

COMMONWEALTH OF KENTUCKY  
BOARD OF MEDICAL LICENSURE  
CASE NO. 1539

FILED OF RECORD

APR 22 2014

K.B.M.L.

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF  
KENTUCKY HELD BY MICHAEL C. HESS, M.D., LICENSE NO. 19773, 1654  
VICTORY COURT, PROSPECT, KENTUCKY 40059

**ORDER OF REVOCATION**

On April 17, 2014, the Kentucky Board of Medical Licensure ("the Board"), acting by and through its Hearing Panel A, took up this case for final action. The members of Panel A reviewed the Complaint; the Board's Motion for Directed Verdict, filed of record December 18, 2013; an Agreed Order of Indefinite Restriction, KBML Case No. 1178, filed January 27, 2012; the Hearing Officer's Recommended Order Finding Dr. Michael C. Hess in Default, filed March 6, 2014; and a memorandum from the Board's counsel, dated March 6, 2014. The licensee, Michael C. Hess, M.D., was given notice of the meeting and an opportunity to be heard; he did not appear before the Panel.

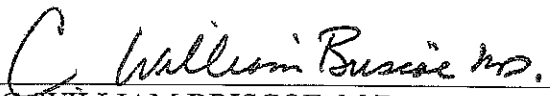
Having considered all the information available and being sufficiently advised, Hearing Panel A ACCEPTS the hearing officer's recommended findings and ADOPTS those findings and INCORPORATES them BY REFERENCE into this Order; Hearing Panel A FURTHER ACCEPTS AND ADOPTS the hearing officer's Recommended Order. (Attachment) Having considered all of the sanctions available under KRS 311.595 and the nature of the violations in this case, Hearing Panel A has determined that revocation is the appropriate sanction. Accordingly, Hearing Panel A **ORDERS**:

1. The license to practice medicine held by Michael C. Hess, M.D., is hereby REVOKED and he may not perform any act which constitutes the "practice of medicine," as that term is defined by KRS 311.550(10) – the diagnosis, treatment, or correction of any and all

human conditions, ailments, diseases, injuries, or infirmities by any and all means, methods, devices, or instrumentalities – in the Commonwealth of Kentucky;

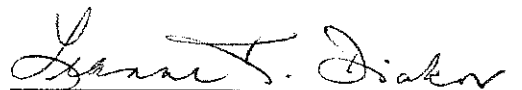
2. The provisions of KRS 311.607 SHALL apply to any petition for reinstatement filed by the licensee; and
3. The licensee SHALL REIMBURSE the costs of these proceedings in the amount of \$62.50, prior to filing any petition for reinstatement of his license to practice medicine in the Commonwealth of Kentucky.

SO ORDERED, this 22nd day of April, 2014.

  
C. WILLIAM BRISCOE, M.D.  
CHAIR, HEARING PANEL A

#### CERTIFICATE OF SERVICE

I certify that the original of the foregoing Order of Revocation was delivered to Mr. Michael S. Rodman, Executive Director, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222; a copy was mailed, first-class postage prepaid, to Thomas J. Hellmann, Esq., Hearing Officer, 415 West Main Street, P.O. Box 676, Frankfort, Kentucky 40602-0676; and a copy was mailed via certified mail return-receipt requested to Michael C. Hess, M.D., License No. 19773, 1654 Victory Court, Prospect, Kentucky 40059, on this 22nd day of April, 2014.

  
Leanne K. Diakov  
General Counsel  
Kentucky Board of Medical Licensure  
310 Whittington Parkway, Suite 1B  
Louisville, Kentucky 40222  
Tel. (502) 429-7150

### EFFECTIVE DATE AND APPEAL RIGHTS

Pursuant to KRS 311.593(1) and 13B.120, this Order will be effective immediately on filing. It is the Panel's opinion that based upon sufficient reasonable cause, the health, welfare, and safety of Dr. Hess' patients or the general public would be endangered by delay.

The licensee may appeal from this Order, pursuant to KRS 311.593 and 13B.140-.150, by filing a Petition for Judicial Review in Jefferson Circuit Court within thirty (30) days after this Order is mailed or delivered by personal service. Copies of the petition shall be served by the licensee upon the Board and its counsel. The Petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested, along with a copy of this Order.

MAR -6 2014

K.B.M.L.

COMMONWEALTH OF KENTUCKY  
BOARD OF MEDICAL LICENSURE  
CASE NO. 1539

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF  
KENTUCKY HELD BY MICHAEL C. HESS, M.D., LICENSE NO. 19773,  
1654 VICTORY COURT, PROSPECT KENTUCKY 40059

RECOMMENDED ORDER FINDING  
DR. MICHAEL C. HESS IN DEFAULT

This action is before the hearing officer on the *Motion for Default Ruling* filed by the Kentucky Board of Medical Licensure. Finding substantial merit to the motion, the hearing officer grants the motion and recommends the Board issue a Final Order finding Dr. Michael C. Hess in default. In support of that recommendation, the hearing officer states the following:

On December 20, 2013, the Board issued the *Complaint* against Dr. Hess charging him with violating KRS 311.595(13). The Board's charges were issued after he failed to comply with the provisions of the *Agreed Order of Indefinite Restriction* entered on January 27, 2012. The *Agreed Order* had resolved allegations related to Dr. Hess's inappropriate sexual conduct and sexual comments to patients and employees.

In this action the Board charges that Dr. Hess failed to comply with the requirements of the *Agreed Order* that he maintain his contractual relationship with the Kentucky Physician Health Foundation and that he comply with all requirements of that contractual relationship. *Complaint*, pages 1-2. The Board asserts that Dr. Hess has failed to reimburse the Kentucky Health Foundation for \$600 in administrative fees and

has failed to respond to the Foundation's request that he make the required payment. In addition, the Board asserts that Dr. Hess has stopped attending group therapy sessions as required by his contract with the Foundation. *Complaint*, page 2. Based upon those allegations, the Board has charged Dr. Hess with violating KRS 311.595(13), which subjects a licensee to discipline if he has "violated any agreed order, letter of agreement, final order, or emergency order issued by the board."

The attachment to the *Motion for Default Ruling* indicates the *Complaint* was hand delivered to Dr. Hess on January 14, 2014, and in accordance with KRS 311.591(4), Dr. Hess was required to file a response to the *Complaint* by February 13, 2014. When he failed to file a response, the Board filed the *Motion for Default Ruling*, upon receipt of the motion, the hearing officer issued an order dated February 18, 2014, requiring Dr. Hess to file by February 28, 2014, responses to the *Complaint* and to the Board's motion. In the order the hearing officer placed Dr. Hess on notice that if he failed to file the responses, the hearing officer would issue a default order recommending the Board take any appropriate action against the doctor's license to practice medicine. *Order Requiring Filing of Responses*.

Dr. Hess has filed nothing in response to the hearing officer's order. Therefore, Dr. Hess is in default pursuant to KRS 13B.080(6), and due to Dr. Hess's failure to file a response to the *Complaint*, the Board may assume the allegations in the *Complaint* are true and that Dr. Hess intends to admit the charges. KRS 311.591(4).

Because Dr. Hess is in default, the administrative hearing scheduled for May 20-21, 2014, is canceled.

### **RECOMMENDED ORDER**

Based upon Dr. Hess's failure to respond to the charges in the *Complaint* or to the hearing officer's order, the hearing officer recommends the Board find Dr. Hess in default, find that he has admitted to the charges in the *Complaint*, and find that he has violated the provisions of KRS 311.595(13) as set forth in the *Complaint*. The hearing officer further recommends that the Board take any appropriate action against the license of Dr. Michael C. Hess to practice medicine for his violations of the Board's statutes.

### **NOTICE OF EXCEPTION AND APPEAL RIGHTS**

Pursuant to KRS 13B.110(4) a party has the right to file exceptions to this recommended decision:

A copy of the hearing officer's recommended order shall also be sent to each party in the hearing and each party shall have fifteen (15) days from the date the recommended order is mailed within which to file exceptions to the recommendations with the agency head.

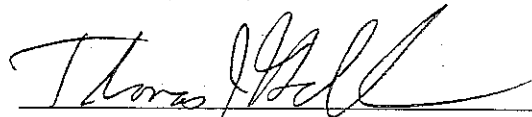
A party also has a right to appeal the Final Order of the agency pursuant to KRS 13B.140(1) which states:

All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue

for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Pursuant to KRS 23A.010(4), "Such review [by the circuit court] shall not constitute an appeal but an original action." Some courts have interpreted this language to mean that summons must be served upon filing an appeal in circuit court.

SO RECOMMENDED this 4<sup>th</sup> day of March, 2014.



THOMAS J. HELLMANN  
HEARING OFFICER  
415 WEST MAIN ST.  
P.O. BOX 676  
FRANKFORT, KY 40602-0676  
(502) 227-2271  
thellmann@hazelcox.com

# CERTIFICATE OF SERVICE

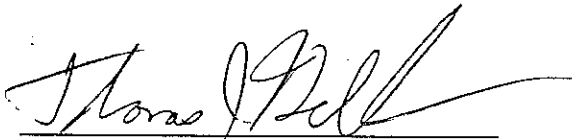
4<sup>th</sup> I hereby certify that the original of this RECOMMENDATION was mailed this day of March, 2014, by first-class mail, postage prepaid, to:

JILL LUN  
KY BOARD OF MEDICAL LICENSURE  
HURSTBOURNE OFFICE PARK STE 1B  
310 WHITTINGTON PKWY  
LOUISVILLE KY 40222

for filing; and a true copy was sent by first-class mail, postage prepaid, to:

C LLOYD VEST II  
GENERAL COUNSEL  
KY BOARD OF MEDICAL LICENSURE  
HURSTBOURNE OFFICE PARK STE 1B  
310 WHITTINGTON PKWY  
LOUISVILLE KY 40222

DR. MICHAEL C. HESS  
1654 VICTORY CT  
PROSPECT KY 40059



THOMAS J. HELLMANN

1539FC



COMMONWEALTH OF KENTUCKY  
BOARD OF MEDICAL LICENSURE  
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IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF  
KENTUCKY HELD BY MICHAEL C. HESS, M.D., LICENSE NO. 19773,  
1654 VICTORY COURT, PROSPECT, KENTUCKY 40059

**EMERGENCY ORDER OF SUSPENSION**

The Kentucky Board of Medical Licensure (hereafter "the Board"), acting by and through its Inquiry Panel B, considered this matter at its November 21, 2013 meeting. At that meeting, Inquiry Panel B considered a Panel Memorandum prepared by Betty Prater, Medical Investigator, dated July 23, 2013; an Agreed Order of Indefinite Restriction, filed January 27, 2012; and correspondence from Greg L. Jones, M.D.; Medical Director, Kentucky Physicians Health Foundation, dated June 19, 2013.

Having considered all of this information and being sufficiently advised, Inquiry Panel B ENTERS the following EMERGENCY ORDER OF SUSPENSION, in accordance with KRS 311.592(1) and 13B.125(1):

**FINDINGS OF FACT**

Pursuant to KRS 13B.125(2) and based upon the information available to it, Inquiry Panel B concludes there is probable cause to make the following Findings of Fact, which support its Emergency Order of Suspension:

1. At all relevant times, MICHAEL C. HESS, M.D., was licensed by the Board to practice medicine in the Commonwealth of Kentucky.
2. The licensee's medical specialty is family medicine.
3. On January 27, 2012, the licensee entered into an Agreed Order of Indefinite Restriction with the Board's Hearing Panel B to resolve Board Case No. 1178, which

addressed the licensee's inappropriate sexual conduct and sexual comments to patients and employees. Under the Agreed Order of Indefinite Restriction, the licensee was prohibited from providing medical treatment or entering into a physician-patient relationship with any female person unless and until approved to do so by the Panel. Condition 3c of the Agreed Order of Indefinite Restriction specifically provides,

The licensee shall maintain his contractual relationship with the Kentucky Physicians Health Foundation and shall fully comply with all requirements of that contractual relationship.

4. By letter dated June 19, 2013, Greg Jones, M.D., Medical Director, Kentucky Physicians Health Foundation ("the Foundation") notified the Panel,

Dr. Hess has been under contract with the Foundation since December of 2010. Components of his contract are as follows:

- Medication management with an addiction psychiatrist
- Individual therapy with Fred Hampton, MSSW, LCSW
- Once he returns to the active practice of medicine, the Foundation will establish worksite accountability which will be obtained through interval reports from a contact at this worksite.

In April of 2013, Dr. Hess was notified that he was in arrears with his administrative fees. At that time he owed the Foundation \$600. He was informed that he would need to pay his balance no later than April 26, 2013. At this time he has neither paid that balance, nor has he contacted our office to make arrangements for a payment plan.

In addition, his therapist, Mr. Hampton, notified us on May 24, 2013, that Dr. Hess is no longer attending his SA group therapy sessions. Mr. Hampton stated that he had left multiple messages for Dr. Hess regarding his absences, but had received no response.

### **CONCLUSIONS OF LAW**

Pursuant to KRS 13B.125(2) and based upon the information available to it, Inquiry Panel B finds there is probable cause to support the following Conclusions of Law, which serve as the legal bases for this Emergency Order of Suspension:

1. The licensee's Kentucky medical license is subject to regulation and discipline by this Board.
2. KRS 311.592(1) provides that the Board may issue an emergency order suspending, limiting, or restricting a physician's license at any time an inquiry panel has probable cause to believe that a) the physician has violated the terms of an agreed order or violated the terms of a disciplinary order; or b) a physician's practice constitutes a danger to the health, welfare and safety of his patients or the general public.
3. There is probable cause to believe that the licensee has violated KRS 311.595(13).
4. The Panel concludes there is probable cause to believe this physician's practice constitutes a danger to the health, welfare and safety of his patients or the general public.
5. The Board may draw logical and reasonable inferences about a physician's practice by considering certain facts about a physician's practice. If there is proof that a physician has violated a provision of the Kentucky Medical Practice Act in one set of circumstances, the Board may infer that the physician will similarly violate the Medical Practice Act when presented with a similar set of circumstances. Similarly, the Board concludes that proof of a set of facts about a physician's practice presents representative proof of the nature of that physician's practice in general.  
  
Accordingly, probable cause to believe that the physician has committed certain violations in the recent past presents probable cause to believe that the physician will commit similar violations in the near future, during the course of the physician's medical practice.

6. The United States Supreme Court has ruled that it is no violation of the federal Due Process Clause for a state agency to temporarily suspend a license, without a prior evidentiary hearing, so long as 1) the immediate action is based upon a probable cause finding that there is a present danger to the public safety; and, 2) the statute provides for a prompt post-deprivation hearing. Barry v. Barchi, 443 U.S. 55, 61 L.Ed.2d 365, 99 S.Ct. 2642 (1979); FDIC v. Mallen, 486 U.S. 230, 100 L.Ed.2d 265, 108 S.Ct. 1780 (1988) and Gilbert v. Homar, 520 U.S. 924 (1997), 117 S.Ct. 1807 (1997). Cf. KRS 13B.125(1).

KRS 13B.125(3) provides that the Board shall conduct an emergency hearing on this emergency order within ten (10) working days of a request for such a hearing by the licensee. The licensee has been advised of his right to a prompt post-deprivation hearing under this statute.

#### **EMERGENCY ORDER OF SUSPENSION**

Based upon the foregoing Findings of Fact and Conclusions of Law, Inquiry Panel B hereby ORDERS that the license to practice medicine in the Commonwealth of Kentucky held by Michael C. Hess, M.D., is SUSPENDED and Dr. Hess is prohibited from performing any act which constitutes the "practice of medicine," as that term is defined by KRS 311.550(10) – the diagnosis, treatment, or correction of any and all human conditions, ailments, diseases, injuries, or infirmities by any and all means, methods, devices, or instrumentalities - until the resolution of the Complaint setting forth the allegations discussed in this pleading or until such further Order of the Board.

Inquiry Panel B further declares that this is an EMERGENCY ORDER, effective upon receipt by the licensee.

SO ORDERED this 20<sup>th</sup> day of December, 2013.



RANDEL C. GIBSON, D.O.  
CHAIR, INQUIRY PANEL B

**CERTIFICATE OF SERVICE**

I certify that the original of this Emergency Order of Suspension was delivered to Mr. Michael S. Rodman, Executive Director, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222; and a copy was mailed via certified mail return-receipt requested to Michael C. Hess, M.D., License no. 19773, 1654 Victory Court, Prospect, Kentucky 40059 on this 20<sup>th</sup> day of December, 2013.



C. LLOYD VEST II  
General Counsel  
Kentucky Board of Medical Licensure  
310 Whittington Parkway, Suite 1B  
Louisville, Kentucky 40222  
(502) 429-7150

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DEC 20 2013

K.B.M.L.

COMMONWEALTH OF KENTUCKY  
BOARD OF MEDICAL LICENSURE  
CASE NO. 1539

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF  
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1654 VICTORY COURT, PROSPECT, KENTUCKY 40059

**COMPLAINT**

Comes now the Complainant Randel C. Gibson, D.O., Chair of the Kentucky Board of Medical Licensure's Inquiry Panel B, and on behalf of the Panel which met on November 21, 2013, states for its Complaint against the licensee, Michael C. Hess, M.D., as follows:

1. At all relevant times, Michael C. Hess, M.D. , was licensed by the Board to practice medicine in the Commonwealth of Kentucky.
2. The licensee's medical specialty is family medicine.
3. On January 27, 2012, the licensee entered into an Agreed Order of Indefinite Restriction with the Board's Hearing Panel B to resolve Board Case No. 1178, which addressed the licensee's inappropriate sexual conduct and sexual comments to patients and employees. Under the Agreed Order of Indefinite Restriction, the licensee was prohibited from providing medical treatment or entering into a physician-patient relationship with any female person unless and until approved to do so by the Panel. Condition 3c of the Agreed Order of Indefinite Restriction specifically provides,

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In addition, his therapist, Mr. Hampton, notified us on May 24, 2013, that Dr. Hess is no longer attending his SA group therapy sessions. Mr. Hampton stated that he had left multiple messages for Dr. Hess regarding his absences, but had received no response.

5. By his conduct, the licensee has violated KRS 311.595(13). Accordingly, legal grounds exist for disciplinary action against his Kentucky medical license.
6. The licensee is directed to respond to the allegations delineated in the Complaint within thirty (30) days of service thereof and is further given notice that:
- (a) His failure to respond may be taken as an admission of the charges;
  - (b) He may appear alone or with counsel, may cross-examine all prosecution witnesses and offer evidence in his defense.
7. NOTICE IS HEREBY GIVEN that a hearing on this Complaint is scheduled for May 20 and 21, 2014 at 9:00 a.m., Eastern Standard Time, at the Kentucky Board of Medical Licensure, Hurstbourne Office Park, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222. Said hearing shall be held pursuant to the Rules and Regulations of the Kentucky Board of Medical Licensure and pursuant to

KRS Chapter 13B. This hearing shall proceed as scheduled and the hearing date shall only be modified by leave of the Hearing Officer upon a showing of good cause.

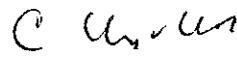
WHEREFORE, Complainant prays that appropriate disciplinary action be taken against the license to practice medicine held by Michael C. Hess, M.D.

This 20<sup>th</sup> day of December, 2013.

  
\_\_\_\_\_  
RANDEL C. GIBSON, D.O.  
CHAIR, INQUIRY PANEL B

**CERTIFICATE OF SERVICE**

I certify that the original of this Complaint was delivered to Mr. Michael S. Rodman, Executive Director, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222; and a copy was mailed to Thomas J. Hellmann, Esq., 415 West Main Street, P.O. Box 676, Frankfort, Kentucky 40602-0676 and mailed via certified mail return-receipt requested to Michael C. Hess, M.D., License no. 19773, 1654 Victory Court, Prospect, Kentucky 40059 on this 20<sup>th</sup> day of December, 2013.

  
\_\_\_\_\_  
C. LLOYD VEST II  
General Counsel  
Kentucky Board of Medical Licensure  
310 Whittington Parkway, Suite 1B  
Louisville, Kentucky 40222  
(502) 429-7150



JAN 27 2012

COMMONWEALTH OF KENTUCKY  
BOARD OF MEDICAL LICENSURE  
CASE NO. 1178

K.B.M.L.

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF  
KENTUCKY HELD BY MICHAEL C. HESS, M.D., LICENSE NO. 19773,  
5129 DIXIE HIGHWAY, LOUISVILLE, KENTUCKY 40216

**AGREED ORDER OF INDEFINITE RESTRICTION**

Come now the Kentucky Board of Medical Licensure (hereafter "the Board"),  
acting by and through its Hearing Panel B, and Michael C. Hess, M.D. ("the licensee"),  
and, based upon the Panel's decision to reinstate the licensee's medical license subject to  
specific conditions, hereby ENTER INTO the following **AGREED ORDER OF  
INDEFINITE RESTRICTION:**

**STIPULATIONS OF FACT**

The parties stipulate the following facts, which serve as the factual bases for this  
Agreed Order of Indefinite Restriction:

1. At all relevant times, Michael C. Hess, M.D., was licensed by the Board to  
practice medicine within the Commonwealth of Kentucky.
2. The licensee's medical specialty is Family Medicine.
3. On February 19, 2008, the Board received a grievance, alleging that the licensee  
had engaged in inappropriate sexual contact and sexual comments with a patient.  
Patient A stated: "I have used Southend Med. Clinic for over ten years. I have  
seen several of its doctors but my primary care giver was Dr. Hess. He has taken  
care of all my medical needs including yearly gynochological [sic] exams. On  
Thursday Jan 3, 08 I saw Dr. Hess because of pain in my right shoulder. Upon  
examination, Dr. Hess proceeded to raise my shirt top along with my bra. He

touched my breast, put my bra down and examined my bursa at the collarbone. In my opinion, the raising of my shirt and bra was totally unnecessary as my pain was near my collarbone. There have been other instances of inappropriate behavior. Once during an annual exam he told me I had attractive breasts, on another visit, he gave me a kiss on the cheek, on another visit he told me I had beautiful eyes, on another visit he had the stethoscope on my chest with one of his fingers on the tips of my nipple, on another visit he pinched my left breast (I was clothed). I have no idea why he did that. All of these incidents confused me to say the least since I had built trust in him. I think he knew exactly what he was doing and thought he could get away with it.”

4. The grievant was subsequently interviewed by the Board investigator, and reported that she had been informed by Jewish Hospital Human Resources that the licensee was no longer with the Southend Medical Clinic. The licensee separated from The Physician’s Group at Jewish Hospital & St. Mary’s Healthcare, Inc. on January 31, 2008.
5. Jennifer Elliott, counsel for Jewish Hospital, was interviewed and stated that the Southend Medical Clinic is operated by and Dr. Hess was employed by The Physician Group at Jewish Hospital & St. Mary’s HealthCare, Inc. This entity purchased the clinic and signed an employment agreement with Dr. Hess and the other physicians on November 23, 2005. Prior to that date, the group had practiced at the same address for a number of years. An employment file on Dr. Hess from his former employer was located. It included complaints by employees and one patient for sexually inappropriate behavior. All complaints preceded Dr.

Hess' employment with The Physician Group at Jewish Hospital and St. Mary's HealthCare, Inc. The earliest complaint dated back to 2001. There were also documented comments from current patients, which were made after Dr. Hess left the practice.

6. Patient B contacted the Southend office manager on October 21, 2004, in order to register a complaint against the licensee. She stated that she saw Dr. Hess in the office for bronchitis on October 20, 2004. As he listened to her chest, he fondled her breast and made inappropriate remarks about the size of her breasts. Patient B stated that prior to his listening to her chest, when she asked him if she needed to remove her outer shirt, Dr. Hess said "only if you are feeling frisky". She said he then raised her shirt, grabbed and lifted her breast and said "you really do have a nice rack." Patient B said she was so shocked by what had happened that she could not response to his action or comments. When interviewed by the Board investigator, Patient B further indicated that the licensee had always asked her about her sex life, purportedly as a legitimate medical concern, and that whenever the licensee listened to her chest, he always reached the stethoscope up under her shirt. A nurse chaperone was never present on these occasions. Patient B indicated that days after she made her complaint, the licensee called her and asked for her forgiveness.
7. Patient C indicated to the Board investigator that she had been treated by the licensee for a number of years, but she had become uncomfortable with the licensee's examinations in approximately 2007. She stated that during an examination, the licensee had placed the stethoscope under her sweatshirt and

touched her breast above the bra. On her last examination, he had rubbed her breast. He had previously rubbed her legs when she was wearing shorts, and told her she had "nice boobs."

8. Patient D stated that the licensee had sexual relations with her multiple times in the examining room. The licensee's improper conduct began on December 28, 2006, when Patient D had an appointment with the licensee. The nurse was not present for the breast examination but did come into the examining room for the pap smear. After the nurse left the room, the licensee commented that he liked what he saw of her body, that she was pretty, and that he would like to take her to a hotel room. The licensee went on to say that her husband (also a patient of the licensee) did not take care of himself, and that the licensee would be there to "pick up the pieces." Patient D had recently lost weight, and the licensee told her that many women who lose weight have affairs and that if she was going to have an affair, she should have it with him. The licensee continued this behavior at the January 18, 2007, appointment, making more comments about wanting to have sex with her and complaining that his wife did not understand him.
9. On February 1, 2007, Patient D saw the licensee for a check-up. She had an afternoon flight scheduled that day for an out of town business trip. The licensee told her that she was beautiful and that he was worried he would never see her again. He locked the exam room door and told her she need to be quiet, and proceeded to engage in sexual intercourse with her.
10. At the appointment on February 17, 2007, the licensee entered the examining room and locked the door. Patient D told the licensee that she needed to get

home, due to the snow and her husband being ill. The licensee engaged in sexual relations with her in the examination room.

11. At the office visit of June 21, 2007, Patient D had told the licensee's nurse that she wanted to be in and out quickly that day, but the licensee nonetheless engaged in sexual relations with her.
12. Patient D stated that she and the licensee engaged in sex in the examination room at every visit beginning February 1, 2007, and ending at the last visit of December 31, 2007. A review of the records indicates that there were eleven office visits with the licensee during this period. After the first sexual encounter, Patient D never paid for any high blood pressure medication, since the licensee always gave her samples.
13. Patient D's final appointment with the licensee was on December 31, 2007. He again engaged in sexual intercourse with her prior to her examination.  
  
Afterwards, the licensee call in his nurse to observe the Pap smear.
14. Patient D also stated to the Board investigator that when using the stethoscope, the licensee frequently went deep into her shirt and he would pull up her shirt in the back to see her tattoo, claiming that it turned him on.
15. Patient E reported that she had gone to the licensee for primary care for fifteen years and had, in the past, recommended him to others. Patient E also indicated to the Board investigator that during her exams, the licensee had usually pulled up her shirt to listen with the stethoscope, and on one occasion pulled up her bra. At the time, she had thought it odd, but not inappropriate. However, at her office examination on November 14, 2007, the licensee treated her for what she had

thought was a lung infection. The licensee yanked her shirt up without warning in order to use the stethoscope. After listening to her chest, he put her shirt back down but then constantly brushed against her breasts during the examination. The licensee told her that if she needed additional sex, she should call the licensee because his wife had left him and he was not getting enough sex. He put his arm around her twice during the office visit and pulled her very close towards him.

Patient E left in tears and decided never to return to the licensee for medical care.

16. Patient F reported to the Board investigator that she had seen the licensee three or four times approximately four years ago. She stopped seeing the licensee because he made her feel uncomfortable. At one visit, Patient F told the licensee that she thought she might be going through menopause, to which the licensee responded by questioning her about her husband, positions they used during sex, and many other personal details that made her feel uncomfortable. At each following visit, the licensee continued the discussion of sex and offered recommendations on sexual positions. Patient F also reported that the licensee would examine and feel her breasts at every unchaperoned visit, even while she remained seated in a chair opposite him.

17. The Board also interviewed employees of Southend Medical Clinic. Employee A stated that on June 5, 2001, she had delivered charts to the licensee's office. When Employee A asked the licensee where she should place the charts, he pointed to his lap. She placed the charts on his desk and left the room, but did not notify the Southend office manager of the incident. Employee A also notified the office manager that the licensee had made comments to her regarding her body

and her clothing, all of which made her feel uncomfortable. After making such a report, Employee A never experienced any further problems from the licensee. Employee A indicated that the licensee had treated her once or twice before the reported incident.

18. Employee B at Southend notified the office manager on November 21, 2001, that She had received flowers and a note from the licensee. She did not want to get the licensee in trouble, however she felt uncomfortable with the unwanted attention. She also stated that the previous week the licensee had come over to her department and touched her inappropriately, i.e., "he goosed me". She said he later came back to the department apologized. When contacted by the Board investigator, Employee B elaborated upon the licensee's conduct, indicating that the licensee had walked up behind her while she was having a conversation with another doctor. The licensee grabbed her buttock with one hand and then quickly walked away without comment. He later came back and apologized to her. The next week, she received flowers with an unsigned card that read, "surely a few bites (or nibbles) wouldn't hurt." Employee B contacted the florist and learned it was the licensee who had sent the flowers.

19. The Board investigator interviewed the Southend office manager. She had had several conversations with the licensee regarding inappropriate behavior after staff brought their concerns to her attention. The office manager further reported that the licensee had a habit of rubbing up against staff, and she had discussed this matter with him. She also indicated that the licensee would like to engage in unprofessional conversations about patients he had examined, i.e., talking about

the female patients' breasts. The office manager also indicated that Southend had recommended that the licensee receive counseling.

20. In addition, in approximately November or December, 2005, the licensee entered the drug closet where the office manager and two nurses were located. The licensee then patted her on the buttock three or four times as he passed behind her. The office manager reported this incident to two physicians who then confronted the licensee about it, but the licensee denied that it had happened.
21. The licensee's nurse was interviewed by the Board investigator. She did not recall the events as narrated by Patient D. She was not aware that there were any staff complaints concerning the licensee, that the office was watching the licensee's conduct, or that he had been ordered to counseling. She also believed that she was present for every breast and pap exam. She stated she never observed the licensee do anything inappropriate.
22. The licensee was interviewed by the Board investigator and denied the patients' allegations. He stated that he would never tell a woman she had very attractive breasts, as he would never use the term breasts. He indicated that he had a long ten-plus year counseling relationship with Patient A, and over a period of time he would make comments in an attitude of affirmation on her strong points. He did not recall kissing her cheek, noting that he probably patted her hand. Regarding his use of a stethoscope, the licensee stated that he always placed the diaphragm and bell on the skin and would reach above and below the heart. He claimed that the stethoscope cannot be accurately used on top of the clothing. He stated his hand could have inadvertently rubbed across the breast and on occasion he may



even have had to lift the breast out of the way to listen. He indicated that he always used a chaperone for a gynecological examination, and may or may not use a chaperone for a breast exam. The licensee admitted that he had had several conversations with the office manager about staff complaints, but denied that he had ever patted the office manager on the buttocks.

23. On September 19, 2008, the Board received another grievance concerning the licensee. This grievant, Patient G, alleged that the licensee had touched her inappropriately during an examination at Southend Medical Clinic on October 6, 2005. Patient G reported that on that date, the licensee had "immediately acted irritated" upon her telling him that her gynecologist had seen her, and then the licensee "went through this whole rant about how it was unnecessary" for her to see a gynecologist. Patient G reported that the licensee then "took sexually inappropriate actions" with her.
24. Upon being interviewed by the Board investigator, she elaborated that in the month previous to her October 6, 2005, office visit with the licensee, she had seen her gynecologist and received a prescription for Evista for the loss of bone mass in her spine. She reported the diagnosis to the licensee and asked him for his opinion on the medication. The licensee's whole demeanor changed when she mentioned having seen her gynecologist. He seemed angry and told her that taking the Evista would make her breasts limp and droopy and they would have a "teardrop look" like her grandmother's. The licensee went on at length about the cosmetic concerns the medication would cause her breasts. He then approached her chair where she sat fully clothed. After examining her throat, ears and neck

he raised her shirt in the back and listened to her breathing. Without saying a word, he stepped in front of her and raised her shirt and then lifted and pushed her bra up fully exposing her breast. The licensee then began to squeeze her breast. She was startled, embarrassed and jerked back. The licensee commented that he just wanted to see what her breast felt like. Patient G stated that she just wanted to get out of the office. She called the office the following day and asked if they had any female physicians on staff. When she learned they had none, she asked for a referral to a female Family Practitioner and requested that her records be forwarded. At her first visit with her female physician, she cried as she related the details of the incident with the licensee. Patient G has warned her daughter and nieces to never see the licensee. As a result of his actions, she has switched all of her specialists to female physicians, whenever possible.

25. On September 24, 2008, the Board received a grievance from Patient H, alleging that the licensee had touched her inappropriately and made inappropriate sexual remarks during an examination at Southend Clinic in August, 2003. Patient H was interviewed by the Board investigator and stated that several years prior to the date of the incident, the licensee became increasingly interested in her sexual life and his signs of affection for her increased. He would constantly pat her leg during an exam. Through the years, Patient H had lost a lot of weight. The licensee would always notice and make comments about her weight loss and inquire about her sexual life. During a typical examination he would lift her shirt in the front and back to listen to her chest sounds. In 2002 the PAP smear felt strange and not quite right, but she thought perhaps it was all in her mind. Later

that year, she was at McNeeley Lake to watch her granddaughter run cross country when the licensee approached her from behind, swirled her around and attempted to bear hug her while exclaiming, "I see you are back from vacation".

26. At the time of the PAP examination in 2003, he pulled both sides of the drape open at the same time and examined her breasts and pinched her nipples very hard. When she commented that he had hurt her, he responded that it was necessary to "watch for cancer." After he finished the breast exam he began questioning her about her sexual life with her husband. The licensee made a crude comment about what a ride, not falling off and being "hooked on." He then called his nurse into the room. He performed a normal pelvic exam, took a culture and handed the slide to his nurse. While the nurse's back was turned preparing the culture to be sent out, the licensee inserted his finger into Patient H's vagina and began moving it in an improper way. At the same time he let his thumb massage her and she knew this was not a proper exam and that he was trying to get her sexually aroused. She immediately pulled away and sat up. He quickly stated that everything looked fine and left the room.

27. He returned to the room before she barely had time to get dressed and offered to give her his cell phone number and take care of her if her husband could not take care of her needs. She told him she loved her husband and whatever problems they had would be worked out. As she started to leave, he stepped toward her and tried to kiss her on the mouth, but she turned her head and he ended up kissing her cheek. Patient H left the office and went to her car where she began crying. She also called her husband and reported the incident to him. She never returned to

that office for medical care. She was unable to find a female Family Practitioner but she has reported this incident to subsequent treating physicians and has insisted that a nurse is always present during all of her examinations.

28. On October 8, 2008, the Board received a grievance from Patient I, alleging that the licensee had touched her inappropriately and had made inappropriate sexual remarks during office visits at Southend Clinic in 2003 and 2004 until she quit seeing him as her primary care physician. Patient I was interviewed by the Board investigator, and indicated that she had been a patient at Southend Medical Clinic and started seeing the licensee in 1999. At first, everything was okay when she visited the office with complaints of depression and female problems. He became increasingly "flirty", and at the time of her last visit he kissed her on the lips after physically grabbing her and pulling her towards him as she was leaving. During the examination that same day and on more than one other occasion, he had inquired about her sex life and told her that if she wasn't getting enough sex at home she should give him a call.

29. During at least three pelvic examinations, the licensee kept his fingers inside of Patient I and seemed to be "playing around" like he was trying to get her aroused. Typically, his nurse would enter the exam room, put the KY jelly on his gloved hand and then leave the room during the sensitive examination. During the last visit, he also performed a breast exam and commented that "little titties are pretty" and "more than a mouthful is enough". He also pinched her nipples without explanation. The licensee stayed in the room while she dressed that day and then followed her into the hallway where he kissed her on the mouth.

30. Southend Clinic also reported to the Board that another former patient of the licensee had come forward to report that through the years the licensee had touched her breasts inappropriately and made inappropriate sexual comments during office visits. Patient J was contacted by the Board investigator. Patient J stated that the licensee had made offensive comments during the last two to three years that she had seen him at Southend Clinic. The licensee's nurse was frequently present when the licensee made inappropriate sexual remarks, and would usually respond by laughing it off and leaving the room before a sensitive examination. Patient J indicated that during annual examinations, the licensee always reached under her shirt and bra when using the stethoscope. He touched her breast inappropriately at these times and also touched them inappropriately when examining them. He continually used slang words to describe her breasts.

31. On or about August 1, 2008, the licensee was employed by the medical office of Norsworthy Associates in Beaver Dam, Kentucky. On August 6, 2008, Patient K filed a police report with the Kentucky State Police 16 following her examination on August 6, 2008, by the licensee at Norsworthy Associates. Patient K indicated in her police report that the licensee placed the stethoscope in the palm of his hand and moved his hand from her neckline down her torso, putting his hand under her bra and touching her nipples while listening to chest/heart sounds. On her back he went both down and under the bra, and then up and under her bra when he listened to her chest. Her autistic son was present with her infant nephew in the examination room. He reported that he was busy taking care of the 18-month-old baby and was not watching the examination, but he later noticed

that his mother was nervous and upset. She had to sit in the parking lot to calm down.

32. The licensee denied engaging in any unprofessional or illegal conduct. He specifically denied the conduct alleged by the complainants (patients and employees).
33. After reviewing all of the information detailed above, the Panel required the licensee to surrender his Kentucky medical license. He did so by entering into an Agreed Order of Surrender on July 16, 2009.
34. At its January 20, 2011 meeting, the Panel considered the licensee's petition for reinstatement. As part of his petition, the licensee presented a September 2010 evaluation by Dennis Wagner, Ed.D. The Axis I diagnosis was Paraphilias, NOS – hypersexuality and sexual compulsivity. As part of his Treatment Recommendations, Dr. Wagner noted,

...He recognized he lacks control over his sexual behavior and needs treatment to control his sexual behavior. Based on Dr. Hess' self-report, the following corrective treatment approaches are recommended.

- Dr. Hess' dysthymic victim stance should be addressed in therapy through use of cognitive behavioral techniques. He needs to gain insight on how this worldview creates a self-fulfilling prophecy.
- He denies ever raping anyone and does not take accountability for the alleged behavior that precipitated this evaluation. His responses, however, suggest he has had sex deviance problems (hypersexuality) and has had sexual problems (sex obsession and compulsivity). These factors should be considered in developing a treatment plan for him.
- Dr. Hess' denial of guilt in the allegations and the number of allegations generated suggest that, at minimum, he is insensitive to the impact his comments and behavior has had on his patients. Counseling addressing that is warranted.
- Continued counseling addressing his sexual compulsivity is warranted with further exploration of the connection between the compulsivity and his early traumatic experiences and the sequelae in the family of origin. (Emphasis added)

35. As part of his petition, the licensee also included a December 13, 2010 letter from Fred Hampton, LCSW. According to Mr. Hampton, he had treated the licensee for Sexual Addiction up to 2008, when the Board issued the Emergency Order and the licensee left treatment. Mr. Hampton noted that the licensee had returned to treatment in September 2010 and had been meeting with Mr. Hampton every other week for therapy.
36. James T. Jennings, M.D., Medical Director, Kentucky Physicians Health Foundation ("the Foundation") supported the licensee's petition for reinstatement. The licensee had entered into a contract with the Foundation on December 10, 2010. In a letter dated December 14, 2010, Dr. Jennings stated,
- Dr. Hess has been involved in therapy with Mr. Hampton off and on over the last four years. Over the last eight or nine months, he has been in intensive therapy with Mr. Hampton to address issues that will assist him with his recovery. The Foundation stands behind Dr. Hess' request to return to the active practice of medicine. I believe he can do so without undue risk to his patients or the public. I also understand that, initially, there will need to be restrictions in place to assure the safety of those involved.
37. The Panel voted to grant the petition, subject to this Agreed Order of Indefinite Restriction, on the express condition that the licensee first successfully pass the Special Purpose Examination (SPEX).
38. The licensee scored an 80 on the SPEX on November 16, 2011, with a minimum pass point of 75, recommended by the Federation of State Medical Boards.
39. The licensee has also provided written verification that he successfully completed the "Maintaining Proper Boundaries" course at Vanderbilt University Medical Center on February 23-25, 2011.

### STIPULATED CONCLUSIONS OF LAW

The parties stipulate the following Conclusions of Law, which serve as the legal bases for this Agreed Order of Indefinite Restriction:

1. The licensee's medical license is subject to regulation and discipline by the Board.
2. While the licensee denied engaging in any unprofessional or illegal conduct generally, and specifically denied the conduct alleged by the patients, he agreed that, based upon the fact issues raised by these individuals, sufficient grounds existed to impose sanctions against his Kentucky medical license pursuant to KRS 311.595(5) and (9) as illustrated by KRS 311.597(4). Accordingly, there were legal grounds for the parties to enter into the Agreed Order of Surrender and, along with KRS 311.607, are grounds to enter into this Agreed Order of Indefinite Restriction.
3. Pursuant to KRS 311.591(6) and 201 KAR 9:082, the parties may fully and finally address this pending petition for reinstatement without an evidentiary hearing by entering into an informal resolution such as this Agreed Order of Indefinite Restriction.

### AGREED ORDER OF INDEFINITE RESTRICTION

Based upon the foregoing Stipulations of Fact and Stipulated Conclusions of Law, and, based upon the Panel's decision to grant the petition for reinstatement subject to the terms of this Agreed Order of Indefinite Restriction, the parties hereby ENTER INTO the following **AGREED ORDER OF INDEFINITE RESTRICTION**:



1. The licensee to practice medicine in the Commonwealth of Kentucky held by Michael C. Hess, M.D., is hereby REINSTATED, effective immediately upon the filing of this Agreed Order of Indefinite Restriction, subject to the remaining terms and conditions of this Agreed Order of Indefinite Restriction.
2. The license to practice medicine in the Commonwealth of Kentucky held by Michael C. Hess, M.D., SHALL BE LIMITED/RESTRICTED BY THE FOLLOWING TERMS AND CONDITIONS FOR AN INDEFINITE PERIOD, with the period commencing immediately upon the date of filing of this Agreed Order of Indefinite Restriction.
3. During the effective period of this Agreed Order of Indefinite Restriction, the licensee's Kentucky medical license SHALL BE SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS OF LIMITATION/RESTRICTION:
  - a. The licensee SHALL NOT provide medical treatment or enter into a physician-patient relationship with any female person, unless and until approved to do so by the Panel;
  - b. The Panel will not consider a request by the licensee that he be permitted to treat female patients or enter into physician-patient relationships with females for a minimum of one calendar year from the date of filing of this Agreed Order of Indefinite Restriction;
  - c. The licensee shall maintain his contractual relationship with the Kentucky Physicians Health Foundation and shall fully comply with all requirements of that contractual relationship;


- d. The licensee understands and agrees that the decision whether to grant such a request lies in the sole discretion of the Panel. The licensee further understands and agrees that the Panel may require him to successfully complete evaluation(s) and/or assessment(s) to assist it in considering any such request. The burden shall be upon the licensee to convince the Panel that he may safely and competently resume his professional relationships with female patients, without undue risk of danger to those patients or to the public. The licensee understands and agrees that, if the Panel should grant such a request, it may do so by Agreed Order with terms and conditions it deems appropriate based upon the information available to them at that time;
  - e. The licensee SHALL NOT violate any provision of KRS 311.595 and/or 311.597.
4. The licensee expressly agrees that if he should violate any term or condition of the Agreed Order of Indefinite Restriction, the licensee's practice will constitute an immediate danger to the public health, safety, or welfare, as provided in KRS 311.592 and 13B.125. The parties further agree that if the Board should receive information that he has violated any term or condition of this Agreed Order of Indefinite Restriction, the Panel Chair is authorized by law to enter an Emergency Order of Suspension or Restriction immediately upon a finding of probable cause that a violation has occurred, after an *ex parte* presentation of the relevant facts by the Board's General Counsel or Assistant General Counsel. If the Panel Chair should issue such an Emergency Order, the parties agree and stipulate that a

violation of any term or condition of this Order would render the licensee's practice an immediate danger to the health, welfare and safety of patients and the general public, pursuant to KRS 311.592 and 13B.125; accordingly, the only relevant question for any emergency hearing conducted pursuant to KRS 13B.125 would be whether the licensee violated a term or condition of this Agreed Order of Indefinite Restriction.

5. The licensee understands and agrees that any violation of the terms of this Agreed Order of Indefinite Restriction would provide a legal basis for additional disciplinary action, including revocation, pursuant to KRS 311.595(13) and may provide a legal basis for criminal prosecution for practicing medicine without a license.

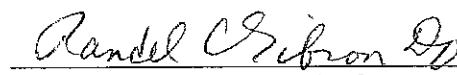
SO AGREED on this 27<sup>th</sup> day of January, 2012.

FOR THE LICENSEE:

  
MICHAEL C. HESS, M.D.

\_\_\_\_\_  
COUNSEL FOR THE LICENSEE  
(IF APPLICABLE)

FOR THE BOARD:

  
RANDEL C. GIBSON, D.O.  
CHAIR, HEARING PANEL B

*C. Lloyd Vest II*

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C. LLOYD VEST II

General Counsel

Kentucky Board of Medical Licensure

310 Whittington Parkway, Suite 1B

Louisville, Kentucky 40222

(502) 429-7150

COMMONWEALTH OF KENTUCKY  
BOARD OF MEDICAL LICENSURE  
CASE NO. 1178

FILED OF RECORD

JUL 16 2009

K.B.M.L.

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF  
KENTUCKY HELD BY MICHAEL C. HESS, M.D., LICENSE NO. 19773,  
5129 DIXIE HIGHWAY, LOUISVILLE, KENTUCKY 40216

**AGREED ORDER OF SURRENDER**

Come now the Kentucky Board of Medical Licensure (hereafter "the Board"),  
acting by and through its Hearing Panel B, and Michael C. Hess, M.D. ("the licensee"),  
and, based upon their mutual desire to fully and finally resolve this pending grievance  
without an evidentiary hearing, hereby ENTER INTO the following **AGREED ORDER  
OF SURRENDER:**

**STIPULATIONS OF FACT**

The parties stipulate the following facts, which serve as the factual bases for this  
Agreed Order of Surrender:

1. At all relevant times, Michael C. Hess, M.D., was licensed by the Board to  
practice medicine within the Commonwealth of Kentucky.
2. The licensee's medical specialty is Family Medicine.
3. On February 19, 2008, the Board received a grievance, alleging that the licensee  
had engaged in inappropriate sexual contact and sexual comments with a patient.  
Patient A stated: "I have used Southend Med. Clinic for over ten years. I have  
seen several of its doctors but my primary care giver was Dr. Hess. He has taken  
care of all my medical needs including yearly gynochological [sic] exams. On  
Thursday Jan 3, 08 I saw Dr. Hess because of pain in my right shoulder. Upon  
examination, Dr. Hess proceeded to raise my shirt top along with my bra. He

touched my breast, put my bra down and examined my bursa at the collarbone. In my opinion, the raising of my shirt and bra was totally unnecessary as my pain was near my collarbone. There have been other instances of inappropriate behavior. Once during an annual exam he told me I had attractive breasts, on another visit, he gave me a kiss on the cheek, on another visit he told me I had beautiful eyes, on another visit he had the stethoscope on my chest with one of his fingers on the tips of my nipple, on another visit he pinched my left breast (I was clothed). I have no idea why he did that. All of these incidents confused me to say the least since I had built trust in him. I think he knew exactly what he was doing and thought he could get away with it.”

4. The grievant was subsequently interviewed by the Board investigator, and reported that she had been informed by Jewish Hospital Human Resources that the licensee was no longer with the Southend Medical Clinic. The licensee separated from The Physician’s Group at Jewish Hospital & St. Mary’s Healthcare, Inc. on January 31, 2008.
5. Jennifer Elliott, counsel for Jewish Hospital, was interviewed and stated that the Southend Medical Clinic is operated by and Dr. Hess was employed by The Physician Group at Jewish Hospital & St. Mary’s HealthCare, Inc. This entity purchased the clinic and signed an employment agreement with Dr. Hess and the other physicians on November 23, 2005. Prior to that date, the group had practiced at the same address for a number of years. An employment file on Dr. Hess from his former employer was located. It included complaints by employees and one patient for sexually inappropriate behavior. All complaints preceded Dr.

Hess' employment with The Physician Group at Jewish Hospital and St. Mary's HealthCare, Inc. The earliest complaint dated back to 2001. There were also documented comments from current patients, which were made after Dr. Hess left the practice.

6. Patient B contacted the Southend office manager on October 21, 2004, in order to register a complaint against the licensee. She stated that she saw Dr. Hess in the office for bronchitis on October 20, 2004. As he listened to her chest, he fondled her breast and made inappropriate remarks about the size of her breasts. Patient B stated that prior to his listening to her chest, when she asked him if she needed to remove her outer shirt, Dr. Hess said "only if you are feeling frisky". She said he then raised her shirt, grabbed and lifted her breast and said "you really do have a nice rack." Patient B said she was so shocked by what had happened that she could not response to his action or comments. When interviewed by the Board investigator, Patient B further indicated that the licensee had always asked her about her sex life, purportedly as a legitimate medical concern, and that whenever the licensee listened to her chest, he always reached the stethoscope up under her shirt. A nurse chaperone was never present on these occasions. Patient B indicated that days after she made her complaint, the licensee called her and asked for her forgiveness.
7. Patient C indicated to the Board investigator that she had been treated by the licensee for a number of years, but she had become uncomfortable with the licensee's examinations in approximately 2007. She stated that during an examination, the licensee had placed the stethoscope under her sweatshirt and

touched her breast above the bra. On her last examination, he had rubbed her breast. He had previously rubbed her legs when she was wearing shorts, and told her she had "nice boobs."

8. Patient D stated that the licensee had sexual relations with her multiple times in the examining room. The licensee's improper conduct began on December 28, 2006, when Patient D had an appointment with the licensee. The nurse was not present for the breast examination but did come into the examining room for the pap smear. After the nurse left the room, the licensee commented that he liked what he saw of her body, that she was pretty, and that he would like to take her to a hotel room. The licensee went on to say that her husband (also a patient of the licensee) did not take care of himself, and that the licensee would be there to "pick up the pieces." Patient D had recently lost weight, and the licensee told her that many women who lose weight have affairs and that if she was going to have an affair, she should have it with him. The licensee continued this behavior at the January 18, 2007, appointment, making more comments about wanting to have sex with her and complaining that his wife did not understand him.
9. On February 1, 2007, Patient D saw the licensee for a check-up. She had an afternoon flight scheduled that day for an out of town business trip. The licensee told her that she was beautiful and that he was worried he would never see her again. He locked the exam room door and told her she needed to be quiet, and proceeded to engage in sexual intercourse with her.
10. At the appointment on February 17, 2007, the licensee entered the examining room and locked the door. Patient D told the licensee that she needed to get



home, due to the snow and her husband being ill. The licensee engaged in sexual relations with her in the examination room.

11. At the office visit of June 21, 2007, Patient D had told the licensee's nurse that she wanted to be in and out quickly that day, but the licensee nonetheless engaged in sexual relations with her.
12. Patient D stated that she and the licensee engaged in sex in the examination room at every visit beginning February 1, 2007, and ending at the last visit of December 31, 2007. A review of the records indicates that there were eleven office visits with the licensee during this period. After the first sexual encounter, Patient D never paid for any high blood pressure medication, since the licensee always gave her samples.
13. Patient D's final appointment with the licensee was on December 31, 2007. He again engaged in sexual intercourse with her prior to her examination.  
Afterwards, the licensee call in his nurse to observe the Pap smear.
14. Patient D also stated to the Board investigator that when using the stethoscope, the licensee frequently went deep into her shirt and he would pull up her shirt in the back to see her tattoo, claiming that it turned him on.
15. Patient E reported that she had gone to the licensee for primary care for fifteen years and had, in the past, recommended him to others. Patient E also indicated to the Board investigator that during her exams, the licensee had usually pulled up her shirt to listen with the stethoscope, and on one occasion pulled up her bra. At the time, she had thought it odd, but not inappropriate. However, at her office examination on November 14, 2007, the licensee treated her for what she had

thought was a lung infection. The licensee yanked her shirt up without warning in order to use the stethoscope. After listening to her chest, he put her shirt back down but then constantly brushed against her breasts during the examination. The licensee told her that if she needed additional sex, she should call the licensee because his wife had left him and he was not getting enough sex. He put his arm around her twice during the office visit and pulled her very close towards him.

Patient E left in tears and decided never to return to the licensee for medical care.

16. Patient F reported to the Board investigator that she had seen the licensee three or four times approximately four years ago. She stopped seeing the licensee because he made her feel uncomfortable. At one visit, Patient F told the licensee that she thought she might be going through menopause, to which the licensee responded by questioning her about her husband, positions they used during sex, and many other personal details that made her feel uncomfortable. At each following visit, the licensee continued the discussion of sex and offered recommendations on sexual positions. Patient F also reported that the licensee would examine and feel her breasts at every unchaperoned visit, even while she remained seated in a chair opposite him.

17. The Board also interviewed employees of Southend Medical Clinic. Employee A stated that on June 5, 2001, she had delivered charts to the licensee's office. When Employee A asked the licensee where she should place the charts, he pointed to his lap. She placed the charts on his desk and left the room, but did not notify the Southend office manager of the incident. Employee A also notified the office manager that the licensee had made comments to her regarding her body

and her clothing, all of which made her feel uncomfortable. After making such a report, Employee A never experienced any further problems from the licensee. Employee A indicated that the licensee had treated her once or twice before the reported incident.

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the female patients' breasts. The office manager also indicated that Southend had recommended that the licensee receive counseling.

20. In addition, in approximately November or December, 2005, the licensee entered the drug closet where the office manager and two nurses were located. The licensee then patted her on the buttock three or four times as he passed behind her. The office manager reported this incident to two physicians who then confronted the licensee about it, but the licensee denied that it had happened.
21. The licensee's nurse was interviewed by the Board investigator. She did not recall the events as narrated by Patient D. She was not aware that there were any staff complaints concerning the licensee, that the office was watching the licensee's conduct, or that he had been ordered to counseling. She also believed that she was present for every breast and pap exam. She stated she never observed the licensee do anything inappropriate.
22. The licensee was interviewed by the Board investigator and denied the patients' allegations. He stated that he would never tell a woman she had very attractive breasts, as he would never use the term breasts. He indicated that he had a long ten-plus year counseling relationship with Patient A, and over a period of time he would make comments in an attitude of affirmation on her strong points. He did not recall kissing her cheek, noting that he probably patted her hand. Regarding his use of a stethoscope, the licensee stated that he always placed the diaphragm and bell on the skin and would reach above and below the heart. He claimed that the stethoscope cannot be accurately used on top of the clothing. He stated his hand could have inadvertently rubbed across the breast and on occasion he may

even have had to lift the breast out of the way to listen. He indicated that he always used a chaperone for a gynecological examination, and may or may not use a chaperone for a breast exam. The licensee admitted that he had had several conversations with the office manager about staff complaints, but denied that he had ever patted the office manager on the buttocks.

23. On September 19, 2008, the Board received another grievance concerning the licensee. This grievant, Patient G, alleged that the licensee had touched her inappropriately during an examination at Southend Medical Clinic on October 6, 2005. Patient G reported that on that date, the licensee had "immediately acted irritated" upon her telling him that her gynecologist had seen her, and then the licensee "went through this whole rant about how it was unnecessary" for her to see a gynecologist. Patient G reported that the licensee then "took sexually inappropriate actions" with her.
24. Upon being interviewed by the Board investigator, she elaborated that in the month previous to her October 6, 2005, office visit with the licensee, she had seen her gynecologist and received a prescription for Evista for the loss of bone mass in her spine. She reported the diagnosis to the licensee and asked him for his opinion on the medication. The licensee's whole demeanor changed when she mentioned having seen her gynecologist. He seemed angry and told her that taking the Evista would make her breasts limp and droopy and they would have a "teardrop look" like her grandmother's. The licensee went on at length about the cosmetic concerns the medication would cause her breasts. He then approached her chair where she sat fully clothed. After examining her throat, ears and neck

he raised her shirt in the back and listened to her breathing. Without saying a word, he stepped in front of her and raised her shirt and then lifted and pushed her bra up fully exposing her breast. The licensee then began to squeeze her breast. She was startled, embarrassed and jerked back. The licensee commented that he just wanted to see what her breast felt like. Patient G stated that she just wanted to get out of the office. She called the office the following day and asked if they had any female physicians on staff. When she learned they had none, she asked for a referral to a female Family Practitioner and requested that her records be forwarded. At her first visit with her female physician, she cried as she related the details of the incident with the licensee. Patient G has warned her daughter and nieces to never see the licensee. As a result of his actions, she has switched all of her specialists to female physicians, whenever possible.

25. On September 24, 2008, the Board received a grievance from Patient H, alleging that the licensee had touched her inappropriately and made inappropriate sexual remarks during an examination at Southend Clinic in August, 2003. Patient H was interviewed by the Board investigator and stated that several years prior to the date of the incident, the licensee became increasingly interested in her sexual life and his signs of affection for her increased. He would constantly pat her leg during an exam. Through the years, Patient H had lost a lot of weight. The licensee would always notice and make comments about her weight loss and inquire about her sexual life. During a typical examination he would lift her shirt in the front and back to listen to her chest sounds. In 2002 the PAP smear felt strange and not quite right, but she thought perhaps it was all in her mind. Later

that year, she was at McNeeley Lake to watch her granddaughter run cross country when the licensee approached her from behind, swirled her around and attempted to bear hug her while exclaiming, "I see you are back from vacation".

26. At the time of the PAP examination in 2003, he pulled both sides of the drape open at the same time and examined her breasts and pinched her nipples very hard. When she commented that he had hurt her, he responded that it was necessary to "watch for cancer." After he finished the breast exam he began questioning her about her sexual life with her husband. The licensee made a crude comment about what a ride, not falling off and being "hooked on." He then called his nurse into the room. He performed a normal pelvic exam, took a culture and handed the slide to his nurse. While the nurse's back was turned preparing the culture to be sent out, the licensee inserted his finger into Patient H's vagina and began moving it in an improper way. At the same time he let his thumb massage her and she knew this was not a proper exam and that he was trying to get her sexually aroused. She immediately pulled away and sat up. He quickly stated that everything looked fine and left the room.

27. He returned to the room before she barely had time to get dressed and offered to give her his cell phone number and take care of her if her husband could not take care of her needs. She told him she loved her husband and whatever problems they had would be worked out. As she started to leave, he stepped toward her and tried to kiss her on the mouth, but she turned her head and he ended up kissing her cheek. Patient H left the office and went to her car where she began crying. She also called her husband and reported the incident to him. She never returned to

that office for medical care. She was unable to find a female Family Practitioner but she has reported this incident to subsequent treating physicians and has insisted that a nurse is always present during all of her examinations.

28. On October 8, 2008, the Board received a grievance from Patient I, alleging that the licensee had touched her inappropriately and had made inappropriate sexual remarks during office visits at Southend Clinic in 2003 and 2004 until she quit seeing him as her primary care physician. Patient I was interviewed by the Board investigator, and indicated that she had been a patient at Southend Medical Clinic and started seeing the licensee in 1999. At first, everything was okay when she visited the office with complaints of depression and female problems. He became increasingly "flirty", and at the time of her last visit he kissed her on the lips after physically grabbing her and pulling her towards him as she was leaving. During the examination that same day and on more than one other occasion, he had inquired about her sex life and told her that if she wasn't getting enough sex at home she should give him a call.

29. During at least three pelvic examinations, the licensee kept his fingers inside of Patient I and seemed to be "playing around" like he was trying to get her aroused. Typically, his nurse would enter the exam room, put the KY jelly on his gloved hand and then leave the room during the sensitive examination. During the last visit, he also performed a breast exam and commented that "little titties are pretty" and "more than a mouthful is enough". He also pinched her nipples without explanation. The licensee stayed in the room while she dressed that day and then followed her into the hallway where he kissed her on the mouth.



30. Southend Clinic also reported to the Board that another former patient of the licensee had come forward to report that through the years the licensee had touched her breasts inappropriately and made inappropriate sexual comments during office visits. Patient J was contacted by the Board investigator. Patient J stated that the licensee had made offensive comments during the last two to three years that she had seen him at Southend Clinic. The licensee's nurse was frequently present when the licensee made inappropriate sexual remarks, and would usually respond by laughing it off and leaving the room before a sensitive examination. Patient J indicated that during annual examinations, the licensee always reached under her shirt and bra when using the stethoscope. He touched her breast inappropriately at these times and also touched them inappropriately when examining them. He continually used slang words to describe her breasts.
31. On or about August 1, 2008, the licensee was employed by the medical office of Norsworthy Associates in Beaver Dam, Kentucky. On August 6, 2008, Patient K filed a police report with the Kentucky State Police 16 following her examination on August 6, 2008, by the licensee at Norsworthy Associates. Patient K indicated in her police report that the licensee placed the stethoscope in the palm of his hand and moved his hand from her neckline down her torso, putting his hand under her bra and touching her nipples while listening to chest/heart sounds. On her back he went both down and under the bra, and then up and under her bra when he listened to her chest. Her autistic son was present with her infant nephew in the examination room. He reported that he was busy taking care of the 18-month-old baby and was not watching the examination, but he later noticed

that his mother was nervous and upset. She had to sit in the parking lot to calm down.

32. The licensee denied engaging in any unprofessional or illegal conduct. He specifically denied the conduct alleged by the complainants (patients and employees).

#### STIPULATED CONCLUSIONS OF LAW

The parties stipulate the following Conclusions of Law, which serve as the legal bases for this Agreed Order of Surrender:

1. The licensee's medical license is subject to regulation and discipline by the Board.
2. While the licensee denies engaging in any unprofessional or illegal conduct generally, and specifically denies the conduct alleged by the patients, he agrees that, based upon the fact issues raised by these individuals, sufficient grounds exist to impose sanctions against his Kentucky medical license pursuant to KRS 311.595(5) and (9) as illustrated by KRS 311.597(4). Accordingly, there are legal grounds for the parties to enter into this Agreed Order of Surrender.
3. Pursuant to KRS 311.591(6) and 201 KAR 9:082, the parties may fully and finally resolve this pending grievance without an evidentiary hearing by entering into an informal resolution such as this Agreed Order of Surrender.

#### AGREED ORDER OF SURRENDER

Based upon the foregoing Stipulations of Fact and Stipulated Conclusions of Law, and, based upon their mutual desire to fully and finally resolve this pending grievance

without an evidentiary hearing, the parties hereby ENTER INTO the following

**AGREED ORDER OF SURRENDER:**

The licensee shall SURRENDER his Kentucky medical license, in lieu of

revocation, with that surrender to become effective immediately upon the filing of this Agreed Order of Surrender, and continuing until further Order of the Panel.

1. Following the effective date of the surrender of his license, the licensee may not engage in any act which would constitute the "practice of medicine" as that term is defined by KRS 311.550(10) – the diagnosis, treatment, or correction of any and all human conditions, ailments, diseases, injuries, or infirmities by any and all means, methods, devices, or instrumentalities – until approved to do so by the Panel.
2. The licensee SHALL pay the costs of the investigation in the amount of \$2,875.00 within twelve (12) months from entry of this Agreed Order of Surrender.
3. The Panel will not consider a request by the licensee for approval to resume the active practice of medicine for a minimum period of two years from the date of filing of the Emergency Order of Suspension on September 10, 2008. The provisions of KRS 311.607 shall apply to any request for reinstatement filed by the licensee. The burden shall be upon the licensee to satisfy the Panel that he is presently of good moral character and is qualified both physically and mentally to resume the practice of medicine, without undue risk or danger to his patients or the public.

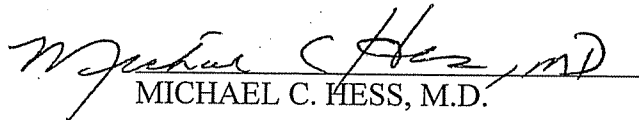
4. The licensee understands and agrees that the Panel may require the licensee to undergo evaluations and/or assessments, at the licensee's expense, to assist the Panel in considering any petition for reinstatement.
5. If the Panel should grant the petition for reinstatement, its shall do so by issuing an Order of Probation or Order of Indefinite Restriction, for a period of time to be determined by the Panel with terms and conditions fixed by the Panel, based upon the information available to the Panel at that time. As a condition of granting the petition for reinstatement, the Panel may require the licensee to enter into an Agreed Order of Probation or Indefinite Restriction, with appropriate terms and conditions.
6. The licensee expressly agrees that if he should violate any term or condition of the Agreed Order of Surrender, the licensee's practice will constitute an immediate danger to the public health, safety, or welfare, as provided in KRS 311.592 and 13B.125. The parties further agree that if the Board should receive information that he has violated any term or condition of this Agreed Order of Surrender, the Panel Chair is authorized by law to enter an Emergency Order of Suspension or Restriction immediately upon a finding of probable cause that a violation has occurred, after an *ex parte* presentation of the relevant facts by the Board's General Counsel or Assistant General Counsel. If the Panel Chair should issue such an Emergency Order, the parties agree and stipulate that a violation of any term or condition of this Order would render the licensee's practice an immediate danger to the health, welfare and safety of patients and the general public, pursuant to KRS 311.592 and 13B.125; accordingly, the only relevant question for any

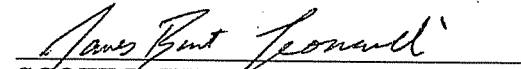
emergency hearing conducted pursuant to KRS 13B.125 would be whether the licensee violated a term or condition of this Agreed Order of Surrender.

7. The licensee understands and agrees that any violation of the terms of this Agreed Order of Surrender would provide a legal basis for additional disciplinary action, including revocation, pursuant to KRS 311.595(13) and may provide a legal basis for criminal prosecution for practicing medicine without a license.

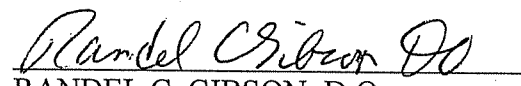
SO AGREED on this 3 day of APRIL, 2009.

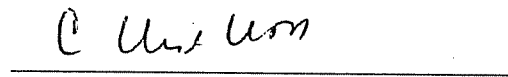
FOR THE LICENSEE:

  
MICHAEL C. HESS, M.D.

  
SCOTT P. WHONSETLER, ESQ.  
JAMES BART LEONARDI, ESQ.  
COUNSEL FOR THE LICENSEE

FOR THE BOARD:

  
RANDEL C. GIBSON, D.O.  
CHAIR, HEARING PANEL B

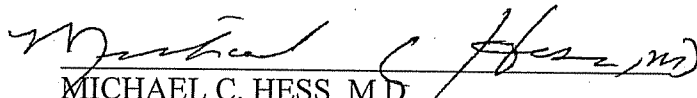
  
C. LLOYD VEST II  
General Counsel  
Kentucky Board of Medical Licensure  
310 Whittington Parkway, Suite 1B  
Louisville, Kentucky 40222  
(502) 429-7150

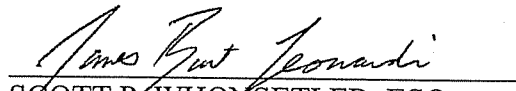
### WAIVER OF RIGHTS

I, Michael C. Hess, M.D., am presently the Respondent in Kentucky Board of Medical Licensure Case No. 1178. I understand that, under 201 KAR 9:082, I must waive certain rights if I wish to resolve this matter by informal dispensation. Accordingly, I WAIVE my right to raise any constitutional, statutory or common law objection(s) I may have to the Hearing Panel rejecting the proposed informal dispensation or to the curtailment of such a settlement by the Board's General Counsel or Assistant General Counsel.

Furthermore, if the Hearing Panel accepts the proposed Agreed Order of Surrender as submitted, I WAIVE my right to demand an evidentiary hearing or to raise additional constitutional or statutory objections in this matter. However, if the Hearing Panel should reject the proposed Agreed Order of Surrender, I understand that further proceedings will be conducted in accordance with KRS 311.530 et seq, and I will have the right to raise any objections normally available in such proceedings.

Executed this 3 day of APRIL, 2009.

  
MICHAEL C. HESS, M.D.  
Respondent

  
SCOTT P. WHONSETLER, ESQ.  
JAMES BART LEONARDI, ESQ.  
COUNSEL FOR THE RESPONDENT

COMMONWEALTH OF KENTUCKY  
BOARD OF MEDICAL LICENSURE  
CASE NO. 1178

FILED OF RECORD  
FEB 25 2009  
K.B.M.L.

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF  
KENTUCKY HELD BY MICHAEL C. HESS, M.D., LICENSE NO. 19773,  
5129 DIXIE HIGHWAY, LOUISVILLE, KENTUCKY 40216

**AMENDED COMPLAINT**

Comes now the Complainant Preston P. Nunnelley, M.D., Acting Chair of the  
Kentucky Board of Medical Licensure's Inquiry Panel A, and on behalf of the Panel  
which met on February 19, 2009, states for its Amended Complaint against the licensee,  
Michael C. Hess, M.D., as follows:

1. At all relevant times, Michael C. Hess, M.D., was licensed by the Board to  
practice medicine in the Commonwealth of Kentucky.
2. The licensee's medical specialty is Family Medicine.
3. On February 19, 2008, the Board received a grievance, alleging that the licensee  
had engaged in inappropriate sexual contact and sexual comments with a patient.  
Patient A stated: "I have used Southend Med. Clinic for over ten years. I have  
seen several of its doctors but my primary care giver was Dr. Hess. He has taken  
care of all my medical needs including yearly gynochological [sic] exams. On  
Thursday Jan 3, 08 I saw Dr. Hess because of pain in my right shoulder. Upon  
examination, Dr. Hess proceeded to raise my shirt top along with my bra. He  
touched my breast, put my bra down and examined my bursa at the collarbone. In  
my opinion, the raising of my shirt and bra was totally unnecessary as my pain  
was near my collarbone. There have been other instances of inappropriate  
behavior. Once during an annual exam he told me I had attractive breasts, on

another visit, he gave me a kiss on the cheek, on another visit he told me I had beautiful eyes, on another visit he had the stethoscope on my chest with one of his fingers on the tips of my nipple, on another visit he pinched my left breast (I was clothed). I have no idea why he did that. All of these incidents confused me to say the least since I had built trust in him. I think he knew exactly what he was doing and thought he could get away with it.”

4. The grievant was subsequently interviewed by the Board investigator, and reported that she had been informed by Jewish Hospital Human Resources that the licensee was no longer with the Southend Medical Clinic. The licensee separated from The Physician’s Group at Jewish Hospital & St. Mary’s Healthcare, Inc. on January 31, 2008.
5. Jennifer Elliott, counsel for Jewish Hospital, was interviewed and stated that the Southend Medical Clinic is operated by and Dr. Hess was employed by The Physician Group at Jewish Hospital & St. Mary’s HealthCare, Inc. This entity purchased the clinic and signed an employment agreement with Dr. Hess and the other physicians on November 23, 2005. Prior to that date, the group had practiced at the same address for a number of years. An employment file on Dr. Hess from his former employer was located. It included complaints by employees and one patient for sexually inappropriate behavior. All complaints preceded Dr. Hess’ employment with The Physician Group at Jewish Hospital and St. Mary’s HealthCare, Inc. The earliest complaint dated back to 2001. There were also documented comments from current patients, which were made after Dr. Hess left the practice.



6. Patient B contacted the Southend office manager on October 21, 2004, in order to register a complaint against the licensee. She stated that she saw Dr. Hess in the office for bronchitis on October 20, 2004. As he listened to her chest, he fondled her breast and made inappropriate remarks about the size of her breasts. Patient B stated that prior to his listening to her chest, when she asked him if she needed to remove her outer shirt, Dr. Hess said "only if you are feeling frisky". She said he then raised her shirt, grabbed and lifted her breast and said "you really do have a nice rack." Patient B said she was so shocked by what had happened that she could not respond to his action or comments. When interviewed by the Board investigator, Patient B further indicated that the licensee had always asked her about her sex life, purportedly as a legitimate medical concern, and that whenever the licensee listened to her chest, he always reached the stethoscope up under her shirt. A nurse chaperone was never present on these occasions. Patient B indicated that days after she made her complaint, the licensee called her and asked for her forgiveness.
7. Patient C indicated to the Board investigator that she had been treated by the licensee for a number of years, but she had become uncomfortable with the licensee's examinations in approximately 2007. She stated that during an examination, the licensee had placed the stethoscope under her sweatshirt and touched her breast above the bra. On her last examination, he had rubbed her breast. He had previously rubbed her legs when she was wearing shorts, and told her she had "nice boobs."

8. Patient D stated that the licensee had sodomized and raped her, and that the licensee had sexual relations with her multiple times in the examining room. The licensee's improper conduct began on December 28, 2006, when Patient D had an appointment with the licensee. The nurse was not present for the breast examination but did come into the examining room for the pap smear. After the nurse left the room, the licensee commented that he liked what he saw of her body, that she was pretty, and that he would like to take her to a hotel room. The licensee went on to say that her husband (also a patient of the licensee) did not take care of himself, and that the licensee would be there to "pick up the pieces." Patient D had recently lost weight, and the licensee told her that many women who lose weight have affairs and that if she was going to have an affair, she should have it with him. The licensee continued this behavior at the January 18, 2007, appointment, making more comments about wanting to have sex with her and complaining that his wife did not understand him.
9. On February 1, 2007, Patient D saw the licensee for a check-up. She had an afternoon flight scheduled that day for an out of town business trip. The licensee told her that she was beautiful and that he was worried he would never see her again. He locked the exam room door and told her she needed to be quiet, and proceeded to engage in sexual intercourse with her.
10. At the appointment on February 17, 2007, the licensee entered the examining room and locked the door. Patient D told the licensee that she needed to get home, due to the snow and her husband being ill. The licensee sodomized her in the examining room.

11. At the office visit of June 21, 2007, Patient D had told the licensee's nurse that she wanted to be in and out quickly that day, but the licensee nonetheless engaged in sexual relations with her.
12. Patient D stated that she and the licensee engaged in sex in the examination room at every visit beginning February 1, 2007, and ending at the last visit of December 31, 2007. A review of the records indicates that there were eleven office visits with the licensee during this period. After the first sexual encounter, Patient D never paid for any high blood pressure medication, since the licensee always gave her samples.
13. Patient D's final appointment with the licensee was on December 31, 2007. He again engaged in sexual intercourse with her prior to her examination. Afterwards, the licensee call in his nurse to observe the Pap smear.
14. Patient D also stated to the Board investigator that when using the stethoscope, the licensee frequently went deep into her shirt and he would pull up her shirt in the back to see her tattoo, claiming that it turned him on.
15. Patient E reported that she had gone to the licensee for primary care for fifteen years and had, in the past, recommended him to others. Patient E also indicated to the Board investigator that during her exams, the licensee had usually pulled up her shirt to listen with the stethoscope, and on one occasion pulled up her bra. At the time, she had thought it odd, but not inappropriate. However, at her office examination on November 14, 2007, the licensee treated her for what she had thought was a lung infection. The licensee yanked her shirt up without warning in order to use the stethoscope. After listening to her chest, he put her shirt back

down but then constantly brushed against her breasts during the examination. The licensee told her that if she needed additional sex, she should call the licensee because his wife had left him and he was not getting enough sex. He put his arm around her twice during the office visit and pulled her very close towards him.

Patient E left in tears and decided never to return to the licensee for medical care.

16. Patient F reported to the Board investigator that she had seen the licensee three or four times approximately four years ago. She stopped seeing the licensee because he made her feel uncomfortable. At one visit, Patient F told the licensee that she thought she might be going through menopause, to which the licensee responded by questioning her about her husband, positions they used during sex, and many other personal details that made her feel uncomfortable. At each following visit, the licensee continued the discussion of sex and offered recommendations on sexual positions. Patient F also reported that the licensee would examine and feel her breasts at every unchaperoned visit, even while she remained seated in a chair opposite him.

17. The Board also interviewed employees of Southend Medical Clinic. Employee A stated that on June 5, 2001, she had delivered charts to the licensee's office. When Employee A asked the licensee where she should place the charts, he pointed to his lap. She placed the charts on his desk and left the room, but did not notify the Southend office manager of the incident. Employee A also notified the office manager that the licensee had made comments to her regarding her body and her clothing, all of which made her feel uncomfortable. After making such a report, Employee A never experienced any further problems from the licensee.

Employee A indicated that the licensee had treated her once or twice before the reported incident.

18. Employee B at Southend notified the office manager on November 21, 2001, that She had received flowers and a note from the licensee. She did not want to get the licensee in trouble, however she felt uncomfortable with the unwanted attention. She also stated that the previous week the licensee had come over to her department and touched her inappropriately, i.e., "he goosed me". She said he later came back to the department apologized. When contacted by the Board investigator, Employee B elaborated upon the licensee's conduct, indicating that the licensee had walked up behind her while she was having a conversation with another doctor. The licensee grabbed her buttock with one hand and then quickly walked away without comment. He later came back and apologized to her. The next week, she received flowers with an unsigned card that read, "surely a few bites (or nibbles) wouldn't hurt." Employee B contacted the florist and learned it was the licensee who had sent the flowers.
19. The Board investigator interviewed the Southend office manager. She had had several conversations with the licensee regarding inappropriate behavior after staff brought their concerns to her attention. The office manager further reported that the licensee had a habit of rubbing up against staff, and she had discussed this matter with him. She also indicated that the licensee would like to engage in unprofessional conversations about patients he had examined, i.e., talking about the female patients' breasts. The office manager also indicated that Southend had recommended that the licensee receive counseling.

20. In addition, in approximately November or December, 2005, the licensee entered the drug closet where the office manager and two nurses were located. The licensee then patted her on the buttock three or four times as he passed behind her. The office manager reported this incident to two physicians who then confronted the licensee about it, but the licensee denied that it had happened.
21. The licensee's nurse was interviewed by the Board investigator. She did not recall the events as narrated by Patient D. She was not aware that there were any staff complaints concerning the licensee, that the office was watching the licensee's conduct, or that he had been ordered to counseling. She also believed that she was present for every breast and pap exam. She stated she never observed the licensee do anything inappropriate.
22. The licensee was interviewed by the Board investigator and denied the patients' allegations. He stated that he would never tell a woman she had very attractive breasts, as he would never use the term breasts. He indicated that he had a long ten-plus year counseling relationship with Patient A, and over a period of time he would make comments in an attitude of affirmation on her strong points. He did not recall kissing her cheek, noting that he probably patted her hand. Regarding his use of a stethoscope, the licensee stated that he always placed the diaphragm and bell on the skin and would reach above and below the heart. He claimed that the stethoscope cannot be accurately used on top of the clothing. He stated his hand could have inadvertently rubbed across the breast and on occasion he may even have had to lift the breast out of the way to listen. He indicated that he always used a chaperone for a gynecological examination, and may or may not

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bra up fully exposing her breast. The licensee then began to squeeze her breast. She was startled, embarrassed and jerked back. The licensee commented that he just wanted to see what her breast felt like. Patient G stated that she just wanted to get out of the office. She called the office the following day and asked if they had any female physicians on staff. When she learned they had none, she asked for a referral to a female Family Practitioner and requested that her records be forwarded. At her first visit with her female physician, she cried as she related the details of the incident with the licensee. Patient G has warned her daughter and nieces to never see the licensee. As a result of his actions, she has switched all of her specialists to female physicians, whenever possible.

25. On September 24, 2008, the Board received a grievance from Patient H, alleging that the licensee had touched her inappropriately and made inappropriate sexual remarks during an examination at Southend Clinic in August, 2003. Patient H was interviewed by the Board investigator and stated that several years prior to the date of the incident, the licensee became increasingly interested in her sexual life and his signs of affection for her increased. He would constantly pat her leg during an exam. Through the years, Patient H had lost a lot of weight. The licensee would always notice and make comments about her weight loss and inquire about her sexual life. During a typical examination he would lift her shirt in the front and back to listen to her chest sounds. In 2002 the PAP smear felt strange and not quite right, but she thought perhaps it was all in her mind. Later that year, she was at McNeeley Lake to watch her granddaughter run cross



country when the licensee approached her from behind, swirled her around and attempted to bear hug her while exclaiming, "I see you are back from vacation".

26. At the time of the PAP examination in 2003, he pulled both sides of the drape open at the same time and examined her breasts and pinched her nipples very hard. When she commented that he had hurt her, he responded that it was necessary to "watch for cancer." After he finished the breast exam he began questioning her about her sexual life with her husband. The licensee made a crude comment about what a ride, not falling off and being "hooked on." He then called his nurse into the room. He performed a normal pelvic exam, took a culture and handed the slide to his nurse. While the nurse's back was turned preparing the culture to be sent out, the licensee inserted his finger into Patient H's vagina and began moving it in an improper way. At the same time he let his thumb massage her and she knew this was not a proper exam and that he was trying to get her sexually aroused. She immediately pulled away and sat up. He quickly stated that everything looked fine and left the room.
27. He returned to the room before she barely had time to get dressed and offered to give her his cell phone number and take care of her if her husband could not take care of her needs. She told him she loved her husband and whatever problems they had would be worked out. As she started to leave, he stepped toward her and tried to kiss her on the mouth, but she turned her head and he ended up kissing her cheek. Patient H left the office and went to her car where she began crying. She also called her husband and reported the incident to him. She never returned to that office for medical care. She was unable to find a female Family Practitioner

but she has reported this incident to subsequent treating physicians and has insisted that a nurse is always present during all of her examinations.

28. On October 8, 2008, the Board received a grievance from Patient I, alleging that the licensee had touched her inappropriately and had made inappropriate sexual remarks during office visits at Southend Clinic in 2003 and 2004 until she quit seeing him as her primary care physician. Patient I was interviewed by the Board investigator, and indicated that she had been a patient at Southend Medical Clinic and started seeing the licensee in 1999. At first, everything was okay when she visited the office with complaints of depression and female problems. He became increasingly “flirty”, and at the time of her last visit he kissed her on the lips after physically grabbing her and pulling her towards him as she was leaving. During the examination that same day and on more than one other occasion, he had inquired about her sex life and told her that if she wasn’t getting enough sex at home she should give him a call.

29. During at least three pelvic examinations, the licensee kept his fingers inside of Patient I and seemed to be “playing around” like he was trying to get her aroused. Typically, his nurse would enter the exam room, put the KY jelly on his gloved hand and then leave the room during the sensitive examination. During the last visit, he also performed a breast exam and commented that “little titties are pretty” and “more than a mouthful is enough”. He also pinched her nipples without explanation. The licensee stayed in the room while she dressed that day and then followed her into the hallway where he kissed her on the mouth.

30. Southend Clinic also reported to the Board that another former patient of the licensee had come forward to report that through the years the licensee had touched her breasts inappropriately and made inappropriate sexual comments during office visits. Patient J was contacted by the Board investigator. Patient J stated that the licensee had made offensive comments during the last two to three years that she had seen him at Southend Clinic. The licensee's nurse was frequently present when the licensee made inappropriate sexual remarks, and would usually respond by laughing it off and leaving the room before a sensitive examination. Patient J indicated that during annual examinations, the licensee always reached under her shirt and bra when using the stethoscope. He touched her breast inappropriately at these times and also touched them inappropriately when examining them. He continually used slang words to describe her breasts.
31. On or about August 1, 2008, the licensee was employed by the medical office of Norsworthy Associates in Beaver Dam, Kentucky. On August 6, 2008, Patient K filed a police report with the Kentucky State Police 16 following her examination on August 6, 2008, by the licensee at Norsworthy Associates. Patient K indicated in her police report that the licensee placed the stethoscope in the palm of his hand and moved his hand from her neckline down her torso, putting his hand under her bra and touching her nipples while listening to chest/heart sounds. On her back he went both down and under the bra, and then up and under her bra when he listened to her chest. Her autistic son was present with her infant nephew in the examination room. He reported that he was busy taking care of the 18-month-old baby and was not watching the examination, but he later noticed

that his mother was nervous and upset. She had to sit in the parking lot to calm down.

32. By his conduct, the licensee has violated KRS 311.595(5) and (9) as illustrated by KRS 311.597(4). Accordingly, legal grounds exist for disciplinary action against his Kentucky medical license.

33. The licensee is directed to respond to the allegations in paragraphs 23-32 delineated in the Amended Complaint within thirty (30) days of service thereof and is further given notice that:

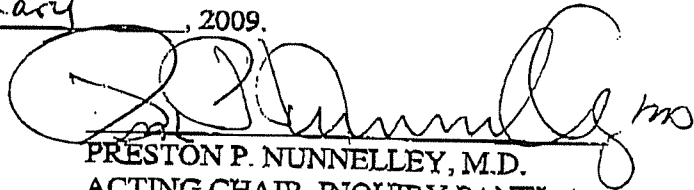
(a) His failure to respond may be taken as an admission of the charges;

(b) He may appear alone or with counsel, may cross-examine all prosecution witnesses and offer evidence in his defense.

34. NOTICE IS HEREBY GIVEN that a hearing on this Amended Complaint is scheduled for April 28, 29, 30 and May 1, 2009 at 9:00 a.m., Eastern Standard Time, at the Kentucky Board of Medical Licensure, Hurstbourne Office Park, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222. Said hearing shall be held pursuant to the Rules and Regulations of the Kentucky Board of Medical Licensure and pursuant to KRS Chapter 13B. This hearing shall proceed as scheduled and the hearing date shall only be modified by leave of the Hearing Officer upon a showing of good cause.


WHEREFORE, Complainant prays that appropriate disciplinary action be taken against the license to practice medicine held by Michael C. Hess, M.D.

This 25<sup>th</sup> day of February, 2009.

  
PRESTON P. NUNNELLEY, M.D.  
ACTING CHAIR, INQUIRY PANEL A

**CERTIFICATE OF SERVICE**

I certify that the original of this Amended Complaint was delivered to Mr. C. William Schmidt, Executive Director, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222; a copy was mailed to Thomas J. Hellmann, Esq., Hearing Officer, 810 Hickman Hill Road, Frankfort, Kentucky 40601; and a copy was mailed via certified mail return-receipt requested to Michael C. Hess, M.D., 1654 Victory Court, Prospect, Kentucky 40059 and to Scott P. Whonsetler, Esq., Whonsetler & Johnson, PLLC, 6011 Brownsboro Park Blvd, Suite E, Louisville, Kentucky 40207 on this 25<sup>th</sup> day of February, 2009.

  
KAREN QUINN  
Assistant General Counsel  
Kentucky Board of Medical Licensure  
310 Whittington Parkway, Suite 1B  
Louisville, Kentucky 40222  
502/429-7150

COMMONWEALTH OF KENTUCKY  
BOARD OF MEDICAL LICENSURE  
AGENCY CASE NO. 1178-E

FILED OF RECORD

OCT 10 2008

K.B.M.L.

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF  
KENTUCKY HELD BY MICHAEL C. HESS, M.D., LICENSE NO. 19773,  
5129 DIXIE HIGHWAY, LOUISVILLE, KENTUCKY 40216

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL ORDER

This action was instituted as the administrative appeal of Michael C. Hess, M.D., from the *Emergency Order of Suspension* issued by the Kentucky Board of Medical Licensure on September 10, 2008, against his license to practice medicine. In that order the Board charged that there was probable cause to believe that Hess had violated the Board's statutes governing the practice of medicine and that his medical practice constituted an immediate danger to the health, safety, and welfare of his patients. Based upon those allegations the Board suspended Hess's medical license and prohibited him from performing any act that constituted the practice of medicine.

Hess filed a response denying the Board's allegations and requesting pursuant to KRS 13B.125 an administrative hearing to review the emergency order. On October 2, 2008, the hearing officer conducted the administrative hearing. Hon. Karen Quinn represented the Kentucky Board of Medical Licensure, and Hon. David A. Lambertus represented Dr. Hess.

After considering the evidence admitted at the hearing and arguments of counsel, the hearing officer finds that there is substantial evidence in the record to

support the conclusion that Dr. Hess engaged in conduct that violated the Board's statutes and that the conduct is an immediate danger to the public health, safety, or welfare. The sanction imposed by the Board to rectify the immediate danger, however, is overly broad and extends beyond what is necessary to protect the public health, safety and welfare pending a hearing on the underlying charges contained in the *Complaint*. Therefore, the hearing officer limits the scope of the emergency order of suspension but otherwise affirms the Board's order. In support of that decision, the hearing officer submits the following findings of fact, conclusions of law, and Final Order:

#### FINDINGS OF FACT

1. On September 10, 2008, the Board filed the *Complaint* charging Hess with misconduct in violation of the Board's statutes. Exhibit 1C.
2. On that same day, the Board filed the *Emergency Order of Suspension* against Hess based upon the same misconduct alleged in the *Complaint*. Exhibit 1D.
3. In the *Emergency Order of Suspension* the Board charged that Hess had inappropriate sexual contact with and made inappropriate sexual comments to six female patients and that he engaged in similar misconduct with three female employees of Southend Medical Clinic, where he was employed. Exhibit 1D, pages 2-9.
4. Based upon those allegations, the Board concluded that Hess violated KRS 311.595(5) by having sexual contact with patients and that by his comments and sexual contact with the females he engaged in dishonorable, unethical, or unprofessional

conduct in violation of KRS 311.595(9), as illustrated by KRS 311.597(4). Exhibit 1D, page 10.

5. The Board also concluded that there was probable cause to believe that Hess's medical practice constituted a danger to the health, welfare and safety of his patients or the general public. Exhibit 1D, page 10.

6. Therefore, the Board's issued the emergency order suspending Hess's license and prohibiting him "from performing any act which constitutes the 'practice of medicine,' as that term is defined by KRS 311.550(10) . . . until the resolution of the Complaint setting forth the allegations discussed in this pleading or until such further Order of the Board." Exhibit 1D, page 11.

7. Hess denied the allegations, and this action was instituted as his administrative appeal of the emergency order.

8. Hess did not personally appear or testify at the hearing, but his counsel argued that the allegations against Hess do not constitute an immediate danger to the public health, safety, or welfare and that the suspension of his license is not the appropriate remedy for the alleged misconduct.

9. The Board called as its witnesses two of the complaining patients listed in the emergency order, Patients A and B. No other witnesses testified at the hearing.

10. Hess had been the primary care physician for Patient A since 1995.

11. Originally, she had been very satisfied with the care that Hess provided to her and her husband, who also was a patient of Hess.



12. Hess had ordered the tests that uncovered her husband's serious heart condition, and consequently, she thought Hess "hung the moon."

13. That sentiment began to change as a result of his conduct during several examinations he performed on Patient A.

14. The first incident of misconduct occurred during a routine breast exam of Patient A. During the exam, Hess commented that Patient A's breasts were still attractive for a woman her age. Patient A thought the comment was unusual, but she didn't think much more about it.

15. During a later appointment for her yearly medical exam, Hess was leaving the room upon completing the examination, but he stopped, turned, approached Patient A, and kissed her on the cheek. He then left the room without comment.

16. Patient A thought Hess's actions were odd, but she did not conclude at that time that his conduct was intentionally inappropriate.

17. Sometime later, she had an appointment to be checked by Hess as a result of a chest cold. As part of the examination, Hess listened to her chest with a stethoscope, but while holding the stethoscope, he maneuvered his hand inside her bra and rested one of his fingers on the nipple of a breast.

18. When she felt him touching her breast, Patient A thought to herself, "get off of me," but neither she nor Hess said anything about his conduct. His finger seemed to remain on her nipple for an "eternity," and she was confused by his conduct.

19. The next incident occurred during an examination as she sat in a chair opposite Hess. As they talked, he reached over and pinched or tweaked her breast.

20. She was so shocked by his actions that she did not say anything, and neither did he. Hess just laughed as if his conduct were a joke.

21. On a later visit, Patient A was concerned that she was developing an eye condition. Hess sat on a stool opposite her and moved his face very close to her own while examining the eye. He then stated, "You have the most beautiful eyes."

22. Her immediate thought was that "he was going to jump me, " and his comment scared her.

23. Hess, however, continued with the exam and made no further comments to her.

24. Patient A began to realize that there was a pattern to Hess's conduct, and she thought that he had some kind of problem.

25. On her last appointment with Hess in January 2008, Patient A was experiencing a pain in her collarbone that went to her shoulder. Although Patient A thought he could easily examine the shoulder without removing her top, Hess started the exam by lifting both her top and bra to her neck.

26. During the exam, he brushed against her breasts, and Patient A believed that "he knew exactly what he was doing."

27. Patient A realized that Hess was engaged in a pattern of conduct "to see what he could get away with," and although she initially believed that he was very

attentive to her needs and was a caring person, by the last visit she felt betrayed and used and that he had a problem.

28. Thus, after that last incident, Patient A did not return to see Hess.

29. Hess's misconduct toward Patient A occurred over a twelve year period, and there was not a nurse or chaperon in the examination room during any of the incidents.

30. Patient B is a retired school bus driver for Jefferson County Schools, and Hess had been her primary care physician since 2000.

31. Like Patient A, Patient B originally had a positive opinion of Hess and believed him to be a caring physician.

32. In October 2004 Patient B saw Hess for bronchitis. She asked whether she should remove her shirt so that he could examine her chest, and he responded, "Only if you feel frisky."

33. During the examination, Hess cupped his hand beneath her breast and commented that she had a "nice rack" and that she shouldn't have any trouble with her sex life.

34. Patient B was so upset by Hess's conduct that she called her sister when she returned home from the appointment, and she called the office manager the next day to complain about his conduct.

35. Later, Hess called Patient B to ask for her forgiveness for his actions, and he explained that he had been under a lot of stress but that was no excuse for his conduct. He promised that if she returned as his patient, it would never happen again.

36. Because Patient B was also taking her elderly mother for medical care from Hess, she decided to remain his patient.

37. During the last examination of Patient B, Hess needed to listen to her lungs, but without warning, he grabbed the front of her shirt and jerked it up.

38. She responded by grabbing the shirt herself and pulling it down while stating, "Excuse me!" Hess didn't say anything in response.

39. That incident embarrassed Patient B and made her rethink whether she should remain as his patient.

40. The *Emergency Order of Suspension* alleged that Hess engaged in similar misconduct toward Patients C, E, and F.

41. In addition, the emergency order alleged that Hess asked Patient E to call him "if she needed additional sex" and that he questioned Patient F about her sex life and "offered recommendations on sexual positions." Exhibit 1D, pages 6-7.

42. The Board further alleged that Hess sodomized and raped Patient D and that he had sexual intercourse with her in the examination room on eleven office visits between February 1, 2007, and December 31, 2007. Exhibit 1D, pages 4-5.

43. Several female members of the staff at the Southend Medical Clinic also alleged that Hess made inappropriate sexual comments to them and that he touched them in a sexual and inappropriate manner.

44. On one occasion when Employee A entered Hess's office and asked where she should place several medical charts, he pointed to his lap. On other occasions, he

"made comments to [Employee A] regarding her body and her clothing, all of which made her feel uncomfortable." Exhibit 1D, page 7; Exhibit 1A, attached exhibit 2.

45. One day, Hess came over to the department where Employee B worked and "grabbed her buttock with one hand and then quickly walked away without comment." He later returned to the department and apologized, but the next week he sent her flowers with a card that read, "Surely a few bites (or nibbles) wouldn't hurt." Employee B "felt uncomfortable with the unwanted attention." Exhibit 1D, page 7-8; Exhibit 1A, attached exhibit 3.

46. In spite of the fact that the office manager had several conversations with Hess about his inappropriate behavior, in November or December 2005 Hess entered the drug closet where the officer manager and two nurses were working, and he "patted [the office manager] on the buttock three or four times as he passed behind her." Exhibit 1D, page 8.

47. When interviewed by the Board investigator about the allegations and in his written response to the allegations of Patient A, Hess denied any intentional misconduct or inappropriate comments to patients or staff. Exhibit 1D, page 9; Exhibit 1A, attached exhibit 8.

48. There were no allegations of misconduct by Hess toward male patients or staff. In addition, there were no allegations that the care and treatment he provided to patients that was unrelated to the allegations of sexual misconduct departed from or failed to conform to the standards of acceptable and prevailing medical practice or

represented an immediate danger to the health, safety, or welfare of patients or the public.

### CONCLUSIONS OF LAW

1. The administrative hearing was held pursuant to the provisions of KRS 13B.125 and KRS 311.592.

2. Pursuant to KRS 13B.090(7), the burden of proof was on the Kentucky Board of Medical Licensure.

3. Under KRS 13B.125(3), "the emergency order shall be affirmed if there is substantial evidence of a violation of law which constitutes an immediate danger to the public health, safety, or welfare."

4. In an appeal from an emergency order of suspension, "the findings of fact in the emergency order shall constitute a rebuttable presumption of substantial evidence of a violation of law that constitutes immediate danger to the health, welfare, or safety of patients or the general public." KRS 311.592(2).

5. "Substantial evidence" is defined as "evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men."

*Kentucky State Racing Commission v. Fuller*, Ky., 481 S.W.2d 298, 308 (1972), quoting *O'Nan v. Ecklar Moore Express, Inc.*, Ky., 339 S.W.2d 466 (1960).

6. Further, "[t]he test of substantiality of evidence is whether when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men." *Fuller*, 481 S.W.2d at 308. Stated another way, substantial

evidence is "evidence that a reasonable mind would accept as adequate to support a conclusion." *Black's Law Dictionary*, 7<sup>th</sup> ed., p. 580.

7. In addition, "if there is substantial evidence in the record to support an agency's findings, the findings will be upheld, even though there may be conflicting evidence in the record." *Kentucky Commission on Human Rights v. Fraser*, Ky., 625 S.W.2d 852, 856 (1981).

8. A physician is subject to discipline if the Board finds that he has "had sexual contact as defined in KRS 510.010(7) with a patient while the patient was under the care of the physician." KRS 311.595(5).

9. "Sexual contact" is defined in KRS 510.010(7) as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party."

10. There is substantial evidence in the record to support the conclusion that Hess had sexual contact with his patients in violation of KRS 311.595(5).

11. Under KRS 311.595(9), a physician is subject to discipline if he has "engaged in dishonorable, unethical, or unprofessional conduct of a character likely to deceive, defraud, or harm the public or any member thereof."

12. Under KRS 311.597(4), "dishonorable, unethical, or unprofessional conduct" is defined as including:

Conduct which is calculated or has the effect of bringing the medical profession into disrepute, including but not limited to any departure from, or failure to conform to the standards of acceptable and prevailing medical practice within the

Commonwealth of Kentucky, and any departure from, or failure to conform to the principles of medical ethics of the American Medical Association or the code of ethics of the American Osteopathic Association.

13. Under the American Medical Association's Code of Medical Ethics, Section 8.14, Sexual Misconduct in the Practice of Medicine, "sexual contact that occurs concurrently with the patient-physician relationship constitutes sexual misconduct."

14. There is substantial evidence in the record to support the conclusion that Hess violated KRS 311.595(9), as illustrated by KRS 311.597(4) by having sexual contact with patients and office staff and that he engaged in sexual misconduct in violation of the AMA Code of Medical Ethics.

15. Under the American Medical Association's Code of Medical Ethics, Section 3.08, Sexual Harassment and Exploitation between Medical Supervisors and Trainees, "sexual harassment may be defined as sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) such conduct interferes with an individual's work or academic performance or creates an intimidating, hostile, or offensive work or academic environment . . . ."

16. There is substantial evidence in the record that Hess engaged in sexual harassment of his patients and office staff by his comments and conduct toward them. He made sexual advances toward patients and office staff by touching them in a sexually inappropriate manner and by making sexually inappropriate comments to them. In addition, there is substantial evidence in the record that his actions interfered



with his care and treatment of his patients and created a hostile, intimidating, and offensive work environment for the staff.

17. Consequently, there is substantial evidence in the record to support the conclusion that Hess violated KRS 311.595(9), as illustrated by KRS 311.597(4), due to his sexual harassment of his patients and office staff.

18. There is substantial evidence in the record that the violations of law set forth in the *Emergency Order of Suspension* constitute an immediate danger to the health, safety, and welfare of Hess's patients, co-workers, and the general public. Hess is accused of having sexual intercourse with one patient, and his sexual contact and comments to other patients interfered with and distracted from the physician/patient relationship and caused patients to terminate Hess as their physician. In addition, his sexual comments and conduct toward the office staff interfered with the performance of their work as shown by the complaints filed with the office manager, and his conduct could have distracted them from providing the necessary attention to their work and care for the patients.

19. Pursuant to KRS 311.592(1), the Board's inquiry panel "may issue an emergency order, in accordance with KRS 13B.125, suspending, limiting, or restricting the physician's license."

20. Under KRS 13B.125(2), the Board "may issue an emergency order to stop, prevent, or avoid an immediate danger to the public health, safety, or welfare."

21. The authority of any state agency, however, is limited by Section 2 of the Kentucky Constitution which prevents the exercise of "arbitrary power over the lives, liberty, or property" of individuals. In accordance with Section 2, "no board or officer vested with governmental authority may exercise it arbitrarily." *Ky. Milk Mktg. and Antimonopoly Comm'n v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985).

22. Therefore, considering the provisions of KRS 13B.125(2) in conjunction with Section 2 of the Kentucky Constitution, the Board's emergency order may not be any broader in scope than is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare as identified in the *Emergency Order of Suspension*. In this action all of the allegations of misconduct involve Hess's conduct toward women in his practice of medicine. Therefore, the immediate danger is prevented or avoided if Hess is prohibited from performing any act that constitutes the "practice of medicine," as that term is defined by KRS 311.550(10), and that involves female patients and if he is prohibited from having any contact or communication with female patients, support staff, health care providers, health care representatives, or any other females while he is engaged in the practice of medicine.

#### **FINAL ORDER**

Based upon the foregoing findings of fact and conclusions of law, the hearing officer affirms the *Emergency Order of Suspension* dated September 10, 2008, except to the scope of the suspension of Hess's medical practice. Pending the resolution of the *Complaint*, Hess is prohibited from performing any act that constitutes the "practice of

medicine,” as that term is defined by KRS 311.550(10), that involves female patients, and he is prohibited from having any contact or communication with female patients, support staff, health care providers, health care representatives, or any other females while he is engaged in the practice of medicine.

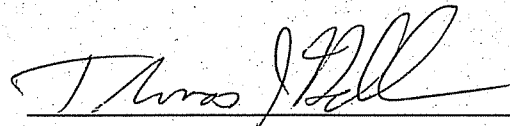
### **NOTICE OF APPEAL RIGHTS**

Pursuant to KRS 13B.125(4), this final order may be appealed pursuant to KRS 13B.140(1). That subsection of the statute states:

All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency’s enabling statutes, within 30 days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the Final Order.

Pursuant to KRS 23A.010(4), “such review [by the Circuit Court] shall not constitute an appeal but an original action.” Some courts have interpreted this language to mean that a summons also be served upon filing an appeal in circuit court.

SO ORDERED this 9<sup>th</sup> day of October, 2008.

A handwritten signature in black ink, appearing to read "Thomas J. Hellmann", written over a horizontal line.

THOMAS J. HELLMANN  
HEARING OFFICER  
810 HICKMAN HILL RD.  
FRANKFORT, KY 40601  
(502) 330-7338  
thellmann@mac.com

CERTIFICATE OF SERVICE

I hereby certify that the original of this FINAL ORDER was mailed this 9<sup>th</sup> day of October, 2008, by first-class mail, postage prepaid, to:

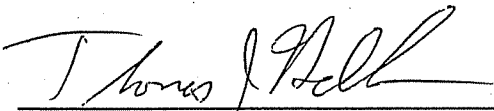
JILL LUN  
KY BOARD OF MEDICAL LICENSURE  
HURSTBOURNE OFFICE PARK STE 1B  
310 WHITTINGTON PKWY  
LOUISVILLE KY 40222

for filing; and based upon the Board's waiver of receipt by certified mail, a true copy was sent by first-class mail, postage prepaid, to:

KAREN QUINN  
ASSISTANT GENERAL COUNSEL  
KY BOARD OF MEDICAL LICENSURE  
HURSTBOURNE OFFICE PARK STE 1B  
310 WHITTINGTON PKWY  
LOUISVILLE KY 40222

and a true copy was sent by certified mail, return receipt requested, to:

DAVID A LAMBERTUS  
ATTORNEY AT LAW  
600 WEST MAIN ST SUITE 300  
LOUISVILLE KY 40202

  
THOMAS J. HELLMANN

1178Efc

COMMONWEALTH OF KENTUCKY  
BOARD OF MEDICAL LICENSURE  
CASE NO. 1178

**FILED OF RECORD**

**SEP 10 2008**

**K.B.M.L.**

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF  
KENTUCKY HELD BY MICHAEL C. HESS, M.D., LICENSE NO. 19773,  
5129 DIXIE HIGHWAY, LOUISVILLE, KENTUCKY 40216

**EMERGENCY ORDER OF SUSPENSION**

The Kentucky Board of Medical Licensure (hereafter "the Board"), acting by and through its Inquiry Panel A, considered this matter at its August 21, 2008 meeting. At that meeting, Inquiry Panel A considered a memorandum prepared by Berry Prater, Medical Investigator dated July 25, 2008; a grievance dated February 13, 2008; staff incident reports dated June 6, 2001, November 21, 2001, and January 20, 2004 ; a patient report of incident dated October 21, 2004; licensee's cell notation of his number as given to a patient; a referral to counseling dated November 24, 2004; and a response provided by licensee's legal representative.

Having considered all of this information and being sufficiently advised, Inquiry Panel A ENTERS the following EMERGENCY ORDER OF SUSPENSION, in accordance with KRS 311.592(1) and 13B.125(1):

**FINDINGS OF FACT**

Pursuant to KRS 13B.125(2) and based upon the information available to it, Inquiry Panel A concludes there is probable cause to make the following Findings of Fact, which support its Emergency Order of Suspension:

1. At all relevant times, Michael C. Hess, M.D., was licensed by the Board to practice medicine in the Commonwealth of Kentucky.
2. The licensee's medical specialty is Family Medicine.

3. On February 19, 2008, the Board received a grievance, alleging that the licensee had engaged in inappropriate sexual contact and sexual comments with a patient. Patient A stated: "I have used Southend Med. Clinic for over ten years. I have seen several of its doctors but my primary care giver was Dr. Hess. He has taken care of all my medical needs including yearly gynochological [sic] exams. On Thursday Jan 3, 08 I saw Dr. Hess because of pain in my right shoulder. Upon examination, Dr. Hess proceeded to raise my shirt top along with my bra. He touched my breast, put my bra down and examined my bursa at the collarbone. In my opinion, the raising of my shirt and bra was totally unnecessary as my pain was near my collarbone. There have been other instances of inappropriate behavior. Once during an annual exam he told me I had attractive breasts, on another visit, he gave me a kiss on the cheek, on another visit he told me I had beautiful eyes, on another visit he had the stethoscope on my chest with one of his fingers on the tips of my nipple, on another visit he pinched my left breast (I was clothed). I have no idea why he did that. All of these incidents confused me to say the least since I had built trust in him. I think he knew exactly what he was doing and thought he could get away with it."
4. The grievant was subsequently interviewed by the Board investigator, and reported that she had been informed by Jewish Hospital Human Resources that the licensee was no longer with the Southend Medical Clinic. The licensee separated from The Physician's Group at Jewish Hospital & St. Mary's Healthcare, Inc. on January 31, 2008.
5. Jennifer Elliott, counsel for Jewish Hospital, was interviewed and stated that

the Southend Medical Clinic is operated by and Dr. Hess was employed by The Physician Group at Jewish Hospital & St. Mary's HealthCare, Inc. This entity purchased the clinic and signed an employment agreement with Dr. Hess and the other physicians on November 23, 2005. Prior to that date, the group had practiced at the same address for a number of years. An employment file on Dr. Hess from his former employer was located. It included complaints by employees and one patient for sexually inappropriate behavior. All complaints preceded Dr. Hess' employment with The Physician Group at Jewish Hospital and St. Mary's HealthCare, Inc. The earliest complaint dated back to 2001. There were also documented comments from current patients, which were made after Dr. Hess left the practice.

6. Patient B contacted the Southend office manager on October 21, 2004, in order to register a complaint against the licensee. She stated that she saw Dr. Hess in the office for bronchitis on October 20, 2004. As he listened to her chest, he fondled her breast and made inappropriate remarks about the size of her breasts. Patient B stated that prior to his listening to her chest, when she asked him if she needed to remove her outer shirt, Dr. Hess said "only if you are feeling frisky". She said he then raised her shirt, grabbed and lifted her breast and said "you really do have a nice rack." Patient B said she was so shocked by what had happened that she could not response to his action or comments. When interviewed by the Board investigator, Patient B further indicated that the licensee had always asked her about her sex life, purportedly as a legitimate medical concern, and that whenever the licensee listened to her chest, he always reached the stethoscope up under her



shirt. A nurse chaperone was never present on these occasions. Patient B indicated that days after she made her complaint, the licensee called her and asked for her forgiveness.

7. Patient C indicated to the Board investigator that she had been treated by the licensee for a number of years, but she had become uncomfortable with the licensee's examinations in approximately 2007. She stated that during an examination, the licensee had placed the stethoscope under her sweatshirt and touched her breast above the bra. On her last examination, he had rubbed her breast. He had previously rubbed her legs when she was wearing shorts, and told her she had "nice boobs."
8. Patient D stated that the licensee had sodomized and raped her, and that the licensee had sexual relations with her multiple times in the examining room. The licensee's improper conduct began on December 28, 2006, when Patient D had an appointment with the licensee. The nurse was not present for the breast examination but did come into the examining room for the pap smear. After the nurse left the room, the licensee commented that he liked what he saw of her body, that she was pretty, and that he would like to take her to a hotel room. The licensee went on to say that her husband (also a patient of the licensee) did not take care of himself, and that the licensee would be there to "pick up the pieces." Patient D had recently lost weight, and the licensee told her that many women who lose weight have affairs and that if she was going to have an affair, she should have it with him. The licensee continued this behavior at the January 18,

- 2007, appointment, making more comments about wanting to have sex with her and complaining that his wife did not understand him.
9. On February 1, 2007, Patient D saw the licensee for a check-up. She had an afternoon flight scheduled that day for an out of town business trip. The licensee told her that she was beautiful and that he was worried he would never see her again. He locked the exam room door and told her she need to be quiet, and proceeded to engage in sexual intercourse with her.
  10. At the appointment on February 17, 2007, the licensee entered the examining room and locked the door. Patient D told the licensee that she needed to get home, due to the snow and her husband being ill. The licensee sodomized her in the examining room.
  11. At the office visit of June 21, 2007, Patient D had told the licensee's nurse that she wanted to be in and out quickly that day, but the licensee nonetheless engaged in sexual relations with her.
  12. Patient D stated that she and the licensee engaged in sex in the examination room at every visit beginning February 1, 2007, and ending at the last visit of December 31, 2007. A review of the records indicates that there were eleven office visits with the licensee during this period. After the first sexual encounter, Patient D never paid for any high blood pressure medication, since the licensee always gave her samples.
  13. Patient D's final appointment with the licensee was on December 31, 2007. He again engaged in sexual intercourse with her prior to her examination. Afterwards, the licensee call in his nurse to observe the Pap smear.

14. Patient D also stated to the Board investigator that when using the stethoscope, the licensee frequently went deep into her shirt and he would pull up her shirt in the back to see her tattoo, claiming that it turned him on.
15. Patient E reported that she had gone to the licensee for primary care for fifteen years and had, in the past, recommended him to others. Patient E also indicated to the Board investigator that during her exams, the licensee had usually pulled up her shirt to listen with the stethoscope, and on one occasion pulled up her bra. At the time, she had thought it odd, but not inappropriate. However, at her office examination on November 14, 2007, the licensee treated her for what she had thought was a lung infection. The licensee yanked her shirt up without warning in order to use the stethoscope. After listening to her chest, he put her shirt back down but then constantly brushed against her breasts during the examination. The licensee told her that if she needed additional sex, she should call the licensee because his wife had left him and he was not getting enough sex. He put his arm around her twice during the office visit and pulled her very close towards him. Patient E left in tears and decided never to return to the licensee for medical care.
16. Patient F reported to the Board investigator that she had seen the licensee three or four times approximately four years ago. She stopped seeing the licensee because he made her feel uncomfortable. At one visit, Patient F told the licensee that she thought she might be going through menopause, to which the licensee responded by questioning her about her husband, positions they used during sex, and many other personal details that made her feel uncomfortable. At each following visit, the licensee continued the discussion of sex and offered recommendations on

sexual positions. Patient F also reported that the licensee would examine and feel her breasts at every unchaperoned visit, even while she remained seated in a chair opposite him.

17. The Board also interviewed employees of Southend Medical Clinic. Employee A stated that on June 5, 2001, she had delivered charts to the licensee's office.

When Employee A asked the licensee where she should place the charts, he pointed to his lap. She placed the charts on his desk and left the room, but did not notify the Southend office manager of the incident. Employee A also notified the office manager that the licensee had made comments to her regarding her body and her clothing, all of which made her feel uncomfortable. After making such a report, Employee A never experienced any further problems from the licensee.

Employee A indicated that the licensee had treated her once or twice before the reported incident.

18. Employee B at Southend notified the office manager on November 21, 2001, that

She had received flowers and a note from the licensee. She did not want to get the licensee in trouble, however she felt uncomfortable with the unwanted attention. She also stated that the previous week the licensee had come over to her department and touched her inappropriately, i.e., "he goosed me". She said he later came back to the department apologized. When contacted by the Board investigator, Employee B elaborated upon the licensee's conduct, indicating that the licensee had walked up behind her while she was having a conversation with another doctor. The licensee grabbed her buttock with one hand and then quickly walked away without comment. He later came back and apologized to her. The

next week, she received flowers with an unsigned card that read, "surely a few bites (or nibbles) wouldn't hurt." Employee B contacted the florist and learned it was the licensee who had sent the flowers.

19. The Board investigator interviewed the Southend office manager. She had had several conversations with the licensee regarding inappropriate behavior after staff brought their concerns to her attention. The office manager further reported that the licensee had a habit of rubbing up against staff, and she had discussed this matter with him. She also indicated that the licensee would like to engage in unprofessional conversations about patients he had examined, i.e., talking about the female patients' breasts. The office manager also indicated that Southend had recommended that the licensee receive counseling.
20. In addition, in approximately November or December, 2005, the licensee entered the drug closet where the office manager and two nurses were located. The licensee then patted her on the buttock three or four times as he passed behind her. The office manager reported this incident to two physicians who then confronted the licensee about it, but the licensee denied that it had happened.
21. The licensee's nurse was interviewed by the Board investigator. She did not recall the events as narrated by Patient D. She was not aware that there were any staff complaints concerning the licensee, that the office was watching the licensee's conduct, or that he had been ordered to counseling. She also believed that she was present for every breast and pap exam. She stated she never observed the licensee do anything inappropriate.

22. The licensee was interviewed by the Board investigator and denied the patients' allegations. He stated that he would never tell a woman she had very attractive breasts, as he would never use the term breasts. He indicated that he had a long ten-plus year counseling relationship with Patient A, and over a period of time he would make comments in an attitude of affirmation on her strong points. He did not recall kissing her cheek, noting that he probably patted her hand. Regarding his use of a stethoscope, the licensee stated that he always placed the diaphragm and bell on the skin and would reach above and below the heart. He claimed that the stethoscope cannot be accurately used on top of the clothing. He stated his hand could have inadvertently rubbed across the breast and on occasion he may even have had to lift the breast out of the way to listen. He indicated that he always used a chaperone for a gynecological examination, and may or may not use a chaperone for a breast exam. The licensee admitted that he had had several conversations with the office manager about staff complaints, but denied that he had ever patted the office manager on the buttocks.

### **CONCLUSIONS OF LAW**

Pursuant to KRS 13B.125(2) and based upon the information available to it, Inquiry Panel A finds there is probable cause to support the following Conclusions of Law, which serve as the legal bases for this Emergency Order of Suspension:

1. The licensee's Kentucky medical license is subject to regulation and discipline by this Board.
2. KRS 311.592(1) provides that the Board may issue an emergency order suspending, limiting, or restricting a physician's license at any time an inquiry panel has probable

cause to believe that a) the physician has violated the terms of an order placing him on probation; or b) a physician's practice constitutes a danger to the health, welfare and safety of his patients or the general public.

3. There is probable cause to believe that the licensee has violated KRS 311.595(5) and (9) as illustrated by KRS 311.597(4).

4. The Panel concludes there is probable cause to believe this physician's practice constitutes a danger to the health, welfare and safety of his patients or the general public.

5. The Board may draw logical and reasonable inferences about a physician's practice by considering certain facts about a physician's practice. If there is proof that a physician has violated a provision of the Kentucky Medical Practice Act in one set of circumstances, the Board may infer that the physician will similarly violate the Medical Practice Act when presented with a similar set of circumstances. Similarly, the Board concludes that proof of a set of facts about a physician's practice presents representative proof of the nature of that physician's practice in general.

Accordingly, probable cause to believe that the physician has committed certain violations in the recent past presents probable cause to believe that the physician will commit similar violations in the near future, during the course of the physician's medical practice.

6. The United States Supreme Court has ruled that it is no violation of the federal Due Process Clause for a state agency to temporarily suspend a license, without a prior evidentiary hearing, so long as 1) the immediate action is based upon a probable cause finding that there is a present danger to the public safety; and, 2) the statute

provides for a prompt post-deprivation hearing. Barry v. Barchi, 443 U.S. 55, 61 L.Ed.2d 365, 99 S.Ct. 2642 (1979); FDIC v. Mallen, 486 U.S. 230, 100 L.Ed.2d 265, 108 S.Ct. 1780 (1988) and Gilbert v. Homar, 117 S.Ct. 1807 (1997). Cf. KRS 13B.125(1).

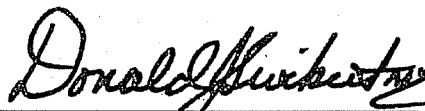
KRS 13B.125(3) provides that the Board shall conduct an emergency hearing on this emergency order within ten (10) working days of a request for such a hearing by the licensee. The licensee has been advised of his right to a prompt post-deprivation hearing under this statute.

### **EMERGENCY ORDER OF SUSPENSION**

Based upon the foregoing Findings of Fact and Conclusions of Law, Inquiry Panel A hereby ORDERS that the license to practice medicine in the Commonwealth of Kentucky held by MICHEAL C. HESS, M.D., is SUSPENDED and Dr. Hess is prohibited from performing any act which constitutes the "practice of medicine," as that term is defined by KRS 311.550(10) – the diagnosis, treatment, or correction of any and all human conditions, ailments, diseases, injuries, or infirmities by any and all means, methods, devices, or instrumentalities - until the resolution of the Complaint setting forth the allegations discussed in this pleading or until such further Order of the Board.

Inquiry Panel A further declares that this is an EMERGENCY ORDER, effective upon receipt by the licensee.

SO ORDERED this 10<sup>th</sup> day of September, 2008.



DONALD J. SWIKERT, M.D.  
CHAIR, INQUIRY PANEL A



**CERTIFICATE OF SERVICE**

I certify that the original of this Emergency Order of Suspension was delivered to Mr. C. William Schmidt, Executive Director, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222; a copy was mailed to Thomas J. Hellmann, Esq., Hearing Officer, 810 Hickman Hill Road, Frankfort, Kentucky 40601; and a copy was mailed via certified mail return-receipt requested to Michael C. Hess, M.D., 1654 Victory Court, Prospect, Kentucky 40059 and to Scott P. Whonsetler, Esq., Whonsetler & Johnson, PLLC, 6011 Brownsboro Park Blvd, Suite E, Louisville, Kentucky 40207 on this 10<sup>th</sup> day of September, 2008.



KAREN QUINN  
Assistant General Counsel  
Kentucky Board of Medical Licensure  
310 Whittington Parkway, Suite 1B  
Louisville, Kentucky 40222  
(502) 429-7150

SEP 10 2008

COMMONWEALTH OF KENTUCKY  
BOARD OF MEDICAL LICENSURE  
CASE NO. 1178**K.B.M.L.**

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF  
KENTUCKY HELD BY MICHAEL C. HESS, M.D., LICENSE NO. 19773,  
5129 DIXIE HIGHWAY, LOUISVILLE, KENTUCKY 40216

**COMPLAINT**

Comes now the Complainant Donald J. Swikert, M.D., Chair of the Kentucky Board of Medical Licensure's Inquiry Panel A, and on behalf of the Panel which met on August 21, 2008, states for its Complaint against the licensee, Michael C. Hess, M.D., as follows:

1. At all relevant times, Michael C. Hess, M.D., was licensed by the Board to practice medicine in the Commonwealth of Kentucky.
2. The licensee's medical specialty is Family Medicine.
3. On February 19, 2008, the Board received a grievance, alleging that the licensee had engaged in inappropriate sexual contact and sexual comments with a patient. Patient A stated: "I have used Southend Med. Clinic for over ten years. I have seen several of its doctors but my primary care giver was Dr. Hess. He has taken care of all my medical needs including yearly gynochological [sic] exams. On Thursday Jan 3, 08 I saw Dr. Hess because of pain in my right shoulder. Upon examination, Dr. Hess proceeded to raise my shirt top along with my bra. He touched my breast, put my bra down and examined my bursa at the collarbone. In my opinion, the raising of my shirt and bra was totally unnecessary as my pain was near my collarbone. There have been other instances of inappropriate

behavior. Once during an annual exam he told me I had attractive breasts, on another visit, he gave me a kiss on the cheek, on another visit he told me I had beautiful eyes, on another visit he had the stethoscope on my chest with one of his fingers on the tips of my nipple, on another visit he pinched my left breast (I was clothed). I have no idea why he did that. All of these incidents confused me to say the least since I had built trust in him. I think he knew exactly what he was doing and thought he could get away with it.”

4. The grievant was subsequently interviewed by the Board investigator, and reported that she had been informed by Jewish Hospital Human Resources that the licensee was no longer with the Southend Medical Clinic. The licensee separated from The Physician’s Group at Jewish Hospital & St. Mary’s Healthcare, Inc. on January 31, 2008.
5. Jennifer Elliott, counsel for Jewish Hospital, was interviewed and stated that the Southend Medical Clinic is operated by and Dr. Hess was employed by The Physician Group at Jewish Hospital & St. Mary’s HealthCare, Inc. This entity purchased the clinic and signed an employment agreement with Dr. Hess and the other physicians on November 23, 2005. Prior to that date, the group had practiced at the same address for a number of years. An employment file on Dr. Hess from his former employer was located. It included complaints by employees and one patient for sexually inappropriate behavior. All complaints preceded Dr. Hess’ employment with The Physician Group at Jewish Hospital and St. Mary’s HealthCare, Inc. The earliest complaint dated back to 2001. There were also

documented comments from current patients, which were made after Dr. Hess left the practice.

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7. Patient C indicated to the Board investigator that she had been treated by the license for a number of years, but she had become uncomfortable with the licensee's examinations in approximately 2007. She stated that during an examination, the licensee had placed the stethoscope under her sweatshirt and touched her breast above the bra. On her last examination, he had rubbed her

breast. He had previously rubbed her legs when she was wearing shorts, and told her she had "nice boobs."

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Afterwards, the licensee call in his nurse to observe the Pap smear.
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and her clothing, all of which made her feel uncomfortable. After making such a report, Employee A never experienced any further problems from the licensee. Employee A indicated that the licensee had treated her once or twice before the reported incident.

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the female patients' breasts. The office manager also indicated that Southend had recommended that the licensee receive counseling.

20. In addition, in approximately November or December, 2005, the licensee entered the drug closet where the office manager and two nurses were located. The licensee then patted her on the buttock three or four times as he passed behind her. The office manager reported this incident to two physicians who then confronted the licensee about it, but the licensee denied that it had happened.
21. The licensee's nurse was interviewed by the Board investigator. She did not recall the events as narrated by Patient D. She was not aware that there were any staff complaints concerning the licensee, that the office was watching the licensee's conduct, or that he had been ordered to counseling. She also believed that she was present for every breast and pap exam. She stated she never observed the licensee do anything inappropriate.
22. The licensee was interviewed by the Board investigator and denied the patients' allegations. He stated that he would never tell a woman she had very attractive breasts, as he would never use the term breasts. He indicated that he had a long ten-plus year counseling relationship with Patient A, and over a period of time he would make comments in an attitude of affirmation on her strong points. He did not recall kissing her cheek, noting that he probably patted her hand. Regarding his use of a stethoscope, the licensee stated that he always placed the diaphragm and bell on the skin and would reach above and below the heart. He claimed that the stethoscope cannot be accurately used on top of the clothing. He stated his hand could have inadvertently rubbed across the breast and on occasion he may

even have had to lift the breast out of the way to listen. He indicated that he always used a chaperone for a gynecological examination, and may or may not use a chaperone for a breast exam. The licensee admitted that he had had several conversations with the office manager about staff complaints, but denied that he had ever patted the office manager on the buttocks.

23. By his conduct, the licensee has violated KRS 311.595(5) and (9) as illustrated by KRS 311.597(4). Accordingly, legal grounds exist for disciplinary action against his Kentucky medical license.

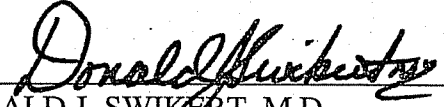
24. The licensee is directed to respond to the allegations delineated in the Complaint within thirty (30) days of service thereof and is further given notice that:

- (a) His failure to respond may be taken as an admission of the charges;
- (b) He may appear alone or with counsel, may cross-examine all prosecution witnesses and offer evidence in his defense.

25. NOTICE IS HEREBY GIVEN that a hearing on this Complaint is scheduled for April 28, 29 and 30, 2009 at 9:00 a.m., Eastern Standard Time, at the Kentucky Board of Medical Licensure, Hurstbourne Office Park, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222. Said hearing shall be held pursuant to the Rules and Regulations of the Kentucky Board of Medical Licensure and pursuant to KRS Chapter 13B. This hearing shall proceed as scheduled and the hearing date shall only be modified by leave of the Hearing Officer upon a showing of good cause.


WHEREFORE, Complainant prays that appropriate disciplinary action be taken against the license to practice medicine held by Michael C. Hess, M.D.

This \_\_\_\_\_ day of September, 2008.

  
DONALD J. SWIKERT, M.D.  
CHAIR, INQUIRY PANEL A

**CERTIFICATE OF SERVICE**

I certify that the original of this Complaint was delivered to Mr. C. William Schmidt, Executive Director, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222; a copy was mailed to Thomas J. Hellmann, Esq., Hearing Officer, 810 Hickman Hill Road, Frankfort, Kentucky 40601; and a copy was mailed via certified mail return-receipt requested to Michael C. Hess, M.D., 1654 Victory Court, Prospect, Kentucky 40059 and to Scott P. Whonsetler, Esq., Whonsetler & Johnson, PLLC, 6011 Brownsboro Park Blvd, Suite E, Louisville, Kentucky 40207 on this 10<sup>th</sup> day of September, 2008.

  
KAREN QUINN  
Assistant General Counsel  
Kentucky Board of Medical Licensure  
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