care. However, the record does not include Dr. Rebarcak's patient records or any documentation of when she started chiropractic care with Dr. Rebarcak. When asked if she read any articles about the Board's prior discipline of Respondent, JO replied that she remembered reading something about it quite awhile before but could not recall what it said except that it was something about inappropriate behavior. JO testified that she did not get the paper but someone who knew she had been treated by Respondent told her about the article. (Testimony of JO)

6. *Respondent Testimony at Hearing.* At hearing, Respondent reiterated that he was unable to recall JO's complaints or the treatments he administered without access to records. Respondent testified that he keeps his treatment records between 8-10 years and that when he told Corey Powell that he treated JO approximately 8-10 years earlier he meant that he knew it had to be beyond 8-10 years or else he would have records for her. He testified that the examination JO described was not consistent with his practice. He testified that the door to his treatment room is always open. He further testified that currently and in the 1990's he only had patients change into a gown if the patient needed x-rays. If patients do change into a gown, they are either alone in the examination room when they change or they change behind a curtained area. (Testimony of Respondent)

7. *Credibility.* After weighing all the evidence, the Board was unable to determine the credibility of JO's allegation that Respondent performed an inappropriate breast examination at her last appointment. Although JO appears sincere, the Board was ultimately persuaded that this charge should be dismissed as untimely because Respondent's ability to present a defense was significantly prejudiced by the lack of patient records and by JO's inability to provide a reliable estimate of when she was treated by Respondent and when the inappropriate examination occurred. The basis for this decision will be more fully explained in the Conclusions of Law.

#### *Allegations of Patient VM*

8. On March 22, 2008, VM filed a complaint with the Board alleging that Respondent slipped his hands under her shirt and bra during an adjustment and touched both of her bare breasts. VM reported that she felt very uncomfortable but did not know if Respondent did it on purpose or not. VM further alleged that following an adjustment on February 27, 2008, Respondent commented to

her "I squished your boobs, didn't I?" After Respondent made this comment VM was convinced that he had "crossed the line" and decided to seek care with a different chiropractor. (State Exhibit 5)

9. Upon receipt of this complaint, the Board asked DIA to investigate. DIA Investigator Corey Powell interviewed VM on April 7, 2008 and interviewed VM's new chiropractor, Dr. John Moore, on April 8, 2008. On April 29, 2008, Mr. Powell interviewed Respondent and obtained Respondent's patient records for VM. (Testimony of Corey Powell; State Exhibits 6; 21)

a. *VM's Interview in April 2008.* In her interview, VM estimated that she had approximately 15 appointments with Respondent. VM alleged that at her second to last visit, Respondent placed his hands underneath her tank top, t-shirt, and bra while performing an adjustment to treat her rib pain. She reported that Respondent's hands were on both sides of her mid-sternum and were on the inner sides of each breast. VM further reported that Respondent did not ask for consent or give appropriate notification to her of where he would be placing his hands during the adjustment.

VM also reported that at her next visit on February 27, 2008, Respondent commented "I squished your boobs, didn't I?" after he performed an adjustment that caused him to press his chest against her body. VM thought the door to the treatment room was open during her appointments. VM reported Respondent's actions to her new chiropractor, Dr. John Moore, who told her that one of his former patients was inappropriately touched by Respondent. (State Exhibit 6, pp. 27-29; Testimony of Corey Powell)

b. In his interview, Dr. John Moore verified that VM told him about her last visits to Respondent at their first appointment. Dr. Moore further verified that he told VM that one of his former patients had also alleged that she was touched inappropriately by Respondent. Dr. Moore could not recall the patient's name, but believed that the patient filed a complaint against Respondent 5 or 10 year earlier and thought there had been an article in the newspaper about the alleged incident. (State Exhibit 6, pp. 30-31)

c. *Respondent Interview in April 2008.* Respondent reviewed his records for VM, which show that Respondent treated VM on 25 occasions between August 20, 2007 and her last appointment on February 27, 2008. Respondent reported that at the second to last appointment on February 15, 2008,

he performed adjustments for VM's reported problems with her back, right knee, hip, T4 on the right, rib rotation, and CT on the right. Respondent further reported that VM's sacral base had dropped on the left, which will pull her ribs down on the right in a twisted fashion. Respondent described the manual rib adjustment that he typically performs for rib pain, which involves placing his right hand on the patient's upper left rib area above the breast on the high side and placing his left hand in the right rib area below the breast and then pushing his hands in a scissors like motion to perform the adjustment. Respondent reported that his thumb will be just off the patient's sternum during the adjustment. Typically Respondent performs the adjustment over the patient's clothing unless he needs to make skin contact to complete the adjustment or to avoid pushing a patient's underwire bra into her chest.

Respondent did not specifically recall if he performed this rib adjustment on VM on February 15, 2008 or if he placed his hands under VM's clothing to perform the adjustment. His records do not document this type of adjustment but Respondent reported that he does not always note when a sternum area adjustment is performed.<sup>4</sup> Respondent asserted that if he performed the sternum adjustment he would have made contact with VM's sternum area and not her breasts. Respondent reported that if it is necessary to place his hands under the patient's clothing he always informs the patient first and obtains appropriate consent before performing the adjustment. (State Exhibit 6, p. 33-34; Exhibit 21)

With respect to VM's last appointment, Respondent confirmed that he sometimes uses a technique that requires a patient to lie on the drop table with the patient's arms crossed over the patient's chest. Respondent then reaches behind the patient's back and pulls the patient's body into his chest to perform the adjustment. Respondent's record for this date does not document that he performed this type of adjustment but Respondent agreed it was possible that he did perform it. Respondent denied making the comment "I squished your boobs, didn't I?" to VM. (Testimony of Corey Powell; State Exhibits 6, 21)

10. VM was 20 years old at the time that Respondent treated her, and she reported that she had received chiropractic care from several chiropractors since she was 14 years old. VM reported that she started receiving chiropractic treatment from Respondent in January 2008 and that she saw him for

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<sup>4</sup> The Board had concerns about the adequacy of Respondent's record keeping but these concerns are not addressed in this decision because the Statement of Charges does not allege a record keeping violation.

approximately two months. (State Exhibit 6, p. 27; Testimony of VM) However, Respondent's patient record for VM documents that Respondent actually started treating VM on August 20, 2007 and that her last appointment was on February 27, 2008. According to her patient records, VM reported complaints of rib pain, chronic neck and shoulder pain, and low back pain. (State Exhibit 6, pp. 40-50)

11. *VM Deposition in December 2010 and Testimony at Hearing.* In her deposition taken on December 7, 2010 and again in her testimony at hearing, VM provided fairly consistent descriptions of the types of adjustments she received from Respondent on February 15 and February 27, 2008. Respondent agreed that VM's descriptions were consistent with adjustments that he performs.

a. During the February 15, 2008 appointment, VM reports she was wearing a t-shirt or shirt, a tight fitting tank top with an inner bra support that had an elastic band below the breast area, and a bra that connected in the back. Respondent sketched these clothing items at the time of her deposition. VM told Respondent that she had centrally located chest pain. In her deposition, VM reported that Respondent palpated the sternum area with his finger to see if she could feel pain. During the adjustment to her sternum, VM was lying on her back on the treatment table.

VM reported that Respondent placed his hands up under her shirt, tank top and bra, with his fingers were pointing toward her head. VM recalled that she could see part of the back side of Respondent's hands. She believed that Respondent's pinky and ring fingers were raised while he applied pressure to her sternum in a down and forward or up motion. VM, who is relatively petite, estimated that her sternum area is 1-2 inches wide. VM reported that she felt Respondent's thumbs, forefingers and middle fingers<sup>5</sup> on the inner sides of both breasts, but not on her nipples, and that this physical contact lasted approximately 5 seconds. VM reports that Respondent did not tell her that he was going to reach under her clothing to make skin-to-skin contact with her sternum area and did not ask permission to do so.

Respondent had previously performed similar adjustments for VM by applying pressure to her back. This was usually done over her clothing but on at least one occasion Respondent reached underneath VM's clothing to perform the

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<sup>5</sup> VM believed that Respondent was missing a portion of his pinky finger and ring finger on his left hand. (Respondent Exhibit D, p. 63) In fact Respondent is missing his left thumb as a result of an accident when he was four years old. (Testimony of Respondent).

adjustment on her back. Respondent sometimes used an instrument (activator) during the adjustment. No other chiropractor had ever reached under VM's clothes to adjust her. (Respondent Exhibit D, pp. 42-50, 56; Testimony of VM)

b. VM was hesitant to return to Respondent for another appointment but decided to go back because she was still experiencing symptoms and because it was expensive for her to switch chiropractors and go through another initial exam. (Testimony of VM) At her visit on February 27, 2008, VM recalled complaining about pain in her central upper back. Respondent adjusted VM while she was lying on her back on the raised table with her arms crossed in front of her and over her chest. Respondent put both of his arms around VM's back on the outside of her clothing and drew her close to him with his chest touching her arms. Respondent then applied pressure to crack her back. Respondent had previously performed this same adjustment on VM. The adjustment lasted from 3-5 seconds. After the adjustment was finished, Respondent commented to VM "I squished your boobs, didn't I?" (Respondent Exhibit D, pp. 58-60). VM felt that Respondent's comment was inappropriate and that his use of the slang word "boobs" showed that he did not have a medical or chiropractic purpose. In VM's opinion, Respondent was testing her boundaries to see how far he could go with her. (Respondent Exhibit D, pp. 60-61; Testimony of VM)

VM did not report any other comments from Respondent that she perceived to be sexually inappropriate. However, VM reported feeling that Respondent "cornered" her into conversations about diet, nutrition, foods that he felt were unhealthy, and vitamin supplements. VM suffered from acid reflux, which she thought might be related to the pain in her sternum area. VM reported that on one occasion Respondent came up to her at the grocery store when she was buying bags of Valentine candy and told her how unhealthy it was. VM told Respondent she was buying the candy for her friends. VM described Respondent as "creepy" and felt it was strange for him to approach her at the grocery store. In VM's opinion, advice on diet and nutrition is not within Respondent's area of expertise, and it was inappropriate of him to be commenting on it to her. (Testimony of VM; Respondent Exhibit D, pp. 27, 36-37, 52-54)

12. Respondent did not disagree with VM's description of the rib adjustment (anterior dorsal adjustment) that he performs. Respondent testified that when he performs the anterior dorsal adjustment his hands are on the patient's rib heads,

just off the sternum. He further testified that he only adjusts the patient under their clothing if skin-on-skin contact is necessary for an effective adjustment or if he is trying to avoid hurting the patient by pushing an underwire bra into her chest. Respondent testified that he tries to be careful not to make contact with the patient's breasts but noted that some incidental contact could occur during the adjustment. The adjustment is quick, approximately 5 seconds, just as VM described. Respondent denied that he would have touched VM's breasts intentionally or for any inappropriate purpose during the adjustment. (Testimony of Respondent)

Respondent also denied that he would have performed an adjustment under VM's clothing without first explaining to her what he was doing, why he was doing it, and asking permission to perform the adjustment. (Testimony of Respondent)

When asked by a Board member if he made the comment "I squished your boobs, didn't I?" at VM's last appointment, Respondent told the Board that he attended a seminar approximately three years earlier, and the presenter recommended using common terms for body parts when speaking to a patient, rather than using terms that the patient may not know. Respondent testified that he saw VM wince when he performed the adjustment, and he may have said something to her like "I'm sorry I smooshed your boobs." However, when questioned further, Respondent could not say that he actually recalled making this particular statement to VM. Respondent denied that any comment that he made was meant to be offensive or sexual. (Testimony of Respondent)

Respondent admits talking to VM about nutrition and diet. He believed that VM's digestive problems contributed to her being out of adjustment. In his opinion, it is within his role to encourage preventive health care and not just provide patients with adjustments to treat an immediate problem with pain or discomfort. (Testimony of Respondent; Respondent Exhibit C, p. 11)

13. Respondent presented testimony from three long-term female patients as well as letters from ten other female patients. The patients report that Respondent has treated them in a professional manner and always asks permission prior to performing adjustments. (Testimony of three patients; Respondent Exhibit B)

14. In 2009, Respondent was evaluated by licensed psychologist Gary R.

Schoener at the Board's request. Mr. Schoener reviewed a number of documents provided by the Board, including Respondent's prior disciplinary orders, VM's complaint and patient record, and the two investigative reports prepared by Corey Powell. Mr. Schoener interviewed Respondent on January 22, 2009 for 3 hours and 45 minutes and administered two psychological tests, the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) and the Millon Clinical Mutiaxial Inventory-III (MCMI-III). Mr. Schoener also conducted a later telephone interview of Respondent and telephone interviews of four collateral contacts. Mr. Schoener issued a written evaluation report dated April 6, 2009.

Respondent verbally reported that he had received some professional boundaries counseling in 1991, which consisted of work-books, study materials, and multiple counseling sessions. In his report, Gary Schoener noted that it was unfortunate that there was not a counselor's report available to him from these counseling sessions because the counselor's impressions and observations would have been helpful.

Gary Schoener reports that Respondent admitted that he could hear himself say something like "I'm sorry if I squished your boobs" to VM in order to "be upfront and acknowledge what she may have felt" when he pressed against her. Respondent agreed that he should not have said "boobs" because it is a non-professional term. Mr. Schoener advised Respondent that any such comment is going to seem "bizarre" and troubling to a patient. Mr. Schoener also advised Respondent that while he may aspire to always be professional and forewarn patients of touch that may be troubling, it was clear that at times he was not doing this successfully. Mr. Schoener advised Respondent that it is more confusing and troubling for the patient to have unexpected touch, especially in an area of the body that is near a sexual area.

Gary Schoener reached the following conclusions with respect to Respondent, based on his review of the documents provided by the Board, the psychological testing, the clinical examination, and the collateral interviews:

- Although no evaluation can rule out a psychological problem, including a disorder related to sexual conduct, Mr. Schoener did not find evidence of a psychological problem;
- Mr. Schoener described the allegations underlying VM's complaint as involving a question of practice technique (upon which he could not offer an opinion), interactional style, and the use of a term. Mr. Schoener

- believed that Respondent may have some difficulties in judging the comfort level of some patients with regard to his lecturing on health issues and in apologizing for incidental touch;
- Mr. Schoener described the allegations underlying JO's complaint as also involving some question of technique but also a question as to whether a breast examination was done during the appointment. He concluded that the passage of time and absence of records makes this even more difficult to assess;
  - Mr. Schoener concluded that both complaints have a common element which appears at a number of points in Respondent's disciplinary history, i.e. difficulties in managing the doctor-patient relationship.

Gary Schoener did not recommend any psychological treatment or rehabilitation for Respondent. However, he believed that Respondent would benefit from some counseling or consultation on professional boundaries issues. Mr. Schoener also believed that Respondent's practice would benefit from having a patient handout that more clearly describes his practice philosophy and his approach to delivering chiropractic care and which invites questions and feedback. Mr. Schoener also mentioned patient satisfaction forms as one method of obtaining feedback and sending a message about accountability. (Respondent Exhibit C)

15. *Credibility Findings.* VM was a credible witness, and Respondent concedes that her descriptions of the adjustments he performs were generally accurate. The primary factual disputes with respect to the February 15<sup>th</sup> adjustment are twofold: (1) whether Respondent touched VM's breasts during the adjustment and whether he did so intentionally and for an inappropriate purpose and (2) whether Respondent informed VM that the adjustment would require skin-to-skin contact in her chest area and whether he asked for her permission to perform the adjustment under her clothing.

Based on VM's testimony and her prompt reporting of the incident to her new chiropractor, it is likely that Respondent's fingers made physical contact with the sides of VM's breasts during the rib adjustment. The Board agrees that this type of physical contact may occur inadvertently while performing this particular adjustment. Based on this record, the Board was not persuaded that Respondent touched VM's breasts intentionally or for an inappropriate purpose. In fact, VM admits that at the time of the adjustment, she was unsure if the touching was inappropriate, and she decided to return for another adjustment twelve days

later.

Nevertheless, the Board was persuaded that Respondent failed to inform VM that the adjustment required skin-on-skin contact and failed to ask for her permission to reach underneath her clothing. In all likelihood, it was Respondent's failure to properly VM about the nature of the adjustment that made her so uncomfortable and caused her to question whether the adjustment was appropriate. VM filed her complaint rather promptly, and her memory and description of the adjustment both appear to be very reliable. Respondent, on the other hand, was unable to state affirmatively that he recalled informing VM of the nature of the procedure or asking her permission to reach under her clothes, even though he was notified of the complaint with a few months after he performed the adjustment. Respondent's defense was that he always informed patients about the nature of such adjustments and always asked for permission before making skin-on-skin contact with the patient so he must have done so in this case. However, Respondent's disciplinary record demonstrates that he has not always properly informed patients before performing these types of adjustments. The Board believes that in this instance, Respondent did not properly inform VM and did not ask her permission prior to reaching under her clothing to perform the adjustment.

The Board was also persuaded that Respondent made the comment "I squished your boobs, didn't I?" to VM at her final appointment on February 27, 2008. Notably, it was only after Respondent made this comment that VM became convinced that the prior adjustment on February 15<sup>th</sup> was done in an inappropriate manner. Although Respondent initially denied making this statement, he essentially admitted, both in his statement to the evaluator and in his testimony at hearing, that he likely apologized to VM for "squishing" or "smooshing" her "boobs." VM's reports and testimony concerning this comment have been far more consistent than Respondent's claims and explanations. Although it was poor judgment and inadvisable to use a slang term in referring to a patient's body parts, the Board was not persuaded that Respondent had sexual or lewd intentions towards the patient when making the comment. Nevertheless, a patient is likely to perceive a chiropractor's use of this type of slang term as an unwelcome familiarity and as a violation of appropriate professional boundaries.

## CONCLUSIONS OF LAW

### *Count I-Unethical Conduct*

The Board is authorized to discipline a licensee for engaging in unethical conduct. Iowa Code sections 147.55(3), 151.9(3), 272C.10(3). Board rules define unethical conduct, in relevant part, to include improper sexual contact with, or making suggestive, lewd, lascivious or improper remarks or advances to a patient, client, or coworker. 645 IAC 45.2(28)"b."

### *Patient JO*

Board rule requires timely filing of complaints in order to ensure the availability of witnesses and to avoid initiation of an investigation under conditions which may have been significantly altered during the period of delay. 645 IAC 9.1(1). However, Board rules do not define "timely" filing of complaints and do not set out a statute of limitations for filing charges.

In addition, Iowa case law recognizes the doctrine of laches as a possible affirmative defense in a professional disciplinary action. *Schaaf v. Iowa Board of Medicine*, 2009 WL 5126252 (Iowa App. 2009); *Miller v. Board of Medical Examiners*, 609 N.W. 2d 478 (Iowa 2000); *Sahu v. Iowa Board of Medical Examiners*, 537 N.W.2d 674(Iowa 1995); *Committee on Professional Ethics & Conduct v. Wunschel*, 461 N.W.2d 840 (Iowa 1990). "The mere passage of time is insufficient to bar the proceedings but we will allow the defense of laches if the licensee is prejudiced by the delay." *Sahu*, 537 N.W.2d at 676.

Under Iowa law, laches bars a professional disciplinary action if (1) the delay is unreasonable, and (2) prejudice to the licensee is established. *Miller*, 609 N.W. 2d at 485. The party asserting the affirmative defense of laches carries the burden of establishing the essential elements by clear, convincing, and satisfactory evidence, which is a higher standard of proof than the "preponderance of the evidence" standard applicable in Board disciplinary proceedings. *Sahu*, 537 N.W. 2d at 676; *Wunschel*, 461 N.W.2d at 846.

Prior to hearing, Respondent filed a motion asking the Board to dismiss the allegations involving patient JO on the grounds that the complaint was so untimely that the licensee's ability to present a defense was prejudiced. Respondent asserted that he was prejudiced because he no longer had any

clinical or billing records for JO, because he did not recall the date of her last appointment, and because he had no recollection of JO's last appointment. Respondent claimed that information from his records would have aided in his defense and without them he could not defend himself against the charges. Following a motion hearing, the Board ruled that while JO's delay in filing her complaint was unreasonable, Respondent's assertions of prejudice directly implicated factual issues that could not fairly be assessed or determined through a motion to dismiss. The Board denied the Motion to Dismiss because at that point in the proceedings the Board was unable to determine, by clear and convincing evidence, that the length of delay and the absence of JO's treatment and billing records was sufficiently prejudicial to Respondent's defense to satisfy the essential elements of laches. See Board Ruling issued August 12, 2010.

After hearing the testimony of JO and Respondent and after reviewing the exhibits, the Board was persuaded that JO's complaint is untimely under the Board's rules. The long delay between JO's last appointment with Respondent and the filing of her complaint significantly prejudiced Respondent's ability to present a defense. Both Respondent and JO were unclear on the dates of JO's treatment and the date of her last appointment.

The Board's rules currently require chiropractors to keep clinical and fiscal records for all adult patients for at least six years after the date of their last examination or treatment. 645 IAC 43.10(3). This rule was adopted effective April 2, 2008. See Iowa Administrative Bulletins for 11/7/07; 2/27/08. Respondent has indicated in his statements to the Board's investigator that he tries to keep adult patient records at least 7 years after the last appointment. At hearing Respondent testified that he typically keeps patient records for 8-10 years after the final appointment. In any event, by the time that JO filed her complaint Respondent no longer had any patient records for her.

Respondent's defense was essentially that while he has no recollection of his final appointment with JO, he would not have performed the inappropriate visual and physical breast examination that she describes. Respondent testified that after the Board issued the 1988 disciplinary order, he has been very cautious in treating female patients and has always kept his treatment door open, which is contrary to JO's testimony that the door was always closed during her treatments. He further testified that since that time he only asks patients to change into gowns for x-rays. Respondent argues that Respondent's memory and perception of her final appointment may have been affected by other events

in her life, by the passage of time, by her review of newspaper articles about him, and by her discussion with her subsequent chiropractor.

JO has provided broad and varying estimates of the timeframe when she received treatment from Respondent. In her April 2008 interview by Corey Powell, JO initially estimated that she first received care from Respondent approximately 20 years earlier. Later in the same interview she estimated it was probably closer to 15 years earlier. If this estimate was accurate, it would mean that JO initiated care with Respondent around 1988 to 1993. JO also estimated that she last received care from Respondent 10 years earlier, or in or about 1998, and was under his care for approximately 3 years.

In her deposition in December 2010, JO could not remember what years she was treated by Respondent but estimated that it was probably 15 to 20 years earlier. At deposition, JO estimated that Respondent probably treated her for ten years or "maybe eight." (Respondent Exhibit A, p. 14) This was inconsistent with the estimate she gave Mr. Powell that Respondent treated her for three years.

At hearing, JO seemed even less certain about the timeframe when she was treated by Respondent. She testified that she thought she went to Respondent for about three years but was not sure. She could not recall how long ago she was treated by Respondent.

JO has also reported having read one or more newspaper articles about the Board's previous discipline of Respondent sometime after her last appointment with Respondent. Respondent was first publically disciplined by the Board in September 1988. Respondent and the Board entered into a Settlement Agreement in October 1991. Respondent was charged again in 1999, but those charges were dismissed in a Board decision issued on January 22, 2001. JO was unable to identify which of these disciplinary actions she read about or to describe what she read although she told Investigator Powell that the article was in the Ames Tribune 8-10 years earlier and outlined an incident similar to the one that she experienced.

Upon reviewing all of the evidence and attempting to weigh the credibility of JO and Respondent, the Board was persuaded that Respondent's ability to defend himself was unfairly and significantly handicapped by JO's delay in filing her complaint and by JO's inability to provide any reliable estimate of the date of the alleged inappropriate examination. For these reasons, the Board has now

decided to grant Respondent's request to dismiss Case No. 08-005.

### *Patient VM*

Although VM was a credible witness, the state failed to prove, by a preponderance of the evidence, that Respondent engaged in unethical conduct during her last two appointments in February 2008. There was insufficient evidence to establish that Respondent touched VM's breasts intentionally or for an inappropriate purpose during a rib adjustment on February 15, 2008. There was insufficient evidence to establish that Respondent made a suggestive, lewd, or lascivious remark to VM following her adjustment on February 27, 2008.

The Board was persuaded that Respondent performed an appropriate adjustment technique to address VM's reported rib pain and that any physical contact he made with VM's breasts was likely inadvertent. Although VM was not comfortable with the adjustment she received from Respondent on February 15, 2008, at the time she was uncertain if she had been touched in an inappropriate manner.

VM credibly testified that after performing an adjustment at her next appointment, Respondent commented, "I squished your boobs, didn't I?" As discussed previously, Respondent all but admitted using this word to refer to the patient's breasts, and the Board was persuaded that Respondent did make this comment. While using a slang term for a patient's body part is ill advised and unprofessional, the Board was not persuaded that the remark was lewd, suggestive or lascivious.

### *Count II – Professional Incompetency*

The Board is authorized to discipline licensees for professional incompetency. Iowa Code sections 147.55(2), 151.9(2), 272C.10(2). As defined by Board rule, professional incompetency includes, but is not limited to:

- a. A substantial lack of knowledge or ability to discharge professional obligations within the scope of practice.
- b. A substantial deviation from the standards of learning or skill ordinarily possessed and applied by other chiropractic physicians in the state of Iowa acting in the same or similar circumstances.

- c. A failure to exercise the degree of care which is ordinarily exercised by the average chiropractic physician acting in the same or similar circumstances.
- d. Failure to conform to the minimal standard of acceptable and prevailing practice of a chiropractic physician in this state.

645 IAC 45.2(2).

*Patient JO*

The Board has determined that Count II should be dismissed with respect to the allegations of patient JO because her complaint was untimely.

*Patient VM*

The preponderance of the evidence established that on February 15, 2008, Respondent failed to inform VM of the nature of the rib adjustment he planned to perform and failed to ask her permission to reach under her clothing to perform the adjustment. These failures constituted a failure to exercise the degree of care ordinarily exercised by the average chiropractic physician acting in the same or similar circumstances as well as a failure to conform to the minimal standard of acceptable and prevailing practice of a chiropractic physician in this state, in violation of Iowa Code sections 147.55(2), 151.9(2), 272C.10(2), and 645 IAC 45.2(2) "c" and "d."

The average chiropractic physician in Iowa explains the purpose of an adjustment and asks for patient permission before reaching under a patient's clothing to perform an adjustment. This is particularly true when the adjustment is performed in an area of the patient's body that is considered private, such as the chest area of a female. Moreover, in prior disciplinary actions this Board has repeatedly reminded Respondent of the importance of fully explaining such procedures to patients and the importance of respecting the dignity and privacy of the patient. Respondent's failure to explain the rib adjustment procedure to the patient, his failure to explain why he needed to reach under the patient's clothing, and his failure to ask permission to touch the patient's skin in a private area of her body constituted a violation of Iowa Code section 147.55(2), 151.9(2), 272C.10(2) and 645 IAC 45.5(2) "c" and "d."

## DECISION AND ORDER

**IT IS THEREFORE ORDERED that the charges under Count I are hereby DISMISSED.**

**IT IS FURTHER ORDERED that the charges under Count II pertaining to patient JO are hereby DISMISSED.**

IT IS FURTHER ORDERED that Respondent Ronald Pehl is hereby CITED for his violation under Count II with respect to patient VM and is hereby WARNED that future violations will result in more severe disciplinary sanctions.

IT IS FURTHER ORDERED that Respondent shall pay a fine of five hundred dollars (\$500) within thirty (30) days of the issuance of this Decision and Order.

IT IS FURTHER ORDERED that Respondent shall complete a continuing education course on Professional Boundaries, within six (6) months of the date of this Decision and Order. The course must be pre-approved by the Board and must provide at least six (6) contact hours. These continuing education hours may not be used by Respondent for license renewal.

IT IS FURTHER ORDERED that Respondent shall complete a classroom course on interpersonal communication skills, which must be a minimum of twelve (12) contact hours. Respondent must obtain Board approval for the course within ninety (90) days of the date of this Decision and Order. Respondent must complete the course and submit verification of his completion within one year of the date of this Decision and Order. These education hours may not be used for license renewal.

IT IS FURTHER ORDERED that Respondent shall prepare a patient handout, which shall be provided to all new patients at the time of their new patient orientation and to all ongoing patients at the time of their patient update. Patients must sign and date a form verifying that they have been given the patient handout, have read it, and were given the opportunity to ask questions. Respondent shall retain the signed in the patient file. The Board may send an investigator at any time to verify that the forms are properly signed and retained in the patients' files.

Respondent shall obtain Board approval for the patient handout and for the form

to be signed by patients. The patient handout and signature form shall be provided to the Board within sixty(60) days of this Decision and Order. The patient handout shall explain Respondent's practice philosophy. The patient handout shall also explain that while some adjustments may require skin-on-skin contact, Respondent will always explain the nature and purpose of the adjustment and request patient permission prior to performing these types of adjustments.

IT IS FURTHER ORDERED that Respondent will be subject to further discipline if he fails to fully comply with the terms of this Decision and Order.

IT IS FURTHER ORDERED, pursuant to Iowa Code section 272C.6, that Respondent shall pay \$75.00 for fees associated with the disciplinary hearing and \$343.75 for the court reporter fees. The total fees of \$418.75 shall be paid within thirty (30) days of receipt of this decision.

**This Findings of Fact, Conclusion of Law, Decision and Order is approved by the Board February 8, 2011.**