

**State Board of Medical Examiners
Open Disciplinary Minutes**

May 14, 2003

A meeting of the New Jersey State Board of Medical Examiners was held on Wednesday, May 14, 2003 at the Richard J. Hughes Justice Complex, 25 Market Street, 4th Floor, Conference Center, Trenton, New Jersey for Disciplinary Matters Pending Conclusion, open to the public. The meeting was called to order by Mr. Farrell, Vice-Chairperson for Open Disciplinary Matters.

PRESENT

Board Members Criss, Farrell, Haddad, Huston, Lucas, Moussa, Perry, Robins, Rokosz, Trayner, Wallace, Walsh and Weiss

EXCUSED

Board Members Chen, Desmond, Harrer, Patel and Ricketti

ALSO PRESENT

Assistant Attorney General Joyce, Deputy Attorney Generals Dick, Ehrenkrantz, Flanzman, Gelber, Levine, and Warhaftig, Executive Director Roeder and Medical Director Joseph Gluck.

RATIFICATION OF MINUTES

The Board Minutes, upon motion made and seconded, voted to table approval for the April 9, 2003 Open Disciplinary Minutes.

HEARINGS, PLEAS, RETURN DATES, APPEARANCES

OLD BUSINESS

**1. PATEL, Chandrakant, M.D., License #37166
FRUCHTMAN, Susan, Esq., for Respondent
EHRENKRANTZ, Kay R., D.A.G., for Complainant**

Enclosed were the Interim Consent Order filed June 12, 2002 and Ms. Fruchtmann's letters of April 10 and 15, 2003, requesting Board approval for Dr. Patel to take the SPEX examination. D.A.G. Ehrenkrantz informed the Administrative Office of the Board that permission was given by Board President Harrer for Dr. Patel to take the SPEX exam as long as the Board would receive contemporaneous notice of his results and assurance that Dr. Patel himself takes the exam without assistance.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO APPROVE DR. PATEL TO TAKE THE SPEX EXAMINATION.

**2. FINALIZATION OF PROVISIONAL ORDERS OF DISCIPLINE
BROWN, Joyce, D.A.G.**

D.A.G. Brown submitted the enclosed May 5, 2003 letter to the Board concerning Provisional Orders of Discipline (PODs) filed with respect to each of the six physicians listed below. Each matter was subject

to finalization 30 days after issuance and no responses have been received. Enclosed were Executive Director Roeder's Affidavits of Service with respect to each physician. The Attorney General was seeking the entry of Final Orders of Discipline Without Modification for each of the physicians listed below.

1. **AQUI, Wilfredo, M.D.** - POD filed on 8/15/02
2. **FLEISCHMAN, Erik, D.O.** - POD filed on 7/23/98
3. **SHEEN, Eun Ho, M.D.** - POD filed on 3/7/03
4. **SARAYBA, Alberto, M.D.** - POD filed on 3/7/03
5. **SHIM, Jung Sup** - POD filed on 2/9/00
6. **SHINDER, Arnold, M.D** - POD filed on 7/26/02

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO APPROVE THE FILLING OF THE FINAL ORDERS OF DISCIPLINE WITHOUT MODIFICATION FOR EACH OF THE PHYSICIANS LISTED ABOVE.

**3. ZAHL, Kenneth, M.D. (Counseling Deputy: FLANZMAN)
JACKSON, John Zen, Esq. for Respondent
HARPER, DOUGLAS J., D.A.G. for Complainant**

Dr. Perry and Dr. Lucas were recused from this matter.

The issue regarding the amount of costs that were to be assessed in this matter was adjourned from the Board's March 12, 2003 meeting to afford the parties additional time to provide submissions detailing the costs sought, and then adjourned from the Board's April 9, 2003 meeting. Again enclosed for Board consideration were the Certification of Costs filed by the Attorney General dated March 7, 2003 and Certification of Costs (Supplemental) filed March 26, 2003; Mr. Jackson's March 24, 2003 letter with comments and concerns regarding both the initial Certification of Costs and the Certification of Costs (Supplemental); and D.A.G. Harper's April 2, 2003 letter memorandum with attachments in support of the Administrative Law Judge's determination that costs in general be assessed, in opposition to Dr. Zahl's objections to date.

Also enclosed were D.A.G. Harper's Second Supplemental Certification of Costs with Volumes I through III of attorney time records in support thereof; filed April 28, 2003; Third Supplemental Certification of Costs filed May 2, 2003; and Mr. Jackson's May 2, 2003 letter in continued opposition and response to the Supplemental Certification and Costs Submission forwarded by D.A.G Harper.

As the Board was aware, the Board issued and filed the enclosed Order on Application for Stay pending appeal denying the request for stay of enclosed Final Order of Revocation filed April 3, 2003. Since the Board's denial of the stay the Board received the enclosed Order of the Appellate Division of the Superior Court of New Jersey entered April 11, 2003, imposing a stay of the Board's Order Revoking Dr. Zahl's license filed on April 3, 2003. The Court's Order conditioned the stay on "appellant's satisfaction of any and all reporting requirements imposed by the State Board of Medical Examiners (Board) and the payment of all costs associated with the Board's continuing supervision and oversight of the financial and billing activities of the appellant's medical practice."

The Executive Committee reviewed this matter and issued an enclosed May 5, 2002 letter and Order filed May 5, 2003, submitted for Board ratification.

The Board voted to go into Executive Session for deliberations and advice of counsel. Deputies, other than counseling staff, left the room, along with other members of the public that were present.

The Board returned to open session with all parties present.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO GRANT THE AMENDED APPLICATION FOR COSTS SINCE THERE WAS NO DISPUTE.

THE BOARD CONCLUDED THAT IT HAD THE STATUTORY AUTHORITY TO IMPOSE ATTORNEY FEES IN THIS MATTER RETROACTIVELY, THEREFORE, UPON MOTION MADE AND SECONDED, VOTED TO GRANT THE STATE'S APPLICATIONS FOR ATTORNEY FEES BECAUSE THE FEES CHARGED WERE REASONABLE, HOWEVER, IN ITS DISCRETION, IT WOULD NOT IMPOSE THOSE FEES RELATING TO THE SUPPLEMENTAL CERTIFICATION FOR COSTS.

THE BOARD, ALSO RECOGNIZED, SUA SPONTE, THAT IT HAD THE STATUTORY AUTHORITY TO RAISE THE PENALTY FEE SCHEDULE FROM THE \$2,500 IMPOSED BY ALJ TO \$10,000, HOWEVER, IN ITS DISCRETION, IT WOULD NOT ALTER THE FEES INITIALLY ASSESSED.

THE BOARD ALSO STAYED THE PAYMENT OF THE ATTORNEY FEES PENDING RESOLUTION AT THE APPELLATE LEVEL.

THE BOARD, UPON MOTION MADE AND SECONDED, RATIFIED PRESIDENT HARRER'S MAY 5, 2003 ORDER. IT FURTHER APPROVED THAT PATRICIA BOEGLIN, R.N. BE AUTHORIZED TO SERVE AS DR. ZAHL'S PRACTICE MONITOR, UNDER THE TRAINING AND DIRECTION OF DOCTOR MOSS.

THE BOARD, UPON MOTION MADE AND SECONDED, EXTENDED THE TIME PERIOD FOR AN ADDITIONAL TWENTY DAYS IN WHICH THE PARTIES COULD SUGGEST A MONITOR TO REVIEW DR. ZAHL'S BILLING RECORDS AND AUTHORIZED THE BOARD PRESIDENT TO REVIEW AND CONSIDER THOSE NOMINATED PRIOR TO THE NEXT BOARD MEETING.

Dr. Perry left the Board meeting and was not present for discussion or vote in the following matters.

**4. KAUL, Richard A., M.D. (Counseling Deputy: JOYCE)
VOLKERT, Susan E., Esq., For Respondent
WARHAFTIG, Jeri, D.A.G. for Complainant**

This matter was before the Board for oral argument on Dr. Kaul's Application to Stay the Board's Order and Respondent's request for an adjournment to the Attorney General's Application for costs. Attached were Ms. Fruchtman's May 7, 2003 letter to the Board; Ms. Volkert's May 7, 2003 letter to the Board; Ms. Volkert's May 8, 2003 letter to the Board with attachments; and Ms. Volkert's May 12, 2003 letter to the Board.

On the onset, Chairperson Farrell informed the parties that oral argument would be limited to ten minutes per side.

Ms. Volkert addressed the Board by reminding the members that this matter was originally scheduled back in December 2002 and for various reasons adjournments had been granted. Since its originally scheduled date, there have been no incidents concerning Dr. Kaul's practice. She continued by arguing that Dr. Kaul's competency to continue to practice has never been raised, therefore, granting the stay would not expose the public to any harm. In fact, she added, the Board heard testimony from various witnesses that indicated that keeping Dr. Kaul from practicing would greatly impact at a minimum the

patients at St. Clare's pain management clinic.

Counsel also argued that in light of the uniqueness of the case, one of first impression in New Jersey with constitutional issues, a stay of the Board's action pending appeal was appropriate. Additionally, irreparable harm would be done to Dr. Kaul even if the Appellate Division reversed the Board's Order because he would have spent time out of practice needlessly. Even if Dr. Kaul prevails on the merits, the harm to his patients and to Dr. Kaul of an active suspension could never be repaired according to Ms. Volkert. She believed that she had a strong case and that she would prevail on the merits at the Appellate level. She believed that the Board's actions were outside its own jurisdiction and had no power to take action based on something which was done in a foreign jurisdiction. Ms. Volkert urged the Board to grant Respondent's Application for a Stay of the Board's Order.

D.A.G. Warhaftig addressed the Board and began by calling many of Ms. Volkert's arguments as they related to the legal issues as a red herring. She reminded the Board that the evidence before it demonstrated that Dr. Kaul admitted to gross negligence and misrepresented responses on various applications. While Ms. Volkert would have the Board believe that significant harm would occur to Dr. Kaul's patients, she continued, Ms. Volkert neglected to recognize that the Board, sua sponte, already afforded Dr. Kaul thirty days to arrange for the appropriate transfer. The Attorney General office maintained that this motion for stay is untimely if the real concern was about harm to patients. If that was truly the concern, she posited, then the application for a stay would have been filed when the Board announced its decision.

Finally, D.A.G. Warhaftig stated that there was little to no likelihood of success on the merits. According to her, when this case is stripped down it is a case in which Dr. Kaul admitted to gross negligence, had his license erased in the United Kingdom and lied and misrepresented himself on various applications.

Ms. Volkert explained that the reason for the late filing of the stay application was because her mother had passed away and that accounted for the delay.

The Board voted to go into Executive Session for deliberations and advice of counsel. Deputies, other than counseling staff, left the room, along with other members of the public that were present.

The Board returned to open session with all parties present and announced the following motion.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO DENY THE APPLICATION FOR A STAY BECAUSE NO COMPELLING REASONS WERE OFFERED TO SUPPORT THAT REQUEST AND THE BOARD DID NOT BELIEVE THAT THERE WOULD BE A SUCCESS ON THE MERITS AT THE APPELLATE DIVISION. ADDITIONALLY, WHILE AN ARGUMENT HAD BEEN MADE THAT GRANTING THE STAY WOULD NOT SERVE TO PROTECT THE PUBLIC FROM HARM, THE BOARD IN ITS ORDERS MADE SPECIFIC FINDINGS TO DR. KAUL'S MISREPRESENTATIONS AND THAT NOT GRANTING THE STAY WOULD BENEFIT THE PUBLIC IN SO FAR AS THE DOCTOR'S INTEGRITY IS AT STAKE. FURTHERMORE, THE BOARD NOTED THAT DR. KAUL WAS GIVEN THIRTY DAYS TO TRANSFER HIS PATIENTS AND HE SEEMINGLY HAS IGNORED THAT OPPORTUNITY.

The Attorney General's office requested a ruling on its application for costs in the matter in light of the fact that no opposition had been filed by Respondent on the application. Ms. Volkert objected and requested an extension of time in which to respond to the application.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO GRANT THE ATTORNEY GENERAL'S APPLICATION FOR COSTS IN ITS ENTIRETY.

5. ASHKAR, Michael, M.D.

KERN, Steven / WEIR, Bonnie M., Esquires for Respondent

BAUDRY, Adriana D.A.G. for Complainant

An Order of Temporary Suspension of License was filed on August 1, 2002, and this matter was referred to the OAL for hearing on November 8, 2002. This matter is still pending with that agency. Enclosed for Board review and discussion were Mr. Kern's March 31, 2003 letter with a Certification of Dr. Ashkar in support of his Application for the Reinstatement of his License to practice medicine, and a March 21, 2003 letter from Dr. Baxter of the PHP. Also enclosed were D.A.G. Baudry's April 23, 2003 response to Dr. Ashkar's application; and Ms. Weir's May 5, 2003 response to D.A.G. Baudry's April 23, 2003 letter, wherein she indicates they have no objection to this matter being argued by Counsel in Closed Session. Ms. Weir objected to the matter being on the Agenda for discussion purposes only and requested oral argument on the application for reinstatement. Also enclosed was D.A.G. Baudry's May 5, 2003 response stating that the Board can not make an informed decision on this application without all of the evaluations.

Mr. Kern stated in his March 31, 2003 letter that since a medical and psychological determination has been made whereby Dr. Ashkar does not pose a threat to the public safety and welfare and Dr. Ashkar would be willing to follow all of the recommendations made by Dr. Baxter in his March 21, 2003 letter to Mr. Kern, Counsel for respondent requested that Dr. Ashkar's license to practice medicine be immediately reinstated and that he be permitted to practice medicine during the pendency of the administrative process.

The Attorney General recommended that if Dr. Ashkar is restored to practice, he refrain from prescribing any CDS pending the outcome of this matter. She urged the Board to review the psychological evaluations conducted by the J.J. Peters Institute and refrain from final decision until the complete reports are available for review.

The Verified Complaint filed July 1, 2002, Respondent's answer filed July 8, 2002 and Dr. Ashkar's certification filed July 9, 2002 was available for Board review at the meeting.

The Board voted to move into executive session to discuss health related issues. All parties, except counseling deputies, left the room.

The Board returned to open session and announced the following motion.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO DENY DR. ASHKAR'S REQUEST FOR REINSTATEMENT BASED ON THE INADEQUACY OF THE SUBMISSION TO ADDRESS THE PATTERN OF PRACTICE OF DR. ASHKAR. THE BOARD PREVIOUSLY FOUND FLAWED JUDGMENT ON THE PART OF THE DOCTOR WHICH WAS IRREMIABLE. THE BOARD ALSO FOUND LIMITED VALUE IN THE PETERS INSTITUTE AS THE EXAMINER DID NOT HAVE ACCESS TO THE BOARD ORDER OR THE FULL FACTS OF THIS MATTER. THE BOARD FURTHER SEALED THE PETERS INSTITUTE REPORT AND THE STATEMENT OF DR. BAXTER, EXCEPT AS IT MAY BE NEEDED FOR THE PREPARATION OF THE BOARD ORDER ON REINSTATEMENT, OR FURTHER ORDER IN THIS MATTER.

6. SGROI, Donald A., M.D. (License #MA 032756)

SEGRETO, James V., Esq.

BAUDRY, Adriana E., D.A.G. for Complainant

An Administrative Action Complaint was filed by the Board on February 14, 2002 and this matter was referred to the Office of Administrative Law on April 8, 2002. This matter was scheduled to commence

plenary hearing in February, 2003 before Judge Weiss. The November, 2002 PRC approved a settlement as noted in the enclosed proposed Consent Order which was signed by the parties. The OAL entered the settlement on its docket and forwarded the file back to the Administrative Office on March 28, 2003. D.A.G. Baudry requested Board approval of this Consent Order to be signed by Dr. Harrer and filed.

THE BOARD, UPON MOTION MADE AND SECONDED, APPROVED THE TERMS OF THE CONSENT ORDER.

**7. CAUCCI, Emilio, J., D.O. (License #MA06668)
OO, Swang, D.A.G.**

This matter was before the Board upon the filing of an Order to Show Cause, Notice of Hearing and Notice to file an Answer.

D.A.G. Warhaftig reported that the parties had reached a settlement in this matter and presented the Board with a proposed Consent Order.

Dr. Wallace recused from discussion and vote in this matter.

THE BOARD, UPON MOTION MADE AND SECONDED, APPROVED THE TERMS OF THE CONSENT ORDER WHICH FULLY RESOLVES THIS MATTER.

The Meeting was adjourned at 6:00 p.m.

Respectfully submitted,

Glenn A. Farrell, Esquire
Secretary
Acting Chairperson for Open
Disciplinary Matters

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