

Nunc Pro Tunc April 13, 2016

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS
OAL DKT. NO. BDS 10502-14

In the matter of:

MONICA R. MEHTA, M.D.
License No. 25MA03398400

FINAL ORDER ADOPTING IN
PART, AND MODIFYING IN
PART, INITIAL DECISION

Overview

This matter was returned to the New Jersey State Board of Medical Examiners (the "Board") upon the Board's receipt of a recommended Initial Decision ("ID") dated January 28, 2016 by A.L.J. Joanne Candido.¹ Therein, ALJ Candido recommended that the Board dismiss nearly all of the charges filed against Dr. Mehta in two separate administrative complaints (denominated respectively as Complaint II and Complaint III in the ID), which had been consolidated and tried jointly below, with the sole exception that Dr. Mehta be found to have violated N.J.S.A. 45:1-21(d) by failing to keep the procedure room at her office facility (the Pain and Disability Institute, "PDI") sterile, allowing numerous unsanitary conditions to exist at her office premises, and by failing to timely discard items to include expired medications, open vials containing medication and expired epidural trays (see ID, p. 32).

¹ The ID was received by the Board on February 8, 2016.

Based thereon, ALJ Candido recommended that Dr. Mehta be assessed a civil penalty of \$15,000 and 10% of the costs of investigation and prosecution of both matters.

Following review of the record below, and consideration of filed written exceptions and oral arguments of counsel offered before the Board on April 13, 2016, we have concluded that cause exists to adopt the vast majority of findings of fact and conclusions of law made by ALJ Candido in the ID. For the reasons set forth below, however, we have decided to modify the ID to specifically find and conclude that Dr. Mehta engaged in "repeated acts of negligence," rather than "negligence." We also specifically decline to reach, and thus do not adopt, the portion of the ID that analyzed the issue whether Dr. Mehta would be absolved from liability based on a defense that she relied on the advice of her counsel. Finally, after balancing the specific findings made, Dr. Mehta's disciplinary history before this Board and the mitigation testimony offered during the penalty phase hearing (also held before the Board on April 13, 2016), we modify the recommended sanctions against Dr. Mehta to specifically add a formal public reprimand for engaging in repeated acts of negligence, and to increase the penalty and cost assessments to \$20,000 and 25% of all costs respectively. We set forth below in greater detail the procedural history of this matter and the basis for the determinations set forth herein.

Procedural History

Initially, we note that the procedural history of this matter, through January 28, 2016, is recounted in the ID, and that recitation is adopted and incorporated herein by reference. In the ID, ALJ Candido found that Dr. Mehta did not make an untrue statement of fact when she testified before the Board on July 10, 2013 (during a mitigation hearing held in a prior matter, referred to as "Complaint I" within the ID) that her office premises, PDI, were accredited by the Joint Commission. Based thereon, ALJ Candido concluded that all charges made in "Complaint II" (specifically, charges that Dr. Mehta violated N.J.S.A. 45:1-21(b), 45:1-21(e) and/or 45:9-6) should be dismissed. ALJ Candido further concluded that Dr. Mehta was, "in any case," "entitled to rely on the advice of counsel to make this representation." (ID 32).

With regard to Complaint III, ALJ Candido concluded that the Attorney General failed to prove allegations that Dr. Mehta engaged in repeated acts of negligence, professional misconduct or that she aided and abetted the unlicensed practice of medicine by authorizing medical assistants, who were not licensed as Radiologic Technologists, to utilize the C-arm x-ray machine in connection with interventional procedures on patients. ALJ Candido sustained charges that Dr. Mehta violated N.J.S.A. 45:1-21(d) generally by

failing to ensure that office conditions at PDI were sterile.² Finally, ALJ Candido recommended that the Board assess a civil penalty of \$15,000 based on Dr. Mehta's violation of N.J.S.A. 45:1-21(d), and that Dr. Mehta be held responsible for ten percent of the costs and fees arising from the investigation and prosecution of the administrative proceeding. ALJ Candido specifically commented that the recommended cost assessment had been reduced because Dr. Mehta had to defend against the serious charges of misrepresentation.

Following the issuance of the ID, both parties filed written exceptions to ALJ Candido's decision with the Board. Within the Attorney General's exceptions dated February 5, 2016, Senior Deputy Attorney General Joan Gelber urged the Board to: 1) reverse the dismissal of Complaint II, and instead find that "Dr. Mehta's boast to the Board of having Joint Commission accreditation" constituted a material misrepresentation or material

² Specifically, ALJ Candido found as follows:

I CONCLUDE that the complainant has not proven that Dr. Mehta committed professional misconduct or malpractice. However, I CONCLUDE that respondent committed negligence. I find that Monica Mehta, M.D. violated N.J.S.A. 45:1-21(d) when she failed to keep PDI's procedure room sterile. Her negligence was found in the fact that the procedure room was not dust free; there was an observable dead insect that she failed to discard; and respondent failed to timely discard expired medications and open vials containing medication. There were expired epidural trays. She further failed to provide soap and towels for the patients and she failed to maintain a clean pillow, free from visible stains. These unsanitary conditions affected the safety of her patients.

ID, p. 32.

omission; 2) reverse the ALJ's suggestion that Dr. Mehta could have relied her attorney's advice "that she could affirmatively assert the Joint Commission certification while withholding the Preliminary Denial status,"; 3) overturn ALJ Candido's failure to have imposed a license sanction or an appropriate penalty for the unsanitary and unsafe conditions, including expired drugs, found by the Joint Commission and by the Enforcement Bureau³; and 4) amend the ID to impose a sanction and penalty for Dr. Mehta's having allowed an unlicensed person to manipulate the C-arm while procedures were performed.

Respondent, through her counsel Keith J. Roberts, Esq., filed written exceptions dated February 16, 2016. Therein, Mr. Roberts urged the Board to adopt the vast majority of ALJ's Candido's findings, conclusions and recommendations, but urged that the Board reject the conclusion that Dr. Mehta violated N.J.S.A. 45:1-21(d). Mr. Roberts argued that the specific concerns identified by the Joint Commission and/or the Enforcement Bureau should not have been found to support claims of negligence, and were materially dissimilar from and far less egregious than the sorts of actions which the Board has found in other cases to constitute repeated acts of negligence and/or gross negligence. Mr. Roberts also urged the Board to find that Dr. Mehta

³ S.D.A.G. Gelber further urged the Board to find that the unsanitary conditions found on two inspections, the expired medications found in both inspections and the lack of emergency medications and equipment constituted "gross negligence."

expeditiously addressed issues regarding the positioning of the C-arm by an unlicensed person when it was brought to her attention by the DEP, and to correct a misstatement in the ID regarding testimony offered by Alexander Weingarten, M.D.⁴

Consistent with Board practice, this matter was scheduled for oral argument before the Board on April 13, 2016, and for a mitigation hearing.⁵ Senior Deputy Attorney General Joan D. Gelber appeared for Complainant Attorney General, and Keith J. Roberts, Brach Eichler, L.L.C., appeared for respondent Monica Mehta, M.D. The Board was counseled in this matter by Senior Deputy Attorney General Steven N. Flanzman.

After announcing our decision to adopt in part and modify in part the findings of fact and conclusions of law within the ID

⁴ Respondent also sought and was granted leave to file a reply brief, which was received on March 3, 2016. Mr. Roberts therein addressed points raised in the Attorney General's exceptions, urged the Board not to disturb ALJ Candido's recommendations as applied to Complaint II, and not to impose any penalties beyond those recommended by ALJ Candido as to Complaint III.

⁵ The matter had initially been scheduled to be heard on March 9, 2016, however we granted respondent's counsel's request to adjourn the case until it could be heard before the Board on April 13, 2016 because of his scheduling conflict involving a Superior Court Order to Show Cause application in another matter. An Order of Extension was thereafter entered by the OAL, extending the time limit for the Board to enter a Final Decision whether to adopt, reject or modify ALJ Candido's Initial Decision through May 9, 2016.

Prior to the hearing, the parties were advised that the Board would bifurcate proceedings, first allowing each side a limited opportunity to supplement their written exceptions with oral argument of counsel, and that following oral argument, the Board would determine whether to adopt, reject or modify the ID. Additionally, the parties were specifically advised that if any charges of misconduct were sustained, a penalty phase hearing would immediately follow.

(see discussion below), we held a hearing on penalty at which time Dr. Mehta was afforded an opportunity to present mitigation witnesses and testimony. Joan Balducci, a health care consultant who Dr. Mehta hired in September 2013, testified about the efforts she had made to address and remediate issues of concern which had been identified in the Joint Commission survey, to include concerns regarding the cleanliness of the office and concerns about failure to dispose of expired medications. Ms. Balducci testified generally regarding the measures she has implemented at PDI to address those "deficiencies," to include the development of new policies, monthly inspections of the facility and monthly checks to assure that drugs on premises are not expired.

Dr. Patrick McGovern, a vascular surgeon who has known Dr. Mehta for twenty years, testified generally that he believed Dr. Mehta to be a competent physician. Dr. McGovern based his opinion on the fact that patients that Dr. Mehta has referred to him all appear to have had appropriate work-ups and on the fact that all of the patients were proper candidates for referral, and noted that he was particularly impressed by the fact that Dr. Mehta personally calls ahead of time to discuss referred patients.

Dr. Mehta then offered her own testimony, to include testimony about what occurred at the time of the Joint Commission and Enforcement Bureau inspections, and her efforts to make sure that her one room center is now in compliance with all board

regulations and requirements, to include her employment of Ms. Balducci as a compliance officer. Dr. Mehta also testified about courses that she has taken in ethics and record keeping to address Board concerns. Finally, Dr. Mehta acknowledged making errors in the past.

Board Determinations

Findings of Fact

Initially, we point out that there is little that is factually disputed. Underscoring that point, neither party filed specific exceptions directly challenging the proposed findings of fact in the ID, other than respondent's lone exception (Point IV in exceptions brief) urging that we modify the statement at page 9 that Dr. Weingarten stated "it is not proper for a medical assistant to move the C-arm." We have reviewed the transcript below and agree that Dr. Weingarten did not make that statement; rather, he testified that it would be within the domain of a medical assistant to move the C-arm for simple procedures. Dr. Weingarten qualified his testimony by noting that the medical assistant should not turn the machine on to activate ionizing radiation, and that a radiation technician should be used for more complicated procedures. While we will modify the ID to conform to the above testimony, we point out that we did not find Dr. Weingarten's testimony dispositive. Rather, the legality of Dr.

Mehta's use of a non-licensed medical assistant to move the C-arm of an x-ray machine is a question of New Jersey law alone, controlled by relevant statutes and regulations.⁶

Conclusions of Law

While the facts of what occurred are not disputed, the parties each vigorously contest ALJ Candido's analysis whether those facts support the charges that were made against Dr. Mehta. Following our independent review of the record below, we have concluded that good cause exists to adopt the vast majority of the conclusions of law made by ALJ Candido, with the sole exception that we modify the ID so as to explicitly find and hold that the conduct which was cited as support for the conclusion that Dr. Mehta engaged in "negligence" should instead be cited to support a conclusion that Dr. Mehta engaged in "repeated acts of negligence."⁷ In the ID, ALJ Candido specifically found that the "unsanitary conditions" present at PDI "affected the safety of [Dr.

⁶ We also note that the sentence appearing as the 2nd full paragraph on page 30 should state that complainant alleges that respondent "aided and abetted," rather than "engaged in", the unlicensed practice of medicine.

⁷ It may be the case that ALJ Candido intended to consider the specific acts of negligence enumerated in the ID to have, in the aggregate, constituted "repeated acts of negligence," given the specific statement found at the end of p. 31 that "each violation" of N.J.S.A. 45:-21(d) is considered a separate violation subject to a civil penalty of not more than \$20,000 for each violation." Nonetheless, given that no specific finding and/or conclusion was made in the ID that Dr. Mehta's conduct constituted "repeated acts of negligence," we conclude that it is appropriate to make that specific modification to the ID for the reasons set forth above.

Mehta's] patients." ID, p. 32. Applying our collective medical expertise, we fully concur. The squalid conditions found at PDI could have exposed Dr. Mehta's patients to substantial risk of infection. Dr. Mehta's failure to maintain necessary emergency equipment in the procedure room, to include her failure to have non-expired epi-pens available, had the clear potential to expose her patients to substantial risk of harm.

We conclude that a finding of "repeated acts of negligence" is supported because Dr. Mehta allowed numerous filthy conditions to exist at her office. Dr. Mehta also allowed conditions to exist which, while not "unsanitary," could have compromised patient care. We conclude that Dr. Mehta could have been found to have engaged in "negligence" based on any single finding made below, but clearly engaged in "repeated acts of negligence" based on the myriad findings of individual negligent actions (or non-actions) which were made.

Additionally, we specifically conclude that Dr. Mehta should have been found to have engaged in "repeated acts of negligence" because the unsanitary office conditions at PDI were found to exist not on a single inspection, but rather on two distinct inspections conducted four weeks apart. We thus suggest that it was incumbent upon Dr. Mehta, after she received notice of the findings made by the Joint Commission, to have taken immediate

measures to address the identified concerns. The record below, however, demonstrates that Dr. Mehta did not do so, as evidenced by the independent findings made by the Enforcement Bureau on July 23, 2013 of dirty office conditions, continued maintenance of expired medications and the continued absence of emergency equipment and medications.⁸

With regard to the allegations made in Complaint II, we adopt ALJ Candido's conclusion that Dr. Mehta did not violate N.J.S.A. 45:1-21(b), or other provisions of statute alleged below, when testifying before the Board on July 11, 2013. While we point out collectively that we are of the opinion that Dr. Mehta could have chosen to volunteer additional information regarding the recent survey by the Joint Commission when she testified, and then disclose what occurred a scant two weeks before (an observation

⁸ We adopt the remainder of ALJ Candido's conclusions to dismiss other charges made against Dr. Mehta in Complaint III, based on the record below. While we have thus elected to adopt the recommended conclusion of law that Dr. Mehta did not aid and abet the unlicensed practice of medicine by using a medical assistant to operate the C-arm of the x-ray machine, we point out that in doing so we are not concluding that such conduct -- whether penalized by the DEP or not - could not in other circumstances be found to provide basis for disciplinary sanction under 45:1-21(n), notwithstanding Judge Candido's observation that 45:1-21(n) "prohibits activities that require a Board license, not activities that require a DEP license." Rather, because there is an obvious overlap of functions, we point out that such a charge could be supported in future cases, depending on the specific facts and circumstances of such cases. On the record in this case, however, we are satisfied that Dr. Mehta's payment of a fine to the DEP, coupled with her subsequent effort to remediate concerns by hiring a properly licensed radiologic technician to operate the x-ray machine, militates against imposing any penalties against her.

made even more compelling by the recognition that Dr. Mehta was not compelled to offer any testimony concerning the Joint Commission accreditation of PDI, but instead made a voluntary election to do so in the context of the mitigation hearing)⁹, we decline to conclude that her failure to have done so -- when answering the one question asked of her during the hearing regarding this issue¹⁰ --

⁹ We thus point out for the record that we continue to harbor a collective sense of unease with the manner in which Dr. Mehta's testimony was presented, perhaps best describing her testimony as a "half-truth." Further, even assuming that Dr. Mehta had been advised by her counsel that the Board was already aware of the issuance of the Preliminary Denial of Accreditation, once it became apparent in the context of the hearing that the Board was not in fact aware of the Joint Commission inspection, we question whether it was appropriate for her to have continued to remain silent and not address the survey findings.

Similarly, we remain concerned that Dr. Mehta provided the Board with "evidence" of accreditation that we now know (based on what was established below) was not a formal "certificate," but instead a print-out from an internet page from the website "qualitycheck.org" [a consumer search engine operated by the Joint Commission as a source for consumers to obtain information regarding Joint Commission accredited health care organizations in the United States (see P-23)]. Significantly, that document was offered on July 10, 2013 even though it included information which clearly was not true on July 10, 2013 -- namely, the statement that the last on-site survey date was January 29, 2013. In fact, the last on-site survey had occurred six months later on June 27, 2013, and the exhibit offered should have identified that fact.

Notwithstanding all the identified concerns, however, we have elected, balancing all of the evidence presented, to sustain and adopt ALJ Candido's determination to dismiss the charges within Complaint II, because the record below establishes that PDI remained "accredited," in the view of the very entity which issued the accreditation, on the date that Dr. Mehta testified before the Board.

¹⁰ The only testimony which Dr. Mehta offered regarding the accreditation of PDI was as follows:

Keosky: And with regard to the type of work that you perform [at PDI], did you recently get accreditation or apply for accreditation from the Joint Commission?

was an act of purposeful misrepresentation. As recognized by ALJ Candido, Kathleen Pankau, Senior Legal Counsel to the Joint Commission, affirmatively stated in writing on August 9, 2013 that "an organization placed in an expedited Preliminary Denial of Accreditation is still considered accredited until a final decision to deny is made," see P-23 below. Accepting that proposition - unrebutted below - as the "official" position of the Joint Commission, PDI was considered "accredited" on July 11, 2013. Dr. Mehta's limited testimony regarding the facility's accreditation status was not untruthful.

Because we have elected to sustain the recommended findings made to dismiss the charges in Complaint II, we find the portion of the ID that analyzes the question whether Dr. Mehta could have properly relied on the advice of counsel to be *dicta*. We specifically decline to reach, and thus do not specifically adopt, the portions of the ID addressing that issue.

Mehta: On, we got - yes, I started my office base surgery facility, one room surgery facility which does not require accreditation but I did do that accreditation so at least I have one in my facility. It is not required to have it. I actually wanted to have that. It is not a requirement for that.

See P-5, Transcript of July 10, 2013 hearing, p. 42:17 - 42:24.

Penalty

Finally, on the question of penalty, ALJ Candido did not recommend that Dr. Mehta receive any specific disciplinary sanction (that is, a specific sanction apart from a monetary penalty or cost assessment). We reject that recommendation, and instead unanimously conclude that the imposition of a formal reprimand is fully supported and warranted in this case, based on the conduct found below. By allowing numerous filthy, unsanitary conditions to fester at PDI - indeed, in the very room where procedures were performed - Dr. Mehta engaged in repeated acts of negligence which could have compromised patient care and exposed patients to risk of harm. She thereafter failed to timely correct or remediate those conditions, even after advised of the concerns in writing by the Joint Commission on June 23, 2016.

In addition to a reprimand, we are unanimously of the opinion that Dr. Mehta's conduct fully supports an assessment of the maximum civil penalty allowable under the Uniform Enforcement Act, and thus have elected to enhance the civil penalty assessment recommended in the ID from \$15,000 to \$20,000 (maximum allowable for a second offender for a single violation).¹¹

Finally, on the question of costs, we agree generally that Dr. Mehta should not be required to bear all of the costs of

¹¹ We decline, however, to attempt to parse the findings made in this conduct based on each of the identified concerns that had been made below, and instead elect, as did ALJ Candido, to impose a single penalty of \$20,000.

the prosecution of this case, given our decision to affirm the dismissal of the charges within Complaint II and given that the State did not prevail on the entirety of charges made within Complaint III. We are, however, convinced that the findings that we made of violations related to the charges in Complaint III are significant and substantial, and support an aggregate cost award in excess of 10%. Taking the entirety of the record below into consideration, to include factoring of mitigation testimony offered, we conclude on balance that Dr. Mehta should be responsible for 25% of all costs in this matter. As we note that the attorney fee application submitted did not include fees incurred subsequent to November 30, 2015, we will allow the Attorney General fifteen days from the date of the hearing (specifically, through and including April 28, 2016) to submit a supplemental certification of costs and fees, to cover any additional costs or fees incurred between November 30, 2015 and April 13, 2016. Respondent will thereafter be afforded a fifteen day period to submit, in writing, any specific objections she may have to the fee application.¹² We will then review the fee application and any additional written submissions that may be filed by the parties at a subsequent Board meeting (said review to

¹² If respondent does submit written objections to the fee application, the Attorney General will thereafter be afforded an additional fifteen day period to submit an additional written response.

be on the papers alone), and enter a supplemental Order setting the amount of any fee award.

WHEREFORE it is on this ~~28th~~ day of April, 2016

ORDERED, nunc pro tunc April 13, 2016

1. The Initial Decision of ALJ Candido in this matter is adopted in part and modified in part, specifically as delineated above.

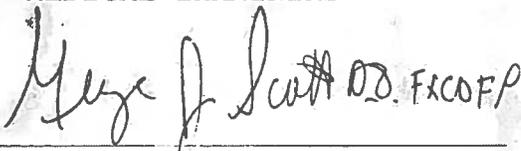
2. Respondent Monica Mehta, M.D., is formally reprimanded for having engaged in repeated acts of negligence, for the reasons set forth above.

3. Respondent Monica Mehta, M.D. is assessed a civil monetary penalty in the amount of \$20,000, which payment shall be due and owing in full within ten days of the date of filing of this Order. Payment shall be made by certified check, bank check or money order (or any other form of payment acceptable to the Board). In the event payment is not timely made, a certificate of debt shall be filed in accordance with N.J.S.A. 45:1-24, and respondent may be subject to such other actions as may be authorized by law.

4. Respondent Monica Mehta, M.D., is assessed an aggregate total of 25% of all costs and fees incurred in the investigation and prosecution of this matter. A supplemental Order, setting the precise amount of all such costs and fees, shall be entered following Board review of the Attorney General's full fee application and of any written objections that may be submitted

thereto by respondent, in accordance with the specific procedure set forth above.

NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS

By:  George J. Scott, D.O., D.P.M.
Board Vice-President

NOTICE OF REPORTING PRACTICES OF BOARD
REGARDING DISCIPLINARY ACTIONS

Pursuant to N.J.S.A. 52:14B-3(3), all orders of the New Jersey State Board of Medical Examiners are available for public inspection. Should any inquiry be made concerning the status of a licensee, the inquirer will be informed of the existence of the order and a copy will be provided if requested. All evidentiary hearings, proceedings on motions or other applications which are conducted as public hearings and the record, including the transcript and documents marked in evidence, are available for public inspection, upon request.

Pursuant to 45 CFR Subtitle A 60.8, the Board is obligated to report to the National Practitioners Data Bank any action relating to a physician which is based on reasons relating to professional competence or professional conduct:

- (1) Which revokes or suspends (or otherwise restricts) a license,
- (2) Which censures, reprimands or places on probation,
- (3) Under which a license is surrendered.

Pursuant to 45 CFR Section 61.7, the Board is obligated to report to the Healthcare Integrity and Protection (HIP) Data Bank, any formal or official actions, such as revocation or suspension of a license (and the length of any such suspension), reprimand, censure or probation or any other loss of license or the right to apply for, or renew, a license of the provider, supplier, or practitioner, whether by operation of law, voluntary surrender, non-renewability, or otherwise, or any other negative action or finding by such Federal or State agency that is publicly available information.

Pursuant to N.J.S.A.45:9-19.13, if the Board refuses to issue, suspends, revokes or otherwise places conditions on a license or permit, it is obligated to notify each licensed health care facility and health maintenance organization with which a licensee is affiliated and every other board licensee in this state with whom he or she is directly associated in private medical practice.

In accordance with an agreement with the Federation of State Medical Boards of the United States, a list of all disciplinary orders are provided to that organization on a monthly basis.

Within the month following entry of an order, a summary of the order will appear on the public agenda for the next monthly Board

meeting and is forwarded to those members of the public requesting a copy. In addition, the same summary will appear in the minutes of that Board meeting, which are also made available to those requesting a copy.

Within the month following entry of an order, a summary of the order will appear in a Monthly Disciplinary Action Listing which is made available to those members of the public requesting a copy.

On a periodic basis the Board disseminates to its licensees a newsletter which includes a brief description of all of the orders entered by the Board.

From time to time, the Press Office of the Division of Consumer Affairs may issue releases including the summaries of the content of public orders.

Nothing herein is intended in any way to limit the Board, the Division or the Attorney General from disclosing any public document.