FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-4439

ERIC LANG, D.O.,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF HEALTH,

Respondent.

Petition to Review Non-Final Agency Action—Original Jurisdiction.

July 27, 2020

OSTERHAUS, J.

Eric Lang petitions for review of the Florida Department of Health's emergency restriction of his license to practice as a physician. Orders that restrict a professional license on an emergency basis must contain detailed facts demonstrating an immediate danger and the need to take quick action. We grant Dr. Lang's petition and quash the Department's order because it fails to state allegations that are sufficient to support the emergency restriction of Dr. Lang's license.

I.

In late 2019, the Department issued an emergency order restricting Dr. Lang's license to practice as an osteopathic

physician. The order prohibited him from treating and interacting with female patients. The Department based its order on two incidents involving a 54-year-old female patient. The first incident occurred at the conclusion of the patient's appointment related to leg pain. After the examination, Dr. Lang hugged the patient just before she left the office. A couple of weeks later, the patient returned for a second appointment involving lower back pain. As the patient was leaving the office, Dr. Lang placed his hand on the doorknob partially blocking the patient's exit and kissed her on the mouth or cheek. The patient was shocked and quickly exited the room.

The patient reported the kiss to law enforcement and her complaint made its way to the Department. A Department investigator interviewed Dr. Lang and he admitted hugging the patient and giving her a "peck on the cheek."

Based on this conduct, the Department alleged that Dr. Lang exercised improper influence in the patient-physician relationship for the purposes of engaging and attempting to engage in sexual activity with the patient in violation of § 459.015(1)(l), Florida Statutes (2019). The Department also concluded that the allegations constituted an immediate, continuing danger to the public. It immediately restricted Dr. Lang's license on an emergency basis, prohibiting him from seeing women patients until a final hearing could be held. Dr. Lang appealed the emergency restriction order (ERO).

II.

Section 120.60(6), Florida Statutes (2019), authorizes a state agency to suspend, restrict, or limit a license if it finds that the licensee presents an "immediate serious danger to the public health, safety, or welfare." *See also* § 456.073(8), Fla. Stat. (2019). The Department is authorized to summarily restrict the license of a health care professional if:

> (a) [Its] procedure provides at least the same procedural protection as is given by other statutes, the State Constitution, or the United States Constitution;

> (b) [It] takes only that action necessary to protect the public interest under the emergency procedure; and
>
> (c) [It] states in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. The [Department]'s findings of immediate danger, necessity, and procedural fairness are judicially reviewable.

§ 120.60(6), Fla. Stat. (2019). In the case of an appeal, the court's review is "limited to evaluating whether the face of an emergency order provides sufficiently detailed allegations." *Sanchez v. Dep't of Health*, 225 So. 3d 964, 966 (Fla. 1st DCA 2017). We will affirm the emergency order if it "amply demonstrate[s] on the face of the order [that petitioner's] continued medical practice would pose an immediate serious danger to public health, safety or welfare." *Field v. Dep't of Health*, 902 So. 2d 893, 895 (Fla. 1st DCA 2005) (quoting *Broyles v. Dep't of Health*, 776 So. 2d 340, 341 (Fla. 1st DCA 2001).

Dr. Lang argues that the ERO is facially insufficient to meet § 120.60(6)'s requirements because the facts don't support its conclusion that his practice poses an immediate danger on the basis that he "engag[ed] a patient in sexual activity." We agree. In order to affirm, the Department's ERO must state "specific facts and reasons for finding an immediate danger to the public health, safety, or welfare." § 120.60(6)(c), Fla. Stat. (2019). The agency's rationale cannot be general or conclusory, but "must be factually explicit and persuasive concerning the existence of a genuine emergency." *Field*, 902 So. 2d at 895 (quoting *Commercial Consultants Corp. v. Dep't of Bus. Regulation*, 363 So. 2d 1162, 1165 (Fla. 1st DCA 1978)).

Here, the ERO alleges that Dr. Lang exercised influence for the purposes of engaging and attempting to engage in sexual activity in violation of § 459.015(1)(l) "by hugging . . . and/or kissing" the patient as she was leaving the office. But the ERO doesn't support its finding of an emergency public danger. In the first alleged incident, Dr. Lang hugged the patient at the end of an

office visit. The patient made no complaint about the hug and returned within two weeks for another appointment. When on the second visit, Dr. Lang kissed the patient on her way out the door, the patient reported that she "was shocked and quickly exited the room." Dr. Lang's surprise kiss clearly offended the patient and caused her to report it. But the ERO doesn't say the patient interpreted his conduct in terms of being either sexual or a public danger. Nor does the ERO provide other details tending to show that Dr. Lang's continued practice presents a danger to public health, safety, or welfare.

We cannot affirm the ERO in the absence of "factually explicit and persuasive [allegations] concerning the existence of a genuine emergency." *Field*, 902 So. 2d at 895 (quoting *Commercial Consultants Corp.*, 363 So. 2d at 1165); *see also* § 120.60(6)(c), Fla. Stat. (2019). Factual allegations "must demonstrate: (1) the complained of conduct is likely to continue; (2) the order is necessary to stop the emergency; and (3) the order is sufficiently narrowly tailored to be fair." *Kaplan v. Dep't of Health*, 45 So. 3d 19, 20–21 (Fla. 1st DCA 2010). "General conclusory predictions of harm are not sufficient . . . ." *Daube v. Dep't of Health*, 897 So. 2d 493, 495 (Fla. 1st DCA 2005); *see also Lawler v. Dep't of Health*, 217 So. 3d 208, 209 (Fla. 1st DCA 2017) (quashing an ERO where the immediate facts were "distressing," but which contained only general and conclusory allegations of future harm). Our cases approving of emergency restrictions for sexually oriented misconduct have contained explicit and persuasive allegations. *See Kruse v. Dep't of Health*, 270 So. 3d 475, 476–77 (Fla. 1st DCA 2019) (alleging sexual comments followed by a forcible grab of the client's buttocks and kiss when she tried to leave); *Sanchez*, 225 So. 3d at 966 (alleging sexual touching under cover of a dental office bib); *Nath v. Dep't of Health*, 100 So. 3d 1273, 1274 (Fla. 1st DCA 2012) (alleging breast- and vaginal area-touching of multiple patients). By contrast, the Department's allegations here describe the emergency in conclusory terms. And so, while the Department may ultimately establish its case at a final hearing, it may not summarily restrict Dr. Lang's license now based on the allegations in the ERO.

Finally, § 120.60(6) authorizes the Department to take emergency action against state licensees "only [as] necessary to

protect the public interest." § 120.60(6)(b), Fla. Stat. (2019). We have disapproved harsh discipline imposed by agencies when less severe remedies are sufficient to stop the alleged harm. *See, e.g.*, *Nath*, 100 So. 3d at 1276; *Machiela v. Dep't of Health, Bd. of Optometry*, 995 So. 2d 1168, 1171 (Fla. 4th DCA 2008). Here, the ERO concluded that only a complete prohibition on Dr. Lang's seeing female patients would protect public safety. There was no additional analysis of available remedies. The Department didn't evaluate, for example, the less harsh remedy imposed by our stay order in this case, which permitted Dr. Lang to continue seeing women patients so long as another medical professional is present. Because the ERO disregarded lesser remedies that appear adequate to address the alleged harm, we also grant the petition on remedy-related grounds.

III.

Because the Department's emergency order is facially insufficient, we GRANT Dr. Lang's petition and QUASH the order under review.

RAY, C.J., and LEWIS, J., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Chanel A. Mosley of Marshall, Dennehey, Warner, Coleman, & Goggin, Orlando, for Petitioner.

Sarah Young Hodges, Chief Appellate Counsel, Florida Department of Health, Tallahassee, for Respondent.