BEFORE THE WEST VIRGINIA BOARD OF MEDICINE

WEST VIRGINIA BOARD OF MEDICINE,

Petitioner,

v.

KATHERINE ANNE HOOVER, M.D.,

Respondent.

ORDER

This proceeding arises under the West Virginia Medical Practice Act, West Virginia Code § 30-3-1, et seq., and is a disciplinary proceeding involving the status of the license to practice medicine and surgery of Katherine Anne Hoover, M.D. (hereinafter "Dr. Hoover" or "Respondent"). The West Virginia Board of Medicine (hereinafter "the Board" or "Petitioner") is the duly authorized State agency to oversee and conduct physician disciplinary hearings pursuant to the provisions of West Virginia Code § 30-3-14.

Procedural History

This matter was initiated on May 13, 1996, by the filing of an initial Complaint and Notice of Hearing. The procedural history regarding that Complaint is set forth more fully in the Recommended Findings of Fact and Conclusions of Law and Recommended Decision of the Hearing Examiner[1] (hereinafter "Recommended Decision"), which procedural history is adopted by the Board as if set forth fully herein. Following

[1] It is noted that the Hearing Examiner incorrectly utilized the term "Finding of Fact" rather than "Findings of Fact" in his Recommended Decision.

litigation regarding that Complaint, the West Virginia Supreme Court of Appeals affirmed a December 18, 2002, Order of the Circuit Court of Harrison County insofar as it found a signature defect on the original Complaint. The Supreme Court reversed the Order insofar as it failed to provide the Board with an opportunity to correct the signature defect. The Supreme Court remanded the case to permit the Board to amend the Complaint to include proper signatures, and to reprosecute the case in its entirety if it chooses to do so, with a new evidentiary hearing before a different Hearing Examiner be held. Hoover v. West Virginia Board of Medicine, 216 W. Va. 23, 31-34 602 S.E. 2nd 466, 474-475 (2004).

The Board voted to reprosecute the case on September 13, 2004, and issued another "Complaint and Notice of Hearing" on November 10, 2004. That Complaint is the subject of the instant Order. The second Complaint was identical to the original Complaint, but included appropriate signatures. Like the original Complaint, the second Complaint alleged that on October 13, 1995, Respondent asked a seventeen (17) year old female patient, who was seeking gynecological care, whether the patient and any of her girlfriends would be willing to come to Respondent's home and have sex with her teenage sons. The second Complaint also charged that this conduct violated W. Va. Code §§ 30-3-14(c)(8) and (17) and 11 CSR 1A-12.1(e), (j) and (r) and 11 CSR 1A-12.2(d) (Hng. File No. 1, Bd. Ex. 6). The Respondent filed an untimely "Response" on January 16, 2005. On May 20, 2005, she filed a Petition for Writ of Prohibition in the Circuit Court of Kanawha County, as set forth more fully in the Recommended Decision. The Court denied the Writ on February 22, 2007, and authorized the Board to proceed with an evidentiary hearing before the assigned Hearing Examiner to address the matters alleged

in the second Complaint. Respondent's petition for appeal of that Order was refused by the Supreme Court.

On December 5 and 6, 2007, and on February 20, 21 and 22, 2008, the second evidentiary hearing was conducted before Hearing Examiner Jack McClung in the Conference Room at the Board offices at 101 Dee Drive, Charleston, West Virginia. The Board appeared by its disciplinary counsel, John K. McHugh, and its Executive Director, Robert G. Knittle. Also present was Leslie Higginbotham, investigator and paralegal for the Board. Dr. Hoover appeared in person and by her counsel, C. Christopher Younger. The Board called as its witnesses patient Sarah Hess-Sphon, her mother Karen Van Horn-Mercer, expert witness John B. Walden, M.D., and Child Protective Services Worker Peggy Kincaid, and introduced fifteen (15) exhibits, which were made a part of the record. Dr. Hoover testified on her own behalf and called as her witnesses medical assistant Peggy Jones and Diane E. Shafer, M.D. She also recalled as witnesses Sarah Hess-Sphon, Karen Van Horn-Mercer and Peggy Kincaid, and introduced four (4) exhibits, which were made a part of the record. Petitioner's Proposed Findings of Fact, Conclusions of Law, and Recommended Decision was filed on June 13, 2008. Respondent filed Proposed Findings of Fact and Conclusions of Law on or about June 12, 2008. Hearing Examiner McClung filed his Recommended Decision on August 22, 2008.

In accordance with 11 CSR 3 13.1, the hearing file, the stenographic record of the hearing, the Petitioner Board's and the Respondent's filings described above were provided to Board members for their individual consideration, along with the Hearing Examiner's Recommended Decision. At the September 8, 2008, regularly scheduled

meeting of the Board, at which a quorum of the Board was present and voting, the Board thoroughly considered all of this information. Drs. Wade, Lynch, Slemp, Arnold, Ferrebee, Hasan, Jimenez, Maheswaran, May and Wazir, Ms. Griffin, Ms. Hays and Mr. Wright participated in the review and, by unanimous vote, and in accordance with 11 CSR 3 7, the Board reached its decision. Dr. Wade presided.

Pursuant to 11 CSR 3 14.3, which specifies that the Board may adopt, modify or reject the recommendations of the Hearing Examiner, the Board hereby adopts the section of the Hearing Examiner's Recommended Decision labeled "Procedural History" on pages one (1) through seven (7) of his Recommended Decision. A true and accurate copy of the Recommended Decision is attached hereto.

Motions

Pursuant to 11 CSR 3 14.3, which specifies that the Board may adopt, modify or reject the recommendations of the Hearing Examiner, the Board hereby adopts the section of the Hearing Examiner's Recommended Decision labeled "Motions" on pages eight (8) through eleven (11) of his Recommended Decision with the following modification, which is made to ensure that the content of the "Motions" section properly reflects the cited references in the hearing record and exhibits:

1. In Footnote No. 5 on page 8 of the Recommended Decision, "an Amended Complaint" is modified to "the second Complaint."
2. On page 9 of the Recommended Decision, at item number 7 ""Hng. File No. 83" is modified to "Hng. File No. 53."

Issues

Pursuant to 11 CSR 3 14.3, which specifies that the Board may adopt, modify or reject the recommendations of the Hearing Examiner, the Board hereby adopts the section of the Hearing Examiner's Recommended Decision labeled "Issues" on pages eleven (11) and twelve (12) of his Recommended Decision.

Findings of Fact

Pursuant to 11 CSR 3 14.3, which specifies that the Board may adopt, modify or reject the recommendations of the Hearing Examiner, the Board hereby adopts the section of the Hearing Examiner's Recommended Decision labeled "Findings of Fact," numbered one (1) through ninety-three (93) on pages twelve (12) through thirty-seven (37) of his Recommended Decision with the following modifications, exceptions and additions. All such modifications and exceptions are made to ensure that the proposed Findings of Fact properly reflect the cited references in the hearing transcript and exhibits, unless otherwise specifically noted:

1. In Finding of Fact No. 2, "an amended Complaint" and "Amended Complaint" are modified to "a second Complaint" and "second Complaint."
2. In Finding of Fact No. 5 is modified to reflect that Dr. Hoover also recalled as witnesses in her case Sarah Hess-Sphon, Karen Van Horn-Mercer and Peggy Kincaid.
3. In Finding of Fact No. 6, "Amended" is modified to "second" and (pp.) "136143" is modified to "136-143."
4. In Finding of Fact No. 12, "to come to" is modified to "to move into" and "pp. 2627" is modified to "pp. 26-27."
5. In Finding of Fact No. 14, "or offers" is not adopted.

6. In Finding of Fact No. 14, the second sentence is modified to read: "This was the only time she has ever come out of a doctor's office with an invitation to the doctor's house and 'the map and the phone number to any doctor that I have been to.'"

7. In Finding of Fact No. 18, the first sentence is modified to read: "On September 6, 2001, a message was left on the answering machine at the residence of Sarah Hess-Sphon's father in Pennsylvania stating that his daughter Sarah is going to be arrested and probably incarcerated for perjury, and that there is an investigation ongoing at the moment." In Finding of Fact No. 18, in the third sentence, the word "threatening" is not adopted and the sentence is modified, in part, to read: "and he stated in the message that Sarah is going to be arrested and probably incarcerated for perjury."

8. In Finding of Fact No. 21, "pp. 143-240" is modified to "pp. 143-237" and "pp. 145-193" is modified to "pp. 145-193."

9. In Finding of Fact No. 22, the first sentence is modified to read: "Karen Van Horn-Mercer has been a management and program analyst for the Federal Bureau of Investigation ('FBI') since approximately October of 1997 and has been employed by the FBI since October of 1994, and she lives in Philippi, West Virginia."

10. Finding of Fact No. 23 is modified in part to read: "with a female gynecologist because Sarah needed gynecological care."

11. In Finding of Fact No. 25, the phrase "because Sarah was always tired" is not adopted and "approximately forty-five (45) minutes" is modified to "forty-five (45) minutes to an hour."

12. Finding of Fact No. 27 is modified to read: "Karen Van Horn-Mercer testified further that Sarah believed that she was included in Dr. Hoover's invitation, and she told Sarah perhaps she had misunderstood Dr. Hoover, and she didn't want to believe this was true (Tr. Vol. I, pp. 152-153, 156-158; 188-193)."

13. In Finding of Fact No. 33, (pp.) "221-222" is modified to "220-221."

14. In Finding of Fact No. 35, the word "professionally" is not adopted.

15. In Finding of Fact No. 36, (pp.) "221" is modified to "220-221."

16. In Finding of Fact No. 37, page 230 from Volume I is added as a transcript reference.

17. Finding of Fact No. 41 is modified to read: "Karen Van Horn-Mercer testified about the harm to Sarah that the whole situation involving Dr. Hoover has caused Sarah. Sarah does not want to go for medical exams and testing after this episode and does not want doctors touching her, Ms. Van Horn-Mercer testified (Tr. Vol. I, pp. 172-173, 179)."

18. In Finding of Fact No. 47, the phrase "of a character" is inserted after the phrase "unprofessional conduct."

19. In Finding of Fact No. 48, "the state" is modified to "this state" and pp. "263-272" is modified to "263-273."

20. In Finding of Fact No. 50, the last phrase is modified to read: "the actions engaged in would violate Number 3, particularly with respect to the patient's dignity and respect."

21. The following additional Finding of Fact (No. 50.a.) is made to properly reflect the opinions of Dr. John Walden and is to be inserted after Finding of Fact No. 50: "Finding of Fact No. 50.a.: Dr. Walden was presented with a second modified set of hypothetical facts, which assumed that the physician asked, in a medical office setting, whether a 17-year-old patient's friends, rather than the patient, would have sex with her sons. He testified that that modification of the hypothetical would not change his opinion that the physician's conduct was unethical and violated the previously cited rules and statutes (Tr. Vol. I, pp. 274-276)."

22. In Finding of Fact No. 51, the first sentence is modified to read: "Dr. Walden was then presented with a third modified set of hypothetical facts, which assumed that a 17-year-old patient, in a medical office setting, came in for treatment and was asked if she and her girlfriends would come to the physician's house, even if it was for nothing more than friends." In Finding of Fact No. 51, (pp.) "295-297" is modified to "295-299."

23. Finding of Fact No. 52 is modified to read: "… he would not give out a book such as this under the circumstances …"

24. In Finding of Fact No. 55, (pp.) "306-312" is modified to "306-314."

25. In Finding of Fact No. 59, (pp.) "36" is modified to "35-36."

26. Finding of Fact No. 62 is modified, in part, to read: "Despite being subjected to overly aggressive cross-examination by counsel for the Respondent on portions of three days regarding the contents ..."

27. Finding of Fact No. 64 is modified to read: "Peggy Jones testified that she initially checked Sarah Hess-Sphon into the office, took her into a room and had a brief conversation with her before speaking with Dr. Hoover (Tr. Vol. III, pp. 207-208, 279-280).

28. In Finding of Fact No. 65, R. Ex. 4 is added as an exhibit reference.

29. In Finding of Fact No. 67, (pp.) "270-273, 276-279, 282-287" is modified to "270-279, 282-285."

30. In Finding of Fact No. 68, "April 26, 1996" is modified to "April 28, 1996."

31. In Finding of Fact No. 69, "symptoms consistent with a yeast infection" is modified to "symptoms consisting of itching and burning mainly on the outside."

32. In Finding of Fact No. 71, the second sentence is modified to read: "As part of her practice, she does pain management and treats a lot of patients with sexual abuse and mine injuries."

33. In Finding of Fact No. 73, (pp.) "167" is modified to "166-167."

34. In Finding of Fact No. 74, Tr. Vol. IV, pp. 87-88 is added as a transcript reference.

35. In Finding of Fact No. 82, "about forty-five minutes, which is consistent" is modified to "about thirty (30) to forty-five (45) minutes, which is generally consistent" and (pp.) "137-143" is modified to "137-150." (Tr.

Vol. IV, pp. 131-133, 137-150, 160; Tr. Vol. V, pp. 21-24, 26-28 and Bd. Ex. 8).

36. In Finding of Fact No. 85, "Amended Complaint" is modified to "second Complaint."

37. Finding of Fact No. 86 is modified to read: "Dr. Hoover also admitted that on September 6, 2001, her husband left a message on the telephone answering machine at the residence of Sarah's father in Pennsylvania, and that the telephone number displayed on the Caller ID in the videotape of the recorded call was the same telephone number written on the map (Bd. Ex. 2) which Dr. Hoover provided to Sarah on October 13, 1995. Dr. Hoover's husband stated that Sarah is going to be investigated and probably incarcerated for perjury. However, there is no evidence that Sarah was ever investigation or incarcerated for perjury, although Dr. Hoover testified that Sarah was being investigated by a Gary Slater with a state agency within the attorney general's office. Although Dr. Hoover now believes it was inappropriate for her husband to leave the message, she did not believe that his actions were inappropriate when she was deposed on November 20, 2002, in connection with Civil Action No. 98-C-1134 (Cir. Ct. Kanawha Co.), where Dr. Hoover sued Board staff. The videotape is authentic and the voice of the caller depicted on the videotape was that of Respondent's husband (Bd. Ex. 7, Tr. Vol. V, pp. 28-40; Vol. IV, pp. 73-74)."

38. In Finding of Fact No. 87, both references to "April 26, 1996" are modified to "April 28, 1996."

39. Finding of Fact No. 89, at the end of the last sentence, is modified to read: "... Gerald Fogg that he had recommended that Karen Van Horn-Mercer file a report with the Board of Medicine requesting an investigation of her, and the April 25, 1996, letter allegedly signed by her medical assistant, Peggy Jones."

40. In Finding of Fact No. 93, the fourth sentence is modified to read: "Dr. Shafer also listed Dr. Hoover's permanent residence as her own in connection with her thinking of attending West Virginia University. (Tr. Vol. IV, pp, 284, 302-305, 317)." In Finding of Fact No. 93, the sentences beginning with "Further pursuant to a public order ..." and "Dr. Shafer complied ..." are not adopted because no evidence regarding the Board Order dated March 20, 1989, is contained in the record herein.

Discussion

Pursuant to 11 CSR 3 14.3, which specifies that the Board may adopt, modify or reject the recommendations of the Hearing Examiner, the Board hereby adopts the section of the Hearing Examiner's Recommended Decision labeled "Discussion," including the subsection entitled "Credibility of Witnesses, Testimony and Exhibits" on pages thirty-seven (37) and thirty-eight (38) and the section entitled "ISSUES" on pages thirty-eight (38) and thirty-nine (39), with the following modification and addition:

1. The fourth paragraph of the "Credibility of Witnesses, Testimony and Exhibits" section is modified in part to read: " ... Gerald Fogg that he had recommended that Karen Van Horn-Mercer file a report with the Board of Medicine requesting an investigation ...."

2. In the section entitled "Credibility of Witnesses, Testimony and Exhibits," Finding of Fact No. 70 in the Recommended Decision is incorporated herein by reference regarding the credibility of the testimony of witness Peggy Jones.

Conclusions of Law

Pursuant to 11 CSR 3 14.3, which specifies that the Board may adopt, modify or reject the recommendations of the Hearing Examiner, the Board hereby adopts the section of the Hearing Examiner's Recommended Decision labeled "Conclusions of Law" on pages forty (40) through forty-two (42) of his Recommended Decision, with the following exceptions and modifications, which are made to ensure that the proposed Conclusions of Law properly reflect the cited references in the hearing transcript and exhibits:

1. In Conclusions of Law No. 3, "service" is modified to "services."
2. In Conclusions of Law No. 7, "demonstrate" is modified to "demonstrates."
3. In Conclusions of Law No. 8, "demonstrate" is modified to "demonstrates."
4. In Conclusions of Law No. 11, "(1989)" is modified to "(1889)."
5. Conclusions of Law No. 13 is modified to read: "Katherine Anne Hoover, M.D., in the absence of the restrictions and conditions placed upon her medical license herein, is unqualified to practice medicine and surgery in the State of West Virginia. West Virginia Code § 30-3-14(c)."

Order

The Board accepts the Hearing Examiner's "Recommended Order" on pages forty-three (43) through forty-six (46) of his Recommended Decision with the following addition, modification and exception:

1. The following paragraph is added as No. 6, and the subsequently numbered paragraphs are renumbered as Nos. 7 through 15:

"6. It is further ORDERED that Respondent Katherine Anne Hoover, M.D., be required to periodically appear before the Board of Medicine's Licensure Committee."

2. In Paragraph No. 14 in the Recommended Decision (which will be Paragraph No. 15 when the paragraphs are renumbered pursuant to the immediately preceding addition and modification), the phrase "and shall remain in effect for five (5) years beginning with the date of dissolution and termination" is not adopted.

The foregoing Order in the matter styled West Virginia Board of Medicine v. Katherine Anne Hoover, M.D., was:

ENTERED this 11th day of September, 2008.

WEST VIRGINIA BOARD OF MEDICINE

John A. Wade, Jr., M.D., President

Catherine Slemp, MD, MPH, Secretary

BEFORE THE WEST VIRGINIA BOARD OF MEDICINE

WEST VIRGINIA BOARD OF MEDICINE,

Petitioner,

v.

KATHERINE ANNE HOOVER, M.D.,

Respondent.

RECOMMENDED FINDING OF FACT AND CONCLUSIONS OF LAW AND RECOMMENDED DECISION OF THE HEARING OFFICER

INTRODUCTION

This proceeding arises under the West Virginia Medical Practice Act, W. Va. Code § 30-3-1, *et seq*. It is a disciplinary proceeding involving the status of the license to practice medicine in the State of West Virginia of Katherine Anne Hoover, M.D. (Dr. Hoover). The procedural history of this matter is extensive, and the undersigned finds that the recitation of such by counsel for the West Virginia Board of Medicine (hereinafter Board) in the Board's post-hearing submission is credible and accurate and adopts the same in its entirety, which is set forth as follows:

PROCEDURAL HISTORY

This matter dates back to events which occurred on October 13, 1995, at the Myers Clinic, in Philippi, West Virginia, and a prior Complaint and Notice of Hearing ("Complaint") issued by the Board on May 13, 1996. During the past twelve (12) years, Respondent has pursued several petitions

for writs of prohibition[1] and related appeals attacking the procedures utilized by the Board, and the case has been before the West Virginia Supreme Court of Appeals on several occasions. *See State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996) (involving issuance of a subpoena on a privately retained court reporter); *State ex rel. Hoover v. Smith*, 198 W. Va. 507, 482 S.E.2d 124 (1997)(involving issuance of subpoenas to conduct depositions); and *Hoover v. West Virginia Board of Medicine*, 216 W. Va. 23, 602 S.E.2d 466 (2004)(involving signatures on Board Orders). Respondent has also filed numerous civil actions against members of the Board and Board staff, attorneys for the Board, hearing examiners and others.[2] Given the significant passage of time since this matter first arose, a detailed background and procedural history is both warranted and necessary.

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[1]*See*, e.g., *Hoover v. West Virginia Board of Medicine, et al.*, Kanawha County Civil Action No. 96-MISC-229 (petition for writ of prohibition against the Board and hearing examiner); *Hoover v. Giatras, et al.*, Kanawha County Civil Action No. 01-MISC-291 (petition for writ of prohibition and damages against the Board, counsel for the Board and hearing examiner); *Hoover v. West Virginia Board of Medicine, et al.*, Kanawha County Civil Action No. 05-MISC-176 (petition for writ of prohibition against the Board and hearing examiner).

[2]The following is a partial listing of the many civil actions, excluding petitions for writs of prohibition, filed by Respondent in various jurisdictions during the past twelve years: *Hoover v. Van Horn*, Braxton County Civil Action No. 96-C-24 (action against a material witness--stayed pending the outcome of this disciplinary action against Respondent before the Board); *Hoover v. West Virginia Department of Health and Human Resources, et al.*, U.S. Dist. Ct. S.D. W. Va., Civil Action No. 97-C-86 (action against DHHR, members of the Board and Board staff for alleged fraudulent complaint--dismissed per *Hoover v. West Virginia Department of Health and Human Resources*, 984 F. Supp. 978 [S.D. W. Va. 1997]); *Hoover v. Briggs, et al.*, Kanawha Co. Civil Action No. 98-C-1134 (action against Board staff for alleged violation of Respondent's constitutional rights and alleged RICO violations--dismissed); *Hoover v. Giatras, et al.*, Kanawha County Civil Action No. 98-C-1951 (action against attorney appointed to serve as Hearing Examiner and attorney appointed to serve as counsel for the Board--dismissed); *Hoover v. Vanbibber, et al.*, Kanawha County Civil Action No. 01-C-961 (action against counsel for the Board, Board President and Executive Director--dismissed); *Tomasic/Hoover v. McHugh, et al.*, Kanawha County Civil Action No. 07-C-1143 (action against counsel for the Board and the Board for alleged libel, slander, defamation and malicious prosecution--dismissed, Rule 60(b) motion pending). Once again, this is only a partial listing, as Respondent has also sued members of the Board in other jurisdictions, including Harrison and Marion Counties.

The disciplinary charges against Respondent were summarized by the West Virginia Supreme Court of Appeals in *Hoover v. West Virginia Board of Medicine*, as follows:

> On May 13, 1996, the Board issued a complaint and notice of hearing (hereinafter referred to as "Complaint") against Dr. Hoover. The complaint alleged that Dr. Hoover asked a seventeen-year-old patient, who was seeking gynecological care, whether the patient and any of her girlfriends would be willing to come to Dr. Hoover's home and have sex with her teenage son. The Complaint charged that this conduct violated W. Va. Code §§ 30-3-14(c)(8) and (17) and 11 C.S.R. 1A-12.1(e), (j) and (r) and 11 C.S.R. 1A-12.2(d).

Hoover v. West Virginia Board of Medicine, 216 W. Va. at 25, 602 S.E.2d at 468; *see also, State ex rel. Hoover v. Smith,* 198 W. Va. at 510, 482 S.E.2d at 127; *accord*, Petitioner's "Response in Opposition to Motion that the Hearing Examiner Recommend Dismissal of Charges," which was filed and entered as part of the record in this matter on April 9, 2007 (Hearing File No. 48).

The first evidentiary hearing in this matter occurred on July 26, 2001, after Respondent pursued several petitions for writs of prohibition and related appeals, as set forth above. The Board called several witnesses and introduced numerous exhibits into evidence. Respondent chose not to participate in the hearing and left the hearing after providing a brief opening statement. On October 31, 2001, after the first hearing was concluded, the hearing examiner issued proposed findings of fact, conclusions of law, and a recommended decision for consideration by the Board. *Hoover v. West Virginia Board of Medicine*, 216 W. Va. at 25, 602 S.E.2d at 468.

On November 9, 2001, the Board, upon consideration of the proposed findings of fact, conclusions of law, and recommended decision of the hearing examiner, entered an Order affecting Respondent's license to practice medicine and surgery in the State of West Virginia. *Id.* After receiving notice of the Board's Order, Respondent immediately filed a Petition for Judicial Review

in the Circuit Court of Harrison County asserting numerous assignments of error regarding the Board proceedings and arguing that the November 9, 2001, Order should be reversed on the basis of several grounds, including alleged improper signatures on the May 13, 1996, Complaint. *Id.*

By Order entered on December 18, 2002, the Circuit Court of Harrison County reversed the Board's November 9, 2001, Order because the President and Secretary of the Board had not personally signed the original Complaint. However, the Court failed to provide the Board with an opportunity to correct the signatures, and did not address any of the other grounds raised by Respondent in her Petition for Judicial Review. *Id.*

On May 7, 2003, the Board appealed the December 18, 2002, Order by the Circuit Court. *Id.* Despite the numerous arguments presented by Respondent in her Petition for Judicial Review in the Circuit Court of Harrison County, Respondent chose not to appeal or cross-appeal the Order or to address or preserve the arguments she had previously asserted in her Petition for Judicial Review.

On May 28, 2004, the Supreme Court affirmed the December 18, 2002, Order insofar as the Circuit Court found a signature defect on the Complaint, but reversed the Order insofar as the Court failed to provide the Board with an opportunity to correct the signature defect. The Supreme Court then remanded the case to permit the Board to amend the Complaint to include proper signatures, and reprosecute the case in its entirety if it chooses to do so. *Id.*, 216 W. Va. at 31-32, 602 S.E.2d at 474-475. The only requirement after amendment of the Complaint to include proper signatures was a new evidentiary hearing before a different Hearing Examiner. *Id.* at 32, 602 S.E.2d at 475, n.7. The Supreme Court did not mandate that the matter be returned to the Complaint Committee for another finding of probable cause prior to the Board issuing the Amended Complaint.

On September 13, 2004, pursuant to the Supreme Court's opinion, the Board voted to "reprosecute the case" against Respondent. *See* Petitioner's "Response in Opposition to Motion that the Hearing Examiner Recommend Dismissal of Charges" (Hng. File No. 48, p. 4). On November 10, 2004, the Board issued an amended Complaint and Notice of Hearing ("Amended Complaint"), which included appropriate signatures, and scheduled another evidentiary hearing before a new Hearing Examiner (Hng. File No. 1, Bd. Ex. 6). The Amended Complaint was identical to the original Complaint, but included appropriate signatures. Like the original Complaint, the Amended Complaint alleged that on October 13, 1995, Respondent asked a seventeen (17) year old female patient, who was seeking gynecological care, whether the patient and any of her girlfriends would be willing to come to Respondent's home and have sex with her teenage sons. The Amended Complaint also charged that this conduct violated W. Va. Code §§ 30-3-14(c)(8) and (17) and 11 C.S.R. 1A-12.1(e), (j) and (r) and 11 C.S.R. 1A-12.2(d) (Hng. File No. 1, Bd. Ex. 6).

On January 16, 2005, Respondent served an untimely "Response" to the Amended Complaint, wherein she generally denied the allegations set forth therein (Hng. File No. 9).[3]

On May 20, 2005, Respondent filed another Petition for Writ of Prohibition in the Circuit Court of Kanawha County alleging that the complaint procedures utilized by the Board were inadequate, that the Board failed to comply with applicable Statutes and Rules of the Board, and that the Board lacked subject matter jurisdiction or exceeded its legitimate powers in prosecuting her. Respondent raised the same arguments previously presented to the Circuit Court of Harrison County

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[3]Pursuant to the provisions of 11 C.S.R. 3-11.5(s), Respondent was required to serve her answer within thirty (30) days after service of the Amended Complaint. Upon the failure of the Respondent to respond to the complaint as required by law, all of the allegations set forth therein as to the conduct or conditions of the Respondent may be taken by the Board as confessed by the Respondent.

in connection with the Petition for Judicial Review filed in 2001. The Petition resulted in a temporary stay of proceedings before the Board pending a decision by the Court with respect to the Petition. *See* Petitioner's "Response in Opposition to Motion that the Hearing Examiner Recommend Dismissal of Charges" (Hng. File No. 48), and Respondent's "Petition for Writ of Prohibition" attached as Exhibit C thereto.

By Order entered on February 22, 2007, the Circuit Court of Kanawha County denied Respondent's Petition for Writ of Prohibition and authorized the Board to proceed with an evidentiary hearing before the assigned Hearing Examiner to address the matters alleged in the Amended Complaint, in accordance with the Board's September 13, 2004, decision to "reprosecute the case." *See* Petitioner's "Response in Opposition to Motion that the Hearing Examiner Recommend Dismissal of Charges" (Hng. File No. 48), and the Circuit Court Order attached as Exhibit A thereto.

In its February 22, 2007, Order the Circuit Court of Kanawha County considered and rejected Respondent's arguments, not only because they were previously raised by Respondent in prior proceedings, but also because she had other adequate means during the previous eleven (11) years to address these issues and/or she waived them (Hng. File No. 48, Ex. A, pp.7-9). The Court also recognized that the Board had fully complied with all of the requirements of the West Virginia Supreme Court of Appeals, as set forth in *Hoover v. West Virginia Board of Medicine*, 216 W. Va. 23, 32, 602 S.E.2d 466, 475 (2004), which authorized the Board to "amend the complaint with the proper signatures, so that the Board may reprosecute the case in its entirety if it chooses to do so" (Hng. File No. 48, Ex. A, p. 8).

Respondent appealed the Circuit Court's Order to the West Virginia Supreme Court, but her Appeal was refused. After the Circuit Court rejected Respondent's arguments, and denied her Petition for Writ of Prohibition, this Hearing Examiner then denied her Motion to Dismiss and further Ordered that the matter should proceed to evidentiary hearing. *See* "Order Denying Respondent's Motion that the Hearing Examiner Recommend Dismissal of Charges," entered by the Hearing Examiner on April 19, 2007 (Hng. File No. 50); and "Order Regarding Pre-Hearing Motions," entered by the Hearing Examiner on October 15, 2007 (Hng. File No. 80).

The second evidentiary hearing in this matter began on December 5 and 6, 2007, and was continued to February 20, 21 and 22, 2008. During the second evidentiary hearing, the Board called as its witnesses patient Sarah Hess-Sphon, her mother Karen Van Horn-Mercer, expert witness John B. Walden, M.D., and Child Protective Services Worker Peggy Kincaid, and introduced fifteen (15) exhibits, which were made a part of the record (e.g., "Bd. Ex."). Respondent testified on her own behalf and called as her witnesses medical assistant Peggy Jones and Diane E. Shafer, M.D. Respondent also introduced four (4) exhibits, which were made a part of the record (e.g., "R. Ex."). A stenographic record of the testimony, evidence, arguments and rulings on the admissibility of testimony during the five (5) day hearing ("Tr. Vol I" through "Tr. Vol V") was prepared pursuant to 11 C.S.R. 3-12.1.

Upon conclusion of the hearing, the undersigned Hearing Examiner instructed both parties to submit proposed Findings of Fact and Conclusions of Law by June 16, 2008.[4]

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[4]Pursuant to 11 C.S.R. 3-13.1, proposed findings of fact and conclusions of law are generally due "within thirty (30) days of the conclusion of a hearing, or in the event the proceedings of a hearing are transcribed, within twenty (20) days from the date the final transcript is available to all parties and to all members of the Board." However, given the length of the hearing in this matter, the extensive procedural history, and the number of exhibits introduced into evidence, this deadline was necessarily extended.

MOTIONS

The parties filed numerous pre-hearing motions regarding various issues, including repeated motions by Respondent seeking the issuance of a subpoena to compel witness Sarah Hess-Sphon, a designated witness for Petitioner, to submit to a pre-hearing deposition, repeated motions by Respondent seeking dismissal of the Amended Complaint, motions by both parties to exclude evidence, and motions by both parties to address the conduct of the hearing.[5] The primary pre-hearing motions considered by this Hearing Examiner, and the rulings thereon,[6] were as follows:

1. Respondent's "Motion to Issue Subpoena for Complaining Witness to Attend Deposition by Respondent and for Amended Witness List" served by Respondent on May 2, 2005 (Hng. File No. 30) was DENIED;

2. Respondent's "Motion That the Hearing Examiner Recommend Dismissal of Charges" served by Respondent on May 11, 2005 (Hng. File No. 31) was DENIED;

3. Respondent's renewed "Motion to Dismiss this Complaint" served by Respondent on September 5, 2007, together with the request by Respondent that attorney John K. McHugh be removed as counsel for the Board (Hng. File No. 74) was DENIED;

4. Respondent's "Objections to Exhibits Listed by Mr. McHugh" served by Respondent on September 5, 2007 (Hng. File No. 75) was DENIED;

5. Respondent's "Motion in Response to Supplemental Disclosure by Petitioner" served by counsel for Respondent on May 14, 2007 (Hng. File No. 56) was DENIED;

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[5]The motions described herein are only those filed after November 10, 2004, when the Board issued an Amended Complaint and Notice of Hearing, and scheduled another evidentiary hearing before a new Hearing Examiner.

[6]*See* "Order Regarding Pre-Hearing Motions" (Hng. File No. 80).

6. Respondent's "Motion for Leave to Present Testimony of Fact Witness (Peggy Jones) by Phone" served by counsel for Respondent on April 30, 2007 (Hng. File No. 52) was GRANTED;

7. "Petitioner's Motion to Strike Respondent's Reply to Petitioner's Response in Opposition to Respondent's Motion to Issue Subpoena for Complaining Witness to be Deposed and for Amended Witness List" served by counsel for Petitioner on May 1, 2007 (Hng. File No. 83) was GRANTED;

8. "Petitioner's Motion to Exclude Irrelevant and Inadmissible Evidence" served by counsel for Petitioner on April 30, 2007 (Hng. File No. 51) was DENIED; and

9. "Petitioner's Motion Relating to Conduct of Hearing" served by counsel for Petitioner on April 30, 2007 (Hng. File No. 51) was GRANTED.

The first two (2) pre-hearing motions filed in May 2005 were decided based upon the submission of briefs by the parties. This Hearing Examiner denied Respondent's "Motion to Issue Subpoena for Complaining Witness to Attend Deposition by Respondent and for Amended Witness List," by Order entered on May 24, 2005, after considering Respondent's Motion and the Board's Response in Opposition thereto (Hng. File No. 41). The controlling authority for the ruling was the decision in *State ex rel. Hoover v. Smith*, 198 W. Va. 507, 482 S.E.2d 124 (1997) identifying the "due process" criteria necessary to require such a deposition over the objection of the Board. The Court in *Hoover* held in syllabus point 3:

> Pursuant to the West Virginia Medical Practice Act set forth in W. Va. Code, 30-3-1 et seq. and the regulations promulgated by the Board of Medicine pursuant to W. Va. Code, 30-3-1 et seq. found in 11 C.S.R. 1A-1 et seq., discovery depositions are not expressly or implicitly authorized in a disciplinary proceeding before the Board of Medicine. Furthermore, the due process clause found in article III, § 10 of the Constitution of West Virginia does not mandate that

> discovery be accorded to a physician in a disciplinary proceeding unless there are particular circumstances which would make it fundamentally unfair to refuse to allow the physician to conduct discovery prior to the hearing in the disciplinary proceeding. In such event the physician may obtain subpoenas for purposes of obtaining pre-hearing discovery depositions.

For the reasons stated in the May 24, 2005, Order, reference to which is herein made, circumstances of fundamental unfairness were not found, and the motion was denied (Hng. File No. 41).

This Hearing Examiner denied Respondent's "Motion That the Hearing Examiner Recommend Dismissal of Charges" by Order entered on April 19, 2007, after considering Respondent's Motion and the Board's Response in Opposition thereto (Hng. File No. 50). The controlling authority for the decision was the Order entered in the Circuit Court of Kanawha County, West Virginia, on February 22, 2007, denying Respondent's Petition for Writ of Prohibition (Hng. File No. 48, Ex. A) and the West Virginia Supreme Court of Appeals' opinion in *Hoover v. West Virginia Board of Medicine*, 216 W. Va. 23, 602 S.E.2d 466 (2004). Although Respondent appealed the Circuit Court's Order to the West Virginia Supreme Court, her Appeal was refused. Accordingly, after the Circuit Court rejected Respondent's arguments, and denied her Petition for Writ of Prohibition, this Hearing Examiner then denied Respondent's Motion to Dismiss, and further Ordered that the matter should proceed to evidentiary hearing.

The remaining pre-hearing motions were fully briefed and then argued during a pre-hearing conference, which occurred on September 19, 2007, and this Hearing Examiner entered an Order on October 15, 2007, regarding each of the remaining motions (Hng. File No. 80). A transcript of the extensive pre-hearing conference, consisting of some 76 pages, is contained in the record and reflects

the relative positions of the parties with respect to their motions, as well as the reasons assigned by the Hearing Examiner for his rulings (Hng. File No. 78).

Additional motions were made during the evidentiary hearing, and the Transcript of Hearing reflects the relative positions of the parties with respect to their motions, the rulings of the Hearing Examiner, and the reasons assigned by the Hearing Examiner for his rulings.

All decisions rendered on all motions filed in this action are hereby affirmed, and all other motions filed in this action by either of the parties upon which the Hearing Examiner previously made no ruling are hereby denied and rejected.

ISSUES

1. Whether Respondent violated W. Va. Code § 30-3-14(c)(8) and 11 C.S.R. lA 12.1(r) by exercising influence within a patient-physician relationship for the purpose of engaging a patient in sexual activity, as set forth in paragraph 2 of Petitioner Board's Complaint and Notice of Hearing?

2. Whether Respondent violated W. Va. Code § 30-3-14(c)(17) and 11 C.S.R. 1A 12.1(e) and (j), as further described in 11 C.S.R. 1A 12.2 (d) by engaging in unprofessional, unethical, dishonorable conduct, as set forth in paragraph 2 of Petitioner Board's Complaint and Notice of Hearing?

After a review of the record and the exhibits admitted into evidence, matters of which the Hearing Examiner took judicial notice during the proceedings, assessing the credibility and demeanor of the witnesses, and weighing the evidence in consideration of the same, the Hearing Examiner makes the following Findings of Fact and Conclusions of Law. To the extent that these findings of fact and conclusions of law are consistent with any proposed findings of fact and conclusions of law submitted by the parties, the same are adopted by the Hearing Examiner, and

conversely to the extent that the same are inconsistent with these findings of fact and conclusions of law, they are rejected. To the extent that the testimony of any witness is not in accord with these findings of fact and conclusions of law, such testimony is not credited. Any proposed finding of fact, conclusion of law, or argument proposed and submitted by a party but omitted herein is deemed irrelevant or unnecessary to the determination of the material issues in this matter.

FINDINGS OF FACT

1. Respondent, Dr. Hoover, is licensed to practice medicine and surgery in the State of West Virginia, and her license is identified as License No. 11571, issued originally in 1978. Dr. Hoover's self-designated medical specialty is Internal Medicine, and her address of record with the Board is in Lost Creek, West Virginia (Hng. File No. 1, Bd. Ex. 6).

2. On November 10, 2004, charges were filed by the West Virginia Board of Medicine in an amended Complaint and Notice of Hearing ("Amended Complaint"), alleging that on October 13, 1995, Respondent, in the course of rendering gynecological care and treatment to a seventeen (17) year old female patient at the Myers Clinic in Philippi, West Virginia, asked the patient to talk to her girlfriends and see if the patient and any of her girlfriends would come to Respondent's home to have sex with her teenage sons (Hng. File No. 1, Bd. Ex. 6).

3. On January 16, 2005, Respondent served an untimely "Response" to the Amended Complaint, wherein she generally denied the allegations set forth therein (Hng. File No. 9).

4. Following the resolution of a Petition for Writ of Prohibition filed by Respondent on May 20, 2005, in the Circuit Court of Kanawha County, this Hearing Examiner, pursuant to an Order entered by the Circuit Court on February 22, 2007, denied Respondent's Motion to Dismiss and

further Ordered that the matter should proceed to evidentiary hearing. *See* "Order Denying Respondent's Motion that the Hearing Examiner Recommend Dismissal of Charges," entered by the Hearing Examiner on April 19, 2007 (Hng. File No. 50); and "Order Regarding Pre-Hearing Motions," entered by the Hearing Examiner on October 15, 2007 (Hng. File No. 80).

5. The evidentiary hearing in this matter began on December 5 and 6, 2007, and was continued to February 20, 21 and 22, 2008.[7] During the evidentiary hearing on the Amended Complaint, the Board called as its witnesses patient Sarah Hess-Sphon, her mother Karen Van Horn-Mercer, expert witness John B. Walden, M.D., and Child Protective Services Worker Peggy Kincaid, and introduced fifteen (15) exhibits, which were made a part of the record. Respondent testified on her own behalf and called as her witnesses medical assistant Peggy Jones and expert witness Diane E. Shafer, M.D. Respondent also introduced four (4) exhibits, which were made a part of the record (Tr. Vols I through V).

Testimony of Sarah Hess-Sphon

6. Sarah Hess-Sphon, who is named in the Amended Complaint, testified during the hearing about her prior experience as a seventeen (17) year old gynecological patient who was treated by Respondent on October 13, 1995, at the Myers Clinic. Sarah was twenty-nine (29) years old at the time of the evidentiary hearing on the Amended Complaint (Tr. Vol I, pp. 11 – 109, 136143, and Tr. Vol III, pp. 106-145).

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[7]As referenced in the Hearing File, there were several continuances before the final evidentiary hearing actually began, including a continuance by mutual agreement, a continuance due to Respondent obtaining new counsel, a continuance due to the withdrawal by counsel for Respondent, and another continuance due to Respondent obtaining substitute counsel (Hng. File Nos. 12, 29, 66, and 82).

7. Sarah Hess-Sphon testified that her mother, Karen Van Horn-Mercer, made an appointment at the Myers Clinic, picked her up from school and drove her to the clinic. She also testified that she was scheduled to see Dr. Hoover for medical treatment, that this was her first ever gynecological visit, and she was very nervous, uncomfortable, and didn't know what to expect (Tr. Vol I, pp. 12-16, 20-21).

8. Sarah Hess-Sphon testified about the yeast infection which had caused her to seek medical treatment and that she told both a medical assistant and Dr. Hoover that she had just recently become sexually active, on a limited basis, with an out-of-state boyfriend, and that she wanted birth control (Tr. Vol I, pp. 16, 18-21).

9. Sarah Hess-Sphon testified that she did not want her mother to know she was sexually active or receiving birth control pills to prevent pregnancy, because she did not want to disappoint her (Tr. Vol I, pp. 16-18, 91-100, and Tr. Vol III, pp. 117-120).

10. Sarah Hess-Sphon testified that she also confided in Dr. Hoover that she did not like sex and was concerned there may be a problem. She further confided in Dr. Hoover that her step-grandfather had sexually abused her when she was about seven (7) years old, and she was concerned about whether this was causing problems (Tr. Vol I, pp. 22-24).

11. Sarah Hess-Sphon testified that Dr. Hoover told her not to worry, demonstrated with her fingers different sexual positions Sarah should try that Dr. Hoover and her husband liked, and recommended that Sarah read a book entitled "ESO: Extended Sexual Orgasm" and that her boyfriend read another book entitled "You Can Heal Your Life." Dr. Hoover wrote the names of the books down for Sarah (Bd. Exs. 1 and 12, and Tr. Vol I, pp. 25, 27-29).

12. Sarah Hess-Sphon testified that Dr. Hoover asked if she had any cute girlfriends whose parents would be lenient enough to allow them to come to Dr. Hoover's house and have sex with her sons. When questioned by Sarah about whether she was serious in this request, Dr. Hoover indicated that she was serious, and stated that she would encourage it. Dr. Hoover wrote down the names and ages of her sons for Sarah on a prescription pad, drew a map to her house and provided her home telephone number for Sarah. Dr. Hoover also provided verbal directions to her house. Sarah testified that she, Sarah, considered herself included in the invitation to come to Dr. Hoover's house with her cute girlfriends to have sex with Dr. Hoover's sons (Bd. Ex. 2, and Tr. Vol I, pp. 2627, 30-34, 63, 72).

13. Sarah Hess-Sphon testified that she was very clear in her mind about why Dr. Hoover wanted Sarah and her friends to come to Dr. Hoover's house and that she had not misconstrued or misunderstood what Dr. Hoover had said to her (Tr. Vol I, pp. 33-34, 62-63, 78-79, 81, 112-113, 120).

14. Sarah Hess-Sphon testified that she has since been to other physicians for gynecological exams, and has never had any similar problems or offers. This was the only time she has ever come out of a doctor's office, with an invitation to the doctor's house, the doctor's phone number, and a map to the doctor's house with the names and ages of the doctor's sons written on the map, after being told by the doctor that the doctor was interested in finding girls whose parents would be lenient enough to allow them to come to the doctor's house and have sex with the doctor's sons (Tr. Vol I, pp. 64-65, 111-112).

15. The testimony of Sarah Hess-Sphon is confirmed by the contents of the complaint filed by her mother with the Board dated October 27, 1995 (Bd. Ex. 4, Tr. Vol I, pp. 43-45, and Tr. Vol III, pp. 135-136).

16. Sarah Hess-Sphon testified that she has since supported her mother's complaint to the Board. She also signed her name to a letter dated April 29, 1996, confirming that she was interested in pursuing the complaint filed with the Board by her mother, Karen Van Horn-Mercer (Bd. Ex. 5, and Tr. Vol. I, pp. 44-45, 48-50, 64).

17. Sarah Hess-Sphon testified that her motivation in pursuing the complaint was to prevent another seventeen (17) year old girl, who might be more vulnerable or prone to compliance with the invitation, from experiencing what she has experienced (Tr. Vol 1, pp. 69-70, 137).

18. On September 6, 2001, Sarah Hess-Sphon received a threatening telephone call on the answering machine at her father's residence. Sarah made a videotape of the recorded telephone call (Bd. Ex. 7). The telephone number displayed on the "Caller ID" in the videotape of the recorded telephone call was the same telephone number written on the map (Bd. Ex. 2), which Respondent provided to Sarah on October 13, 1995. The person making the threatening telephone call was later identified by Respondent as her husband and stated that Sarah was being investigated for perjury and would be arrested and incarcerated for perjury. Sarah was never arrested or incarcerated for perjury, and was never advised by any entity that she was being investigated for perjury. The videotape is authentic and the voice of the caller depicted on the videotape was that of Respondent's husband (Bd. Ex. 7, Tr. Vol I, pp. 53-62, 127-131, and Tr. Vol V, pp. 28-40).

19. Sarah Hess-Sphon also testified about an addendum made by Respondent to Sarah's medical record on November 1, 1995, after she learned that Sarah's mother had made a complaint.

The addendum reads: "*Patient had used condoms with boyfriend. On exam medium speculum easily inserted. No hymen present. Patient definitely not a virgin—has had numerous episodes of intercourse.*" According to Sarah, this addendum to the record was degrading, made her look bad, and really upset her (Tr. Vol I, pp. 43, 47-48, 117-120, and Bd. Ex. 3).

20. The testimony of Sarah Hess-Sphon was perceived by the undersigned as being very credible on all material matters by her demeanor, supporting documentation and her refusal to waiver in the face of extensive, aggressive, and sometimes argumentative cross-examination.

Testimony of Karen Van Horn-Mercer

21. Sarah's mother, Karen Van Horn-Mercer, testified during the evidentiary hearing about her experience in connection with Sarah's interaction in October, 1995, with Dr. Hoover (Tr. Vol I, pp. 143-240, and Tr. Vol III, pp. 145-205).

22. Karen Van Horn-Mercer, was then and is now a management and program analyst for the Federal Bureau of Investigation ("FBI") and lives in Philippi, West Virginia. In connection with her employment with the FBI, she is required to maintain a top secret security clearance, and is subject to periodic polygraph examinations (Tr. Vol I, pp. 143-145).

23. Karen Van Horn-Mercer testified about telephoning the Myers Clinic in 1995, and requesting an appointment for Sarah with a female physician because she presumed Sarah had a yeast infection and needed medical care (Tr. Vol I, pp. 146-147).

24. Karen Van Horn-Mercer confirmed that she made an appointment at the Myers Clinic, picked her daughter up from school and drove her to the clinic. She also confirmed that this was Sarah's first gynecological visit (Tr. Vol I, pp. 147-148).

25. Karen Van Horn-Mercer described the events upon their arrival at the clinic. She further testified that, as Sarah was entering the exam area, she told a nurse that she wanted a blood test because Sarah was always tired. She then returned to the waiting area, and Sarah came out after approximately forty-five (45) minutes (Tr. Vol I, pp. 148-149).

26. Karen Van Horn-Mercer testified about what Sarah said to her when she had finished her appointment with Dr. Hoover. Specifically, Sarah told her that Dr. Hoover was "one of those peace, love, flower type, hippie type people..." Dr. Hoover told Sarah that "sex should be a free and gratifying experience, and that she encouraged it in her children..." According to Sarah, Dr. Hoover then gave Sarah "a map with directions to her home and her sons' names and ages and her phone number and that she wanted Sarah to get some of her friends and that she was looking for some girls to come to her home to have sex with her sons." (Tr. Vol I, pp. 150-151, 153, 198, and Tr. Vol III, pp. 145-147, 149).

27. Karen Van Horn-Mercer testified further that Sarah believed she was included as a potential sex partner for Dr. Hoover's sons, and she told Sarah perhaps she had misunderstood Dr. Hoover, and she didn't want to believe this was true (Tr. Vol I, pp. 152-153, 156-158).

28. Karen Van Horn-Mercer identified the document introduced as Bd. Ex. 1, which includes the names of two books recommended by Dr. Hoover which Sarah referenced in her testimony that Dr. Hoover gave Sarah at Sarah's appointment (Tr. Vol I, pp. 153-155, and Bd. Ex. 1).

29. Karen Van Horn-Mercer also identified the prescription sheet bearing Dr. Hoover's telephone number, the names of Dr. Hoover's sons and their ages, and a map to Dr. Hoover's house, as found in Bd. Ex. 2, which Sarah referenced in her testimony that Dr. Hoover gave Sarah at Sarah's

appointment. According to Ms. Mercer, the map is an accurate map to Dr. Hoover's house (Tr. Vol I, pp. 155-157, and Bd. Ex. 2).

30. Karen Van Horn-Mercer testified further that about six (6) days after Sarah's appointment with Dr. Hoover, Dr. Hoover telephoned her and asked if Sarah and some of her friends would like to come to Dr. Hoover's home on Sunday, to which she replied "No, she will be going to her father's home" (Tr. Vol I, pp. 159-160, 188, 193, 198, 206-207, 214-222, 226-228).

31. Karen Van Horn-Mercer testified that Dr. Hoover had been pleasant during the telephone conversation, and that she and Dr. Hoover discussed Sarah's diagnosis and prescriptions. They also discussed the need for blood tests because Sarah was always tired, and Dr. Hoover agreed to order Sarah "a CBC, a Sed Rate, and a thyroid." During the first telephone call, Ms. Mercer did not ask Dr. Hoover about her discussions with Sarah, because she still thought Sarah may have misunderstood what had happened (Tr. Vol I, pp. 160-163).

32. Karen Van Horn-Mercer testified that, after further reflection, she decided to telephone Dr. Hoover to let her know what Sarah had told her about Dr. Hoover's remarks to Sarah during Sarah's appointment. Dr. Hoover was with a patient, so she asked that Dr. Hoover return her call (Tr. Vol I, pp. 163).

33. Karen Van Horn-Mercer testified that when Dr. Hoover returned her call, she told Dr. Hoover during the telephone conversation that "I should have mentioned this to you the first time that I talked to you but you caught me a little off guard . . . I think Sarah misconstrued something that you said....Sarah is under the impression that you want her to get some of her friends and get the girls to come to your house to have sex with your sons..." (Tr. Vol I, pp. 163-164, 221-222).

34. Karen Van Horn-Mercer testified that Dr. Hoover's voice got "very cold and so very, very flat" and Dr. Hoover stated "no, she didn't misconstrue me, we parents need to get our heads out of the sand, we did it, our kids are doing it, and the best thing we can do as parents is provide them with a safe and protective environment" (Tr. Vol I, pp. 164-165, 177-178, 199, 206-207, 214-222, 226-228, 230, and Tr. Vol III, pp. 166-169, 174-176).

35. Karen Van Horn-Mercer testified she was in shock at Dr. Hoover's admission and that she expressed concern for Dr. Hoover professionally that she was talking to minors in this manner and that other parents might not react as calmly as she was (Tr. Vol I, pp.165-166).

36. Karen Van Horn-Mercer testified that Dr. Hoover expressed surprise that Sarah had told her mother about Sarah's conversation with Dr. Hoover and Dr. Hoover stated "I'll have to be more discreet" (Tr. Vol I, pp. 165-166, 199, 221).

37. Karen Van Horn-Mercer testified that Dr. Hoover's response to Ms. Mercer, where she stated "no, she didn't misconstrue me" was a primary basis for filing a complaint against Dr. Hoover (Tr. Vol I, pp. 186-187).

38. Karen Van Horn-Mercer's testimony was consistent with her complaint to the Board, made on October 27, 1995 (Bd. Ex. 4).

39. Karen Van Horn-Mercer testified that she was aware that an assistant prosecuting attorney in Barbour County, Gerald Fogg, had written a letter to Dr. Hoover on October 30, 1995, describing the incidents with Sarah as a patient and Karen Van Horn-Mercer on the telephone (Tr. Vol I, pp. 175-177, and Bd. Ex. 8).

40. Gerald Fogg's letter to Dr. Hoover states that he recommended to Karen Van Horn-Mercer, after hearing about the situation, that she file a report with the West Virginia Board of Medicine requesting an investigation (Bd. Ex. 8).

41. Karen Van Horn-Mercer testified about the harm to Sarah that Dr. Hoover's propositioning of Sarah had caused Sarah. Sarah didn't want to go for female exams after this episode, didn't want to be touched, and is afraid she is not normal (Tr. Vol I, pp. 172-173, 179).

42. Karen Van Horn-Mercer confirmed that her daughter has supported her complaint to the Board. Both of them signed a letter dated April 29, 1996, confirming that Sarah was interested in pursuing the complaint filed with the Board (Bd. Ex. 5, and Tr. Vol. I, pp. 170-171, 178).

43. Karen Van Horn-Mercer testified that her daughter has since had other gynecological exams, and has never experienced similar problems with other physicians (Tr. Vol. I, pp. 178-179).

44. The testimony of Karen Van Horn-Mercer was perceived by the undersigned as being credible in its entirety and effectively corroborates the testimony of her daughter, Sarah Hess-Sphon.

Testimony of John B. Walden, M.D.

45. John B. Walden, M.D., Professor and Associate Dean at Marshall University School of Medicine and Co-Chairman of the Department of Family and Community Health, testified as an expert witness on behalf of the Board during the evidentiary hearing (Bd. Ex. 9, and Tr. Vol I, pp. 240-315).

46. Dr. Walden testified that assuming a physician in the course of rendering gynecological care and treatment to a seventeen (17) year old female patient asked that patient to talk to her girlfriends and see if the patient and any of her girlfriends would come to the physician's home to have sex with the physician's sons, would constitute a violation of W. Va. Code § 30-3-14(c)(8),

and 11 C.S.R. 1A 12.1(r), exercising influence within a patient-physician relationship for the purpose of engaging a patient in sexual activity (Tr. Vol I, pp. 249-255, 262-263, and Bd. Ex. 10).

47. Dr. Walden further testified that assuming the same facts, there would be a violation of W. Va. Code § 30-3-14(c)(17), and 11 C.S.R. 1A 12.1(e), violating a rule of the Board, specifically engaging in dishonorable, unethical or unprofessional conduct likely to deceive, defraud or harm the public or any member thereof (Tr. Vol I, pp. 256-262).

48. Dr. Walden testified further that assuming the same facts, there would be a violation of W. Va. Code § 30-3-14(c)(17), and 11 C.S.R. 1A 12.1(j), engaging in unprofessional conduct including, but not limited to, any departure from, or failure to conform to, the standards of acceptable and prevailing medical practice or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby, or has committed any act contrary to honesty, justice or good morals, whether the same is committed in the course of his or her practice or otherwise and whether committed within or without the state (Tr. Vol I, pp. 263-272).

49. Dr. Walden further testified that assuming the same set of facts, there would be a violation of the provisions of 11 C.S.R. 1A 12.2(d), bringing the medical profession into disrepute and would not conform to the prevailing standards of medical practice in West Virginia (Tr. Vol I, pp. 258-261).

50. Dr. Walden testified as to Number 3 of the AMA Code of Medical Ethics, Fundamental Elements of the Patient – Physician Relationship, that "The patient has the right to courtesy, respect, dignity, responsiveness and timely attention to his or her needs" and stated that assuming the same set of facts, the actions engaged in would violate the patient's dignity and self-respect. (Tr. Vol I, pp. 266-267, and Bd. Ex. 11).

51. Dr. Walden was then presented with a second modified set of hypothetical facts, which assumed that the patient, in an office setting, came in for treatment and was then invited to the physician's house. Dr. Walden testified that even if a patient who came in for treatment was merely invited to the physician's house, such an action would still be a violation of the Statutes and Rules, as stated previously, if the invitation was made in the practice setting, particularly, without any prior social relationship between the physician and patient. Dr. Walden also testified that he has never invited anyone to be friends with his children while he was in the process of evaluating or treating them (Tr. Vol I, pp. 276-278, 295-297).

52. Dr. Walden was then presented with a copy of the book entitled "ESO: Extended Sexual Orgasm," which was the same book recommended by Dr. Hoover to Sarah Hess-Sphon during her first gynecological visit on October 13, 1995. Dr. Walden was asked to assume that the patient previously testified that, before the initial exam, she had only recently become sexually active and had only had sex on a few occasions. Dr. Walden testified that, in his personal experience and practice, he would not give out the book under the circumstances described, and that "It just would seem to me to be inappropriate in a clinical setting, given the circumstances you have presented me with" (Tr. Vol I, pp. 278-283, and Bd. Ex. 12).

53. Dr. Walden also reviewed the addendum made by Respondent to Sarah's medical record on November 1, 1995, after she found out Sarah's mother had complained, which reads: *"Patient had used condoms with boyfriend. On exam medium speculum easily inserted. No hymen present. Patient definitely not a virgin—has had numerous episodes of intercourse."* Regarding the entry, Dr. Walden testified that, in his opinion, there was no medical reason for the addendum, and that it appears to have nothing to do with what the patient came to see the doctor for in the first

place. Specifically, Dr. Walden stated: "It strikes me as . . . an attempt to enter something into the record. It's almost some sort of – as a cover for something." Dr. Walden further stated, "If this were an attempt to somehow cover one's self for something that was wrong, went astray or might go astray, it strikes me that this might fill the bill for what someone might write in a chart, having seen other examples of physicians who have been involved in some things. And that's how it strikes me, as a possibility or a likelihood" (Tr. Vol I, pp. 286-294, and Bd. Ex. 3).

54. When asked to assume that there was evidence that the physician had used the addendum to cover herself, as suspected by Dr. Walden, Dr. Walden testified that, assuming such facts as true, the addendum would be both unprofessional and unethical. Dr. Walden then explained his opinion in detail with reference to the addendum (Tr. Vol I, pp. 300-301, 302-305, and Bd. Ex. 3).

55. Dr. Walden was also presented with a copy of prior deposition testimony of Dr. Hoover, taken in connection with a related civil action, on November 20, 2002, wherein Dr. Hoover specifically admitted that the reason why she wrote the addendum on November 1, 1995, was because Karen Van Horn-Mercer complained. Dr. Walden testified that, if Dr. Hoover's motivation for adding the addendum was because she somehow knew a complaint was made against her, as admitted by her in her prior deposition testimony of November 20, 2002, then the addendum would be both unprofessional and unethical (Tr. Vol I, pp. 306-312).

56. The testimony of Dr. Walden is credible and believable, based upon the Hearing Examiner's observations of the demeanor of the witness, and the truthful testimony provided by the witness on all material matters.

Testimony of Peggy Kincaid

57. Peggy Kincaid, a Child Protective Services Worker with the Department of Health and Human Resources working in Barbour County in 1995, testified that she had been contacted by assistant prosecutor Gerald Fogg in October, 1995, and was asked to interview Sarah and her mother regarding the events of October 13, 1995, and determine if they were credible. She identified the report that she had prepared after the interviews (Bd. Ex. 13, Tr. Vol II, pp. 13-16, and Tr. Vol III, pp. 30-32, 34-35, 42, 52, 92).

58. Peggy Kincaid testified that her investigation in this matter was limited and didn't fall within the jurisdiction of Child Protective Services, as it didn't involve wrongdoing toward a child by someone within the household, and that she had conducted the interviews as a courtesy to the assistant prosecutor (Tr. Vol II, pp. 23-24).

59. Peggy Kincaid testified that she included everything in her report which she felt was necessary and important in connection with her limited role of interviewing Sarah and her mother regarding the events of October 13, 1995, and she believes that her report accurately reflects what she discovered during the interviews and that her testimony regarding the same has been honest and forthright (Tr. Vol III, pp. 21-22, 36, 52-54, 93-94, and Tr. Vol IV, p. 59).

60. Ms. Kincaid testified regarding her opinion that Sarah Hess-Sphon was credible, honest, truthful, and had a clear recollection of what had occurred on October 13, 1995. She further testified about her recollection that Sarah told her that Dr. Hoover wanted to find a girl or girls whose parents were liberal enough to let their daughter move into Dr. Hoover's home to have sex with her sons (Tr. Vol II, pp. 55-56, and Tr. Vol III, pp. 36, 38, 43, 54)

61. In response to inquiry by counsel for Respondent as to whether Sarah was included in the invitation to Dr. Hoover's house to have sex with her sons, Ms. Kincaid stated: "What I recall is that I felt Sarah had the distinct impression, and she shared that with me, that she and/or her friends were invited to Dr. Hoover's home." (Tr. Vol II, pp. 27-30).

62. Despite being subjected to three days of overly aggressive cross-examination by counsel for the Respondent on the contents of her file relating to this matter, the undersigned finds that Peggy Kincaid's testimony is consistent and corroborative with the testimony of Sarah Hess-Sphon and her mother, Karen Van Horn-Mercer, concerning Sarah's and Dr. Hoover's conversation at Myers clinic on October 13, 1995. It is further the finding of the undersigned that the bulk of Peggy Kincaid's testimony has minimal application to the material issues of this matter.

Testimony of Peggy Jones

63. Peggy Jones served as a medical assistant at the Myers Clinic in Philippi, West Virginia, for twenty-four (24) years. For about a year in 1995, she was periodically assigned to work with Dr. Hoover, and was working on October 13, 1995, when Sarah Hess-Sphon came to see Dr. Hoover (Tr. Vol III, pp. 206-285).

64. Peggy Jones testified that she initially checked Sarah Hess-Sphon into the office, recorded her height and weight, took a brief patient history, and had a brief conversation with Sarah Hess-Sphon before speaking with Dr. Hoover (Tr. Vol III, pp. 207-208, 279-280).

65. After checking Sarah in, Peggy Jones was instructed by Dr. Hoover to prepare Sarah for a pelvic exam, and was present during the pelvic exam. Although Ms. Jones did not hear any inappropriate conversations between Dr. Hoover and Sarah Hess-Sphon during the pelvic exam, she

admitted that she was not present during conversations that Dr. Hoover had with Sarah before and after the pelvic exam (Tr. Vol III, pp. 211-213, 226, 249-250).

66. Counsel for Respondent called Peggy Jones primarily to provide testimony regarding a letter dated April 25, 1996, which purportedly summarizes her observations and impressions concerning the treatment of Sarah Hess-Sphon during the office visit on October 13, 1995, at the Myers Clinic. The observations and impressions of Peggy Jones, as set forth in the April 25, 1996, letter, are allegedly based upon conversations between Peggy Jones and Sarah Hess-Sphon, Sarah's medical treatment at the Myers Clinic, and Sarah's interaction with Dr. Hoover. The letter also contains statements concerning the character of Dr. Hoover, Sarah and her mother (Tr. Vol III, pp. 206-285, and R. Ex. 4).

67. Peggy Jones was completely confused as to how the letter, which is dated more than six (6) months after the October 13, 1995, office visit, was prepared, who prepared it, when it was prepared, and the circumstances surrounding its preparation, including the persons who were present when it was allegedly signed and notarized. Ms. Jones testified that she did not write or author the letter, doesn't recall typing or writing anything, and doesn't recall Dr. Hoover ever telling her to write anything regarding the office visit of October 13, 1995, and she can't even recall signing the letter. Ms. Jones believes someone else actually wrote the letter or, in the alternative, that it was from a deposition sent to her by Dr. Hoover or someone else, but she is not sure, and she had never been involved in anything like it before or since (Tr. Vol III, 206-207, 248, 259-260, 263-268, 270-273, 276-279, 282-287).

68. This Hearing Examiner finds that the apparent confusion of Peggy Jones as to how the April 25, 1996, letter was prepared, who prepared it, when it was prepared, and the circumstances

surrounding its preparation are directly attributable to the fact that Peggy Jones did not actually write or author the letter. Instead, it is clear from the remaining evidence in this case, including the testimony of Dr. Hoover, and the specific wording contained in the letter, which matches the November 1, 1995, addendum added to Sarah's medical records by Dr. Hoover, that the letter was actually authored and written by Dr. Hoover, in order to serve her own interests, and in preparation for her appearance before the Board on April 26, 1996. The fact that the letter was authored and written by Dr. Hoover, when combined with the inability of this witness to recall any specific facts about the letter, raises serious questions regarding the credibility of this witness and whether her testimony is accurate and complete (Tr. Vol IV, pp. 155-156, 227-235, and R. Ex. 4).

69. There are also significant inconsistencies and conflicts with respect to the testimony of Peggy Jones and the remaining evidence, including the April 25, 1996, letter, and the medical records. For example, Ms. Jones initially testified that the primary reason Sarah Hess-Sphon was seeking treatment was to obtain birth control, as opposed to her seeking treatment for a yeast infection. In that regard, Ms. Jones initially testified "there was no mention of an infection to me," and stated that she didn't find that out until later (Tr. Vol III, p. 210, 279-280). However, this contradicts the medical records and remaining testimony, based upon her handwritten office notes dated October 13, 1995, that Sarah had complained of symptoms consistent with a yeast infection when she arrived at the clinic (Tr. Vol III, pp. 231-237, 260, and Bd. Ex. 3).

70. The testimony of Peggy Jones lacked credibility and is disregarded by the Hearing Examiner based upon the Hearing Examiner's determinations regarding the credibility of Ms. Jones as a witness and the substance of her testimony, which suggested multiple inconsistencies, conflicts and ulterior motives, particularly with respect to her confusion and inability to recall specific details

concerning the origin of a letter, which Dr. Hoover prepared for Ms. Jones to sign on or about April 25, 1996, six (6) months after the subject events occurred, and just before Dr. Hoover appeared before the Board in connection with the original complaint filed by Karen Van Horn-Mercer.

Testimony of Katherine A. Hoover, M.D.

71. Dr. Hoover's address of record with the Board is in Lost Creek, West Virginia, but she practices medicine in Williamson, West Virginia, where she currently specializes in pain management. As part of her practice, she deals with chronic pain patients some of whom are also sexual abuse patients (Tr. Vol IV, pp. 61-64).

72. Dr. Hoover testified during the hearing about her treatment of Sarah Hess-Sphon as a seventeen (17) year old gynecological patient on October 13, 1995, at the Myers Clinic in Philippi, West Virginia (Tr. Vol IV, pp. 61-255, and Tr. Vol V, pp. 10-27).

73. Dr. Hoover testified that she had never met Sarah Hess-Sphon prior to October 13, 1995, when she was scheduled to provide medical treatment to Sarah. According to Dr. Hoover, when Sarah arrived for treatment, the only persons in the waiting room were her mother, Karen Van Horn-Mercer, and other patients. Dr. Hoover testified that her medical assistant, Peggy Jones, assisted in treating Sarah (Tr. Vol IV, pp. 88-94, 167, and Tr. Vol V, pp. 10-27).

74. Dr. Hoover testified about the yeast infection which had caused Sarah to seek medical treatment, and stated that Sarah told medical assistant Peggy Jones and her that she had just recently become sexually active, on a limited basis, with an out-of-state boyfriend, and that she wanted birth control. Dr. Hoover was aware that this was Sarah's first gynecological exam and confirmed that Sarah was nervous during the exam (Tr. Vol IV, pp. 82-83, 101-102, 168-173, and Tr. Vol V, pp. 11-13).

75. Dr. Hoover testified that Sarah did not want her mother to know she was sexually active or receiving birth control pills to prevent pregnancy, because Sarah was afraid her mother would disapprove. Dr. Hoover believed this put her in a difficult position (Tr. Vol IV, pp. 66, 100-101, 107-109).

76. Dr. Hoover testified that Sarah confided in her that she was having problems with sex and was concerned there may be a problem. Dr. Hoover denies that Sarah further confided in her that her step-grandfather had sexually abused her when she was about seven (7) years old, or that Sarah was concerned about whether this was causing problems. Had Sarah told Dr. Hoover about this, Dr. Hoover would have been required to report it to authorities, and her treatment would have been different (Tr. Vol IV, pp. 77-80, 85, and Tr. Vol V, pp. 15-17, 48-49).

77. Dr. Hoover admitted that she recommended that Sarah read a book entitled "ESO: Extended Sexual Orgasm" and that her boyfriend read another book entitled "You Can Heal Your Life." Dr. Hoover wrote the names of the books down for Sarah and still believes the books are appropriate. Dr. Hoover did not mention the books in Sarah's medical records, did not make a clinical assessment concerning the books, and was surprised Sarah's mother obtained the information. Dr. Hoover has never recommended the book entitled "ESO: Extended Sexual Orgasm" to another minor female patient (Tr. Vol IV, pp. 84-87, 214-216, 220-221, Tr. Vol V, p. 17, and Bd. Exs. 1 and 12).

78. Dr. Hoover admitted that she discussed her sons with Sarah and wrote down their names and ages for Sarah on a prescription pad, drew a map to her house and provided her home telephone number for Sarah. She also admitted that she invited Sarah to her house, but denied telling Sarah she wanted her to have sex with her sons. According to Dr. Hoover, Sarah initiated the

conversations regarding her sons, and offered to help them. Dr. Hoover believes that Sarah misconstrued or misunderstood what Dr. Hoover had said to her about her sons, and she attempted to blame Sarah for any misunderstanding.[8] She does not believe it is improper to have patients come to her home or to provide her phone number to patients. However, this is the first time that she ever provided her phone number, a map to her house, and the names and ages of her sons to a minor female patient (Tr. Vol IV, pp. 95-99, 128-130, 137, 152, 154, 211-213, Tr. Vol V, pp. 18-20, and Bd. Ex. 2).

79. Dr. Hoover denied asking Sarah to find some of her girlfriends to come out to her home to have sex with her sons, and doesn't believe Sarah would have said that "because it seems to me if her girlfriends were sexually active, her mother would think that she was sexually active also" (Tr. Vol IV, pp. 110-112, 127-128, 135-136, 141-142, and Tr. Vol V, pp. 18-20).

80. Dr. Hoover also disagrees with the allegations that she told Sarah sex should be free and open, that she would encourage sex with her sons, or that she told Karen Van Horn-Mercer she should be more discreet (Tr. Vol IV, pp. 135-136, 145-146, 149-150, and Tr. Vol V, p.17).

81. Dr. Hoover acknowledged that Sarah was laughing during the pelvic exam because she appeared uncomfortable and embarrassed about the exam (Tr. Vol IV, p. 88, and Tr. Vol V, pp. 11-13).

82. Dr. Hoover confirmed that the appointment lasted about forty-five (45) minutes, which is consistent with the testimony of Karen Van Horn-Mercer, and testified further that Sarah

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[8] Throughout her testimony, Dr. Hoover attempted to shift the blame to Sarah for what occurred and actually concluded the hearing by stating: "Well, I have always been concerned for Sarah, and her mental and physical health and I still am. I think she has got problems that need to be looked at and addressed. And I hope she gets the help she needs" (Tr. Vol. V, p. 51).

left the appointment carrying papers and birth control. She also confirmed that she spoke with Sarah's mother by telephone regarding test results, proposed blood work, a medication prescribed for the yeast infection and Karen Van Horn-Mercer's continuing education. However, Dr. Hoover did not have a specific memory of the contents of her various telephone conversations with Karen Van Horn-Mercer. Instead, she was relatively vague as to what actually occurred, and her testimony is unclear. She also was unaware that Karen Van Horn-Mercer was upset until she received the letter dated October 30, 1995, from Gerald Fogg (Tr. Vol IV, pp. 131-133, 137-143, Tr. Vol V, pp. 21-24, 26-28, and Bd. Ex. 8).

83. Initially, Dr. Hoover testified that she had agreed to lie for Sarah regarding the reason for prescribing birth control pills and state that the birth control pills were to regulate periods. However, upon further reflection during the hearing, Dr. Hoover changed her testimony and stated, in the alternative, that neither she nor Sarah were lying, and that the reasons listed in the record for prescribing birth control were legitimate (Tr. Vol IV, pp. 133, 160-163).

84. Dr. Hoover also testified about an addendum she made to Sarah's medical record on November 1, 1995, after she learned that Sarah's mother, Karen Van Horn-Mercer, had made a complaint, which reads: *"Patient had used condoms with boyfriend. On exam medium speculum easily inserted. No hymen present. Patient definitely not a virgin—has had numerous episodes of intercourse."* According to Dr. Hoover, she added the addendum after her conversation with Karen Van Horn-Mercer and after she received a letter dated October 30, 1995, from Gerald Fogg (Bd. Ex. 8). Dr. Hoover knew that Karen Van Horn-Mercer had complained before she added the addendum, and she allegedly wanted to clarify the record. According to Dr. Hoover, the addendum merely states the facts (Tr. Vol IV, pp. 81-82, 177-187, 193-204, and Bd. Exs. 3 and 8).

85. During the hearing, Dr. Hoover again complained about the adequacy of the complaint procedures utilized by the Board, the Board's compliance with applicable Statutes and Rules, and other matters previously addressed in prior Court Orders in *Hoover v. West Virginia Board of Medicine*, 216 W. Va. 23, 602 S.E.2d 466 (2004). Although Dr. Hoover was allowed to provide testimony concerning these procedural matters, her testimony was not particularly helpful within the context of this evidentiary hearing to address the specific allegations set forth in the Amended Complaint, and these procedural matters have no tendency to make the existence of any fact that is of consequence to the determination of this action more probable or less probable than it would be without the evidence, particularly since they were resolved by prior court orders (Tr. Vol IV, pp. 66-71, and Tr. Vol V, pp. 4, 8-9).

86. Dr. Hoover also admitted that on September 6, 2001, her husband made a threatening telephone call on the answering machine at the residence of Sarah's father, and that the telephone number displayed on the "Caller ID" in the videotape of the recorded telephone call was the same telephone number written on the map (Bd. Ex. 2), which Dr. Hoover provided to Sarah on October 13, 1995. Dr. Hoover's husband stated that Sarah was being investigated for perjury and would be arrested and incarcerated for perjury. However, there is no evidence that Sarah was ever arrested or incarcerated for perjury, although Dr. Hoover suggested Sarah was previously being investigated by a Gary Slater with a state agency within the attorney general's office. Although Dr. Hoover now believes it was inappropriate for her husband to call a witness in this case and threaten that the witness was going to be arrested for perjury, she did not believe her husband's actions were inappropriate when she was deposed on November 20, 2002, in connection with Civil Action No. 98-C-1134 (Cir. Ct. Kanawha Co.), where Dr. Hoover had sued Board staff. The videotape is

authentic and the voice of the caller depicted on the videotape was that of Respondent's husband (Bd. Ex. 7, Tr. Vol V, pp. 28-40).

87. Dr. Hoover also provided testimony concerning how the April 25, 1996, letter signed by Ms. Peggy Jones was prepared. According to Dr. Hoover, Ms. Jones was completely incorrect in her testimony regarding how the letter was prepared and who prepared it. Unfortunately, Dr. Hoover's testimony with respect to what occurred is also somewhat unclear and confusing. She essentially testified that she told Ms. Jones to write in long-hand what had occurred during the office visit of October 13, 1995, and that she would then type it into a letter format for presentation to the Board during a meeting scheduled on April 26, 1996, in Beckley, West Virginia. Dr. Hoover further testified that Ms. Jones complied with her request and that she (Dr. Hoover) then typed the notes of Ms. Jones exactly as written. According to Dr. Hoover, she did not save any notes prepared by Ms. Jones, did not assist with editing in any way, and she further denies coaching Ms. Jones at all on what she should or shouldn't say. In any event, this Hearing Examiner is convinced from Dr. Hoover's testimony and the remaining evidence in this case, including the specific wording contained in the letter, which matches the November 1, 1995, addendum added to Sarah's medical records by Dr. Hoover, that the letter was actually authored and written by Dr. Hoover, in order to serve her own interests, and in preparation for her appearance before the Board on April 26, 1996 (R. Ex. 4, and Tr. Vol IV, pp. 155-156, 227-235).

88. Dr. Hoover also confirmed that she previously subpoenaed the records of witness Peggy Kincaid on September 23, 1999, in connection with her prior deposition of Ms. Kincaid on October 4, 1999, in a related civil action, *Katherine A. Hoover, et ux. v. Karen Van Horn*, Civil Action No. 96-C-24, which remains pending in the Circuit Court of Barbour County, West Virginia.

She denied obtaining the file, but was obviously aware that the file existed or she wouldn't have requested the subpoenas in her related civil action pending against material witness Karen Van Horn-Mercer. In addition, Dr. Hoover never followed up on her prior subpoenas during the deposition in 1999, even though the witness mentioned her file and personal notes during the deposition, and Dr. Hoover requested no additional subpoenas either in the pending civil action or in this proceeding (Tr. Vol IV, pp. 239-251, R. Ex. 3).

89. The testimony of Dr. Hoover was not entirely credible, based upon the Hearing Examiner's observations of Dr. Hoover as a witness, when combined with various inconsistencies, conflicts and ulterior motives. Dr. Hoover's testimony was often inconsistent and confusing in relation to the evidence and medical records, particularly with respect to the circumstances of her invitation to Sarah Hess-Sphon, the book she recommended to Sarah Hess-Sphon entitled "ESO: Extended Sexual Orgasm," an addendum dated November 1, 1995, which Dr. Hoover added to the medical records of Sarah Hess-Sphon after she received notice from prosecuting attorney Gerald Fogg that a complaint would be filed against her with the Board by Karen Van Horn-Mercer, and the April 25, 1995, letter allegedly signed by her medical assistant, Peggy Jones.

Testimony of Diane Shafer, M.D.

90. Diane E. Shafer, M.D., was called to testify as an expert witness on behalf of Respondent. Dr. Shafer practices medicine and surgery in Williamson, West Virginia, and her primary medical specialty is orthopedic surgery (Tr. Vol IV, pp. 255-261).

91. Dr. Shafer has practiced orthopedic surgery in West Virginia for approximately twenty-eight (28) years, and is familiar with the ethics of the medical profession. Dr. Shafer also works for Logan Mental Health and conducts mental hygiene exams in Williamson, West Virginia.

Dr. Shafer has limited experience in treating women who have been sexually abused in connection with her work at Tug Valley Recovery Shelter (Tr. Vol IV, pp. 255-261, 265-267).

92. Dr. Shafer lacks any formal education or training in the areas of sexual abuse, psychiatry or mental health, and did not participate in an internship, residency, fellowship, or other certification process. Like other physicians, she rotated through psychiatry in medical school, and occasionally attends Continuing Medical Education ("CME") courses which address issues related to sexual abuse, psychiatry or mental health. Dr. Shafer has authored two (2) articles for the Tug Valley Medical Society regarding sexual abuse, but has authored no other publications (Tr. Vol. IV, pp. 286-289, 317).

93. It is the finding of the undersigned that the testimony of Dr. Shafer is entitled to little or no weight because of her close personal relationship with Dr. Hoover. Dr. Hoover resides with Dr. Shafer from Monday through Thursday in Williamson, West Virginia. Dr. Shafer and Dr. Hoover engage in a wide variety of activities together including travel. Dr. Shafer has also listed Dr. Hoover's permanent residence as her own in connection with her work in the Clarksburg, West Virginia, area. Further pursuant to a public order entered by the Board on March 20, 1989, Dr. Shafer was subjected to disciplinary action by the Board for attempting to obtain, obtaining, renewing, or attempting to renew her license to practice medicine and surgery by fraudulent misrepresentation and engaging in dishonorable, unethical and unprofessional conduct of a character likely to deceive, defraud or harm the public or any member thereof, and her license was subject to such limitations and restrictions set forth in the order. Dr. Shafer complied with the limitations and restrictions as of March 31, 1991. (Tr. Vol IV, pp. 284, 302-305, 317); (Public Board Order dated March 20, 1989). Dr. Shafer's testimony and demeanor clearly reflected a bias and deference toward Dr. Hoover and

essentially destroyed her credibility as a witness and therefore her testimony has largely been disregarded by the undersigned.

DISCUSSION

Credibility of Witnesses, Testimony and Exhibits

After reviewing all of the evidence in this matter, and based upon detailed credibility determinations, this Hearing Examiner is satisfied that the Board's witnesses, Sarah Hess-Sphon, and her mother, Karen Van Horn-Mercer, were both credible and truthful, and that they provided sincere testimony, which was both clear and convincing. The demeanor of these witnesses together with the substance of their testimony, including their opportunity for knowledge, information possessed, ability to recall and relate specific events, and similar indications of veracity, suggested no significant inconsistencies, conflicts, or ulterior motives, and there is no evidence suggesting any personal gain to be achieved by either Sarah Hess-Sphon or her mother Karen Van Horn-Mercer as a result of testifying.

The opinion testimony of the Board's expert witness, John B. Walden, M.D., was also credible, clear and convincing. Dr. Walden clearly possesses the necessary professional knowledge, experience, education and training to provide useful expert opinion testimony, and his expert opinion testimony was particularly helpful in enabling this Hearing Examiner to understand the evidence and determine the facts at issue, particularly with respect to the applicable standard of care to which Dr. Walden's expert opinion testimony was addressed.

The testimony of Board witness Peggy Kincaid, the Child Protective Services Worker who interviewed Sarah Hess-Sphon in late 1995, was somewhat confusing, and at times appeared to be inconsistent with the evidence. However, the overall importance of Ms. Kincaid's testimony was minimal.

The Hearing Examiner does not believe that the testimony of Dr. Hoover was entirely credible, based upon her demeanor as a witness and various inconsistencies, conflicts and ulterior motives. Dr. Hoover's testimony was often inconsistent and confusing in relation to the evidence and medical records, particularly with respect to the circumstances of her invitation to Sarah Hess-Sphon, the book she recommended to Sarah Hess-Sphon entitled "ESO: Extended Sexual Orgasm," an addendum dated November 1, 1995, which Dr. Hoover added to the medical records of Sarah Hess-Sphon after she received notice from prosecuting attorney Gerald Fogg that a complaint would be filed against her with the Board by Karen Van Horn-Mercer, and the April 25, 1996, letter allegedly signed by her medical assistant, Peggy Jones.

The testimony of Dr. Diane Shafer, the Respondent's expert witness, was not perceived as credible for the reasons hereinbefore set forth in Finding of Fact No. 93.

It is further the finding of the Hearing Examiner that all records and documents entered as exhibits are authentic, valid, and were entered with proper evidentiary foundation.

ISSUES

1. Whether Respondent violated W. Va. Code § 30-3-14(c)(8) and 11 C.S.R. 1A 12.1(r) by exercising influence within a patient-physician relationship for the purpose of engaging a patient in sexual activity, as set forth in paragraph 2 of Petitioner Board's Complaint and Notice of Hearing?

2. Whether Respondent violated W. Va. Code § 30-3-14(c)(17) and 11 C.S.R. 1A 12.1(e) and (j), as further described in 11 C.S.R. 1A 12.2 (d) by engaging in unprofessional, unethical, dishonorable conduct, as set forth in paragraph 2 of Petitioner Board's Complaint and Notice of Hearing?

With respect to Issue 1, the substantial, credible, clear and convincing evidence adduced by the Board as set forth in the foregoing Findings of Fact shows that the Respondent did in fact exercise influence within a patient-physician relationship for the purpose of engaging a patient in sexual activity, in violation of W. Va. Code § 30-3-14(c)(8) and 11 C.S.R. lA 12.1(r).

With respect to Issue 2, the substantial, credible, clear and convincing evidence adduced by the Board as set forth in the foregoing Findings of Fact shows that the Respondent's actions in the course of rendering gynecological care and treatment to a seventeen year old patient and asking the patient to talk to her girlfriends and see if the patient and any of her girlfriends would come to the Respondent's home to have sex with her teenage sons constitute engaging in unprofessional, unethical, dishonorable conduct, in violation of W. Va. Code § 30-3-14(c)(17) and 11 C.S.R. lA 12.1(e) and (j), as further described in 11 C.S.R. lA 12.2 (d).

From the review of the testimony taken during this proceeding and the exhibits admitted into the record, it is, therefore, the opinion of this Hearing Examiner that given all of the evidence of record, the following Conclusions of Law are appropriate and the following proposed disposition is justified.

CONCLUSIONS OF LAW

1. Respondent is a physician licensed to practice medicine and surgery in the State of West Virginia and the West Virginia Board of Medicine is the State agency charged with licensure and discipline of physicians under W. Va. Code § 30-3-1, *et seq.*

2. The West Virginia Board of Medicine has jurisdiction over the subject matter and over the Respondent. W. Va. Code § 30-3-1, *et seq.*

3. The expressed purpose of the West Virginia Medical Practice Act is to provide for the licensure and professional discipline of physicians and to provide a professional environment that encourages the delivery of quality medical service within the State. W. Va. Code § 30-3-2.

4. Petitioner bears the burden of proving the allegations in the Complaint and Notice of Hearing by clear and convincing evidence. *See* W. Va. Code § 30-3-14(b), and *Webb v. West Virginia Board of Medicine*, 212 W. Va. at 155, 569 S.E.2d at 231.

5. The basic purpose of any evidentiary hearing is the ascertainment of truth with the aid of all testimony which may properly contribute to that purpose. The ascertainment of truth and the prevention of manifest injustice are entitled to priority consideration by the trier of fact. *Roark v. Dempsey*, 159 W. Va. at 32, 217 S.E.2d at 918.

6. In an administrative proceeding, the trier of fact is entitled to take into account the credibility and demeanor of witnesses, including their inconsistent statements and inability to recall details, in making findings of fact and conclusions of law, and the trier of fact is uniquely situated so as to make such determinations. *Webb v. West Virginia Board of Medicine*, 212 W. Va. at 156, 569 S.E.2d at 232. In addition, determinations of credibility by an administrative law judge are

entitled to deference upon review. *See Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002).

7. The testimony of Sarah Hess-Sphon, Karen Van Horn-Mercer, Peggy Kincaid, and John B. Walden, M.D., as set forth in the Findings of Fact, clearly and convincingly demonstrate that Dr. Hoover exercised influence within a patient-physician relationship for the purpose of engaging a patient in sexual activity, in violation of W. Va. Code § 30-3-14(c)(8) and 11 C.S.R. lA 12.1(r), for which Dr. Hoover may be disciplined.

8. The testimony of Sarah Hess-Sphon, Karen Van Horn-Mercer, Peggy Kincaid, and John B. Walden, M.D., as set forth in the Findings of Fact, clearly and convincingly demonstrate that Dr. Hoover's actions in the course of rendering gynecological care and treatment to Sarah Hess-Sphon, then seventeen (17), in asking Sarah to talk to her girlfriends and see if Sarah and any of the girlfriends would come to Dr. Hoover's home to have sex with her teenage sons, constitute engaging in unprofessional, unethical, dishonorable conduct, in violation of W. Va. Code § 30-3-14(c)(17) and 11 C.S.R. 1A 12.1(e) and (j) and as further described at 11 C.S.R. lA 12.2(d) specifically bringing the medical profession into disrepute, for which Dr. Hoover may be disciplined.

9. The opinion testimony of the Board's expert witness, John B. Walden, M.D., was credible, clear and convincing and was particularly helpful in enabling this Hearing Examiner to understand the evidence and determine the facts at issue, particularly with respect to the applicable standard of care to which Dr. Walden's expert opinion testimony was directly addressed. Dr. Walden's expert testimony is given great weight in this matter under the provisions of Rules 702 and 704 of the West Virginia Rules of Evidence and the Board's standard practice and custom. *See West Virginia Board of Medicine v. David C. Shamblin, MD.*, (1989); *West Virginia Board of*

Medicine v. Thomas J. Park, MD., (1994); *West Virginia Board of Medicine v. Thomas E. Mitchell, M.D.* (1995).

10. The practice of medicine is a high calling; a professional license is a high privilege; the state may attach to its possession conditions "onerous and exacting." *Barsky v. Board of Regents*, 111 N.E. 2d 222 (N.Y. 1953, *reh. den.* 112 N.E. 2d 773, *affirmed* 347 U.S. 442, 74 S. Ct. 650), cited in *West Virginia Board of Medicine v. Clayton E. Linkous, Jr., MD.*, (1991); and in *West Virginia Board of Medicine v. Rahmet Muzaffer, MD.*, *supra*; and *see* W. Va. Code § 30-1-1a; and § 30-1-1, cited in *State ex rel Webb v. West Virginia Board of Medicine*, 203 W. Va. 234, 506 S.E.2d 830 (1998).

11. The inherent object of the underlying statute regulating the practice of medicine is the preservation of the public health. *Vest v. Cobb*, 76 S.E.2d 885 (W. Va. 1953) citing *Dent v. State of West Virginia*, 129 U.S. 114, 123 S. Ct. 231 (1989), cited in the 1993 revocation Order in *West Virginia Board of Medicine v. Magdi Z. Fahmy, MD.*, and in the 1994 revocation Order in *West Virginia Board of Medicine v. Thomas J. Park. M.D.*

12. A variety of disciplinary sanctions may be imposed by the Board under the provisions of W. Va. Code § 30-3-14(j) and 11 C.S.R. 1A 12.3, when the Board finds a person unqualified to practice medicine in the State of West Virginia after hearing and due process.

13. Katherine Anne Hoover, M.D., is unqualified to practice medicine and surgery in the State of West Virginia. W. Va. Code § 30-3-14(c).

RECOMMENDED ORDER

WHEREFORE, on the basis of the foregoing Findings of Fact and Conclusions of Law, and pursuant to the provisions of W. Va. Code §§ 30-3-14(j), and 11 C.S.R. 1A 12.3, the Hearing Examiner recommends that the Board enter an **ORDER** as follows:

1. The license to practice medicine and surgery in the State of West Virginia heretofore issued to Katherine Anne Hoover, M.D., is hereby **REVOKED**, effective at 12:01 a.m. on Monday, October 6, 2008, which **REVOCATION** is hereby **STAYED IMMEDIATELY**, and which **STAY** is subject to immediate dissolution and termination upon the Board's determination of the Respondent's failure to comply fully, timely, and satisfactorily with any other term or condition of this **ORDER**.

2. Effective immediately upon the **STAY**, the Respondent's license shall be placed on **PROBATION** for five (5) years in which the licensee shall practice only under the supervision of one (1) or more duly licensed physicians approved by the Board prior to commencement of such supervision, and under such other supervision and reporting requirements as the Board may impose during the probationary period.

3. In order to effectuate Board approval of a supervising physician, the Respondent shall submit to the Board, on or before October 6, 2008, the names, addresses, and telephone numbers of three (3) proposed supervising physicians, and the Board shall select one (1) of the three (3) proposed supervising physicians for service in this case. If none of the proposed supervising physicians is acceptable to the Board, then the Board may, in its sole discretion, select an appropriate supervising physician. The Board-approved supervising physician shall then provide directly to the Board correspondence on his or her letterhead confirming the nature of supervision to be rendered.

4. The Board-approved supervising physician shall provide quarterly reports to the Board attesting to the continued ability of Respondent to practice medicine and surgery in a safe and effective manner, and further describing the status of Respondent with respect to patient care, practice management, delivery of medical services, medical ethics requirements and professionalism, and any other subject matter designated or pre-approved by the Board throughout the five (5) year probationary period.

5. The quarterly reporting periods commence in March 2009, and all reports shall be made by the supervising physician and submitted directly to the Board within the last business week of March, June, September, and December of each year throughout the five (5) year probationary period.

6. Should the performance of Respondent at any time fall below the reasonable standard of care or otherwise endanger the health, safety, and welfare of patients, the Board-approved supervising physician shall immediately notify the Board.

7. If at any time the designated supervising physician is unwilling or unable to serve in that capacity, Respondent shall have ten (10) working days from the date of the supervising physician's termination of service, to obtain another duly licensed supervising physician approved by the Board.

8. Throughout the five (5) year probationary period, the Respondent shall not render medical services to any patient who has not yet attained the age of eighteen (18) years without a Board-approved chaperone present in the examination room.

9. The Respondent shall report the substance of and present a copy of this **ORDER** to her approved supervising physician, any employer or health care or medical facility where

Respondent is authorized to practice medicine and surgery in the State of West Virginia, and during the period that this Order is in effect, Respondent shall provide a copy of this Order to any prospective employer or health care or medical facility where Respondent seeks to practice medicine and surgery in the State of West Virginia.

10. The Respondent shall submit to any further conditions, accommodations, limitations or restrictions the Board may deem necessary and appropriate to effectuate the terms and conditions of this **ORDER** throughout the five (5) year probationary period.

11. Administrative costs including but not limited to fees and expenses of attorneys, Hearing Examiners, court reporters, advisors and consultants, and all other costs of investigation and prosecution of this matter, shall be paid by the Respondent to the Board within thirty (30) days of issuance of an invoice by the Board.

12. The Respondent shall pay to the State of West Virginia a civil fine of One Thousand Dollars ($1,000.00), to be received by the Board within thirty (30) days of entry of this **ORDER**.

13. The Respondent shall comply with all Statutes and Rules of the Board and shall comply with all State and Federal law.

14. Upon the Board's determination of the Respondent's failure to comply with any of the terms and conditions of this **ORDER**, the Board shall issue written **NOTICE** of immediate and

automatic dissolution and termination of the **STAY**, upon which the **REVOCATION** shall take full force and effect without further proceedings and shall remain in effect for five (5) years beginning with the date of dissolution and termination.

Dated this 2nd day of August, 2008.

Jack C. McClung

JACK C. McCLUNG
HEARING OFFICER

CERTIFICATE OF SERVICE

I, Rebecca L. Stepto, post-hearing legal advisor to the West Virginia Board of Medicine, do hereby certify that service of the foregoing "Order" has been made upon the parties and counsel of record by mailing true copies thereof to in the manner specified on this 12th day of September, 2008:

Hand Delivered to:
West Virginia Board of Medicine
101 Dee Drive
Charleston, WV 25311

Hand Delivered to:
John K. McHugh, Esquire
West Virginia Board of Medicine
101 Dee Drive
Charleston, WV 25311

Via U.S. Mail, postage pre-paid, and via Certified Mail, Return Receipt Requested, to:
Katherine Anne Hoover, M.D.
Route 2, Box 203
Lost Creek, WV 26385

Via U.S. Mail, postage pre-paid:
C. Christopher Younger, Esquire
106 Logan Street
Williamson, WV 25661
Counsel for Katherine Anne Hoover, M.D.

Rebecca L. Stepto
State Bar No. 3597
844 Sherwood Road
Charleston, WV 25314