

FILED

July 19, 2012

**NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS**

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS

In the Matter of:

PARVEZ DARA, M.D.
License No. MA33292

**AMENDED SUPPLEMENTAL ORDER
ON COSTS**

This matter was reopened before the New Jersey State Board of Medical Examiners (the "Board") for consideration of the issue of costs to be assessed upon respondent Parvez Dara, M.D. which issue was specifically reserved at the time that we entered our Final Order in this matter both to afford the Attorney General an opportunity to submit a cost application and to allow respondent to submit written objections to any items sought to be recovered as costs by the Attorney General.¹ The matter could not be considered

¹ After announcing terms orally on the record on September 14, 2011, our Final Order filed on October 12, 2011 provided:

Additionally, Respondent shall pay reasonable costs to the State for prosecution of this matter to be assessed after the submission of the State's cost application and any response. Said application was to be submitted in writing by September 24, 2011 and Respondent's written reply to the cost application shall be due October 4, 2011. Respondent's motion for a stay of civil

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as scheduled at the October 2011 meeting due to the lack of a quorum of non-recused Board members and the parties were so advised. Therefore the matter was carried and we deliberated and announced our determination with the specific amount of costs assessed, orally on the record November 9, 2011. The decision regarding costs was also recorded in the Board's public minutes.

Upon review of the multiple submissions made by the parties we determined for the reasons detailed herein not to impose upon respondent \$31,636.50 of the \$403,665.78 in costs sought by the State and that respondent is to be required to pay a total of \$372,029.28 in costs, consisting of the following assessments:

<u>Cost Items</u>	<u>Amount Assessed</u>
Costs of Investigation by the Enforcement Bureau	\$ 15,480.18
Expert Witness Fees	\$ 7,775.00
Transcript Costs	\$ 20,021.60
Attorneys' Fees	\$328,752.50
Total Costs	\$372,029.28

We set forth below a summary of the history of this application

penalties and costs at this time is denied. However, at the time of consideration of the State's application for costs at the October meeting, Respondent may present certified financial records and renew his motion for a stay of the costs and penalties. The Board shall hold open the record in this matter for consideration of the cost submissions. The Board shall consider the matter of costs on the papers at its October 12, 2011 meeting. (Final Order at p. 39).

(limited to submissions made in support of or opposition to the Attorney General's Cost Application) and the reasoning supporting the Order we herein make.

SUMMARY

As set forth in our Final Order this matter was returned to the Board from the Office of Administrative Law (OAL) for review of an Initial Decision of Administrative Law Judge (ALJ) Jeff S. Masin of June 7, 2011. Following review, we ratified in part and amended in part ALJ Masin's determination that Dr. Dara should be assessed "costs of the investigation" as authorized pursuant to N.J.S.A. 45:1-25(d), as we also imposed, with some limited exceptions, costs to the State for prosecuting this matter including attorney, transcript and expert fees.²

We have since received and reviewed multiple submissions from the parties. The Attorney General initially submitted a September 26, 2011 Certification detailing costs sought. Within said Certification, the Attorney General documented costs in the following amounts; \$15,480.18 investigative costs, \$7,975.00 expert witness fees, \$20,021.60 transcript costs and \$359,989.00 in attorneys' fees for a total of \$403,665.78. Respondent submitted opposition to the State's cost submission on October 7, 2011. Respondent's argument focused on objections to the fees sought as

² ALJ Masin was silent as to all other costs to the State for the prosecution of this matter.

excessive and unreasonable. He relied on Poritz v. Stang 288 N.J. Super 217, 221 (App. Div. 1996) which requires a determination as to the reasonableness of claimed costs supported by the development of a record of actual hours spent and tasks performed.

In regard to costs of the investigation respondent specifically objected that daily logs from the investigators providing details of actual hours expended are missing. He also objected to the State's reliance on a "multiplier" in making the assessments. In regard to the expert fees sought respondent found fault with the costs sought for the services of William H. Farrer, M.D. an infectious disease and infection control specialist as he asserted the fees were redundant. He also asserted that fees incurred for the services of a different expert, William V. Harrer, M.D., predated this proceeding and that there is no indication of the services he provided. Additionally, Respondent objected to imposition of the transcript costs and asserted that because the State filed the Exceptions the State should bear the burden of those costs under N.J.S.A. 52:14B-9(e).

Respondent, citing Rendine v. Panzer, 141 N.J. 292 (1995), concentrated the bulk of his arguments on opposing attorneys' fees. He objected to several experienced Deputy Attorneys General (DASG) performing administrative tasks which he believes are more properly performed by attorney assistants or paralegals. He also asserted that billing for two attorneys rather

than one at the more than 25 days of hearings at OAL is not a legitimate basis for recovery and is "unproductive" time. He initially emphasized that a large percentage of the attorney billing for tasks by DASG Krier and Merchant do not contain any contemporaneous narratives or descriptions regarding legal services performed. Essentially he claimed that the State failed to meet its burden of justifying fees through a demonstration of detailed work performed and his Exhibit A is a list of billing entries lacking detailed work descriptions attributed to multiple DASG. He concluded with a statement that the costs are disproportionate and argued that the matter has created extreme financial hardship for respondent. To support a claim of hardship he attaches copies of the first page of respondent's tax returns documenting adjusted gross income of \$564,871, \$964,895, \$1,435,172 and \$365,137 in 2006 through 2009 respectively, with a statement from respondent's accountant that his income since the litigation is almost nonexistent.

On October 11, 2011, the State requested an extension of time to respond to respondent's submission, to which respondent objected. At our October 2011 meeting we did not consider the State's request for an adjournment. It was moot because the Board lacked a quorum to determine the costs application. Therefore, the matter was carried to the regularly scheduled November 2011 meeting and Respondent was so advised.

Thereafter, the Attorney General submitted an October 19, 2011 Reply to Respondent's Opposition. Within that Reply the State supplemented its Cost Application and over Respondent's objection to that aspect of the Reply, in our discretion we accepted the late submission of the Supplemental Cost Certification.

In regard to investigative costs the DAG argued that the Certification of Sandra Murray, a Supervisor at the Division of Consumer Affairs Enforcement Bureau, reflected the actual hours expended and that is what is required under Poritz v. Stang, 288 N.J. Super. At 221. The State asserted that case law does not require the production of a detailed daily description of confidential investigative activities and techniques. We concur. The need for maintaining confidentiality of investigative practices is an important public interest. The State argued the importance of the investigators' daily time sheets is diminished as the Certification reflects the actual hours expended and that the activity conducted was investigation. McClain v. College Hospital, 99 N.J. 346 (1985). Furthermore, the State asserted that respondent is aware of how the investigators' time was utilized as he is in possession of the reports the Enforcement Bureau generated which are in the record and they provide in a narrative form the details of the activities performed by the investigators.

In regard to Expert Costs, the State outlined the services provided by Dr. William H. Farrer, M.D. and conceded that

the mistaken \$200 charge attributed to Dr. William V. Harrer, a different physician, should not be assessed against respondent. Additionally, the DAG argued the cost statute expressly includes transcript costs which are a standard expense in nearly all contested Board cases.

The State countered Respondent's argument regarding attorney's fees by asserting that the hours expended by two DASG were clearly reasonable given the complex scientific and legal issues in the case. Additionally, Respondent was represented by three (3) seasoned attorneys at hearing who vigorously defended the matter, engendering significant legal work in order to respond to the defense. The State emphasized the emergent public safety issues presented by respondent's continued practice and that the Attorney General ultimately prevailed on both Counts. Therefore, the DAG contended the fees generated were reasonable given the magnitude of work performed, the serious nature of the case, and the public safety issues at stake.

In response to respondent's assertion that a significant number of DAG time sheets provided in the September 26, 2011 Cost Application lacked narratives describing the exact legal functions performed, the DAG supplemented her Application with Exhibit C to her Reply to Respondent's Opposition. She included certifications with specific details in narrative form as to the nature of the legal work performed. The narratives supplemented the original

application which included the identity of the DAG who provided the services, the date services were rendered, the amount of time spent, and an activity code describing the nature of the work. She further justified in detail the billings for post OAL functions and explained typographic errors. The DAG supported billings for her co-counsel DAG Merchant in the supplemental narrative as active non duplicative essential services such as preparing and interviewing witnesses, legal research, and conferring and assisting on legal issues which arose during the prosecution of this matter.

In his October 28, 2011 Sur-Reply to the costs and fees sought, respondent's counsel objected to the opportunity the State had to supplement its Certifications. He objected to the billing codes initially employed as merely reflecting a title for the scope of work performed rather than detailing the nature of the work. He objected to the supplementary Certifications of the DASG (which include reconstructed time records) as not contemporaneously recorded. He also objected to the credibility of the reconstructed time sheets, and he argued that 54.3 hours for DAG Merchant and 130.7 hours for DAG Krier should be disallowed because the time records were not supplemented with narratives in the subsequent Certification. Finally, he objected to the overall reasonableness of specific tasks detailed in the narrative performed by each DAG on specifically enumerated days.

DISCUSSION

We have now reviewed and considered all the submissions of the parties concerning costs. We find, with three (3) exceptions detailed below, the application as supplemented to be sufficiently detailed to permit our conclusion that the bulk of time spent, and the overall fees sought to be objectively reasonable as well. (See, Poritz v. Stang, 288 N.J. Super 217 (App. Div. 1996) and the Rules of Professional Conduct.)

We determined to consider the State's Supplemental Cost Certifications in part because the receipt of the submission did not engender delay. Importantly, we also relied on the public policy favoring costs being borne by respondents' in contested cases when the State prevails. We are cognizant that N.J.S.A. 45:1-25(d) is remedial in nature and should be construed liberally to achieve its purposes. Enforcement of the cost statute encourages settlement which conserves State resources. It also provides for reimbursement to the State for expenditures created due to the proceedings which led to findings of Respondent's gross negligence and misconduct resulting in an outbreak of Hepatitis C stemming from myriad substandard infection control protocols in his oncological practice. As we have stated many times in the past, if the individual licensee who is found in violation of Board statutes does not compensate the State for these costs, they are inappropriately passed on to the licensure pool of physicians in the form of heightened licensure fees which fund Board operations.

For all of these reasons we determined to consider the State's Supplemental Cost Certification.

We find the portion of the State's application for investigative costs is appropriately supported by a Certification of the Supervising Investigator. The Supervisor has personal knowledge of the investigative activities undertaken by the Bureau's staff and bases her certified statements on a review of their daily activity logs. We decline to require the production of investigators' daily activity logs which reveal confidential investigation techniques. Release of those activity logs would make public investigative techniques and hamper future investigatory actions thereby putting the public at risk.

Furthermore the overall amount of the investigative time expended over the pendency of the matter is very reasonable for investigative services in a matter of this urgency and magnitude. There was a public health crisis due to the significant outbreak of Hepatitis C in Respondent's oncological practice. The information the investigators discerned aided the State in its effort to stem the further spread of the outbreak by identifying Respondent's office as the source.

We have also considered and find that the rates charged, for the Enforcement Bureau Services (from \$79 to \$110 per hour) to be reasonable, and take notice that we have approved the rate of investigative fees, many times in the past, as properly based on

salaries, overhead and the cost of state employees. Relying on the Certifications of Sandra Murray, Acting Supervisory Investigator, and June Levy, Assistant Director of the Division of Consumer Affairs and Chief Fiscal Officer of the Division, we reject respondent's assertion that the "multiplier" is inappropriate. If the fees were not computed in this matter the cost to investigate an outbreak of Hepatitis C stemming from Respondent's office would be passed on to all licensees through licensing fees which must by statute support all Board activities. Considering the important state interest to be vindicated, protection of the public, (which in this case includes vulnerable cancer patients) the investigative costs imposed herein are certainly reasonable.

Similarly, in regard to imposition of attorneys' fees for the prosecution of this matter, we find that the Attorney General's Certification as supplemented with supporting exhibits, extensively documented, with limited exceptions, the time the attorneys expended in these proceedings. The State provided details in support of the application with additional information in the form of narratives reconstructing the manner in which the time billed was spent. The fact that the narratives were not contemporaneously drafted did not diminish their value sufficiently to eliminate their consideration. The Attorney General's Certification was supported by the time sheets of primarily the two DASG who prosecuted this case. There were 14 additional individuals, both

attorneys and para professionals from the Division of Law who provided some limited services in furtherance of the prosecution of this highly complex case. A chart documenting their work appears on page 16 of DAG Krier's Certification.

We reject respondent's argument that the time expended by two DASG at the OAL is unreasonable or that attorney time spent on functions paralegals could accomplish should be disallowed. We decline to hamstring legal strategies and we recognize that the work environment in government agencies often requires attorneys to perform administrative tasks. We are also cognizant of the emergent nature of the proceedings at issue and the need for the State to devote considerable efforts and legal staff time toward stemming a health crisis. We therefore impose the attorneys' fees sought with the limited exception set forth below. We herein assess attorneys' fees upon respondent in the amount of \$328,752.50.

However, we decline to impose attorneys' fees in certain limited instances where the information provided was not sufficiently detailed so that we could assess the reasonableness of the tasks performed. Therefore, we have denied 54.3 hours sought for DAG Merchant at \$135.00 an hour for a total of \$7,330.50 and 130.7 hours at \$155.00 an hour for DAG Krier for a total of \$20,258.50. We also decline to impose costs for 28.5 hours of legal work sought for June 29, July 1, 2, 7 and 27 of 2011 for a

total of \$3,847.50 as there is not sufficient detail demonstrated for those limited entries. Therefore due to lack of information necessary for us to make a determination as to the reasonableness of the time allocated for those specific days, we decline to impose a total of \$31,436.50 of the attorneys' fees sought.

Aiding us in our determination regarding attorneys' fees was information derived from a memorandum by Nancy Kaplan, AAG, then Acting Director of the Department of Law and Public Safety, detailing the uniform rate of compensation for the purpose of recovery of attorneys' fees established in 1999 and amended in 2005, setting the hourly rate of a DAG with 5 to 10 years of legal experience at \$155.00 per hour and a DAG with 0 to 5 years at \$135.00 an hour. We are aware the rates charged have been approved many times by us and in prior litigated matters and appear to be well below the community standard. Moreover, we find the Certification attached to the billings along with the supplementary Certifications to be sufficient except in the instances already noted.

We impose full transcript costs of \$20,021.65. Transcripts establish the record of the hearing in order for the Board to consider the ALJ's Initial Decision whether or not exceptions are filed. The transcripts are also necessary for any future appeal or proceeding. This cost should not be passed on to the general licensure pool but instead be recouped from respondent

whose conduct gave rise to the need for the expense. We also impose expert fees of \$7,775.00 which reflects a \$200.00 reduction for the fee charged by Dr. William V. Harrer mistakenly included in the application. We find the expert fees were essential to the prosecution of the case which hinged on scientific expertise. Recoupment of expert fees is authorized by statute and justified as the State prevailed on both Counts. Respondent should bear these costs along with the transcript costs which are a routine expense of the litigation.

In sum, after a searching review and lengthy deliberations we are satisfied that as to the attorneys' fees we are assessing, the record adequately details the tasks performed and the amount of time spent on each by the DASG (to include but not be limited to investigation, research, drafting, discovery, negotiations, motions, affidavits and briefs, preparation of experts and exhibits for trial, trial presentation, and post hearing brief with appendix). We find the tasks performed, while time-consuming, needed to be performed and that in each instance we awarded costs, the time spent was reasonable. We find the Attorney General has adequately documented the legal work necessary to advance the prosecution of this case. We are thus satisfied that the Attorney General's claims are reasonable especially when viewed in the context of the seriousness and scope of the action maintained against respondent. (See, Poritz v. Stang, 288 N.J.

Super 217 App. Div. 1996). We further find respondent's assertions of an inability to pay such costs not to be persuasive. The remarkably substantial income asserted over many years (almost one and half million dollars in one year alone) and notably absent proof of any kind regarding assets, is utterly unconvincing as a demonstration of hardship.

In considering the issue of costs to be imposed we are mindful that we greatly reduced the civil penalty that could be lawfully imposed to \$30,000.00. This sum was far less than the maximum of over \$500,000.00 in penalties that could have been ordered based on the number of infection control breaches found to have occurred in respondent's office or the number of patients infected as a result of those breaches.³ In reaching a determination to impose a lower civil penalty, we took into account that respondent would bear the costs of the prosecution of this matter.

Therefore, we find pursuant to N.J.S.A. 45:1-25, as announced orally on the record November 9, 2011, the State is awarded the portion of attorney's fees and expert fees indicated above and we further determine that the State should be awarded all transcript costs and costs of investigation.

³ N.J.S.A. 45:1-25 provides that the civil penalty shall not be more than \$10,000.00 for the first offense and \$20,000.00 for each subsequent violation found, including multiple violations within a single proceeding.

IT IS THEREFORE, ON THIS 19 DAY OF July 2012

NUNC PRO TUNC NOVEMBER 9, 2011

ORDERED THAT:

Respondent Dara is hereby ordered within 30 days of the date of the service of this Order, to pay costs incurred by the State pursuant to N.J.S.A. 45:1-25 in the amount of \$328,752.50. The costs shall be paid by means of a certified check or money order payable to the State of New Jersey and submitted to the Board of Medical Examiners, 140 East Front Street, 2nd Floor, Trenton, New Jersey 08608. Respondent may petition the Board for an installment payment plan. If an installment plan is granted, interest shall be assessed and will be set at a rate consistent with the New Jersey Court Rules (See, R. 4:42-11). In the event any payment due is not timely made, a Certificate of Debt may be filed as well as such other proceedings permitted by law including proceedings for collection.

NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS

BY: 

PAUL JORDAN, M.D.
Board President