

**New Jersey State Board of Medical Examiners  
Disciplinary Matters Pending Conclusion  
September 10, 2008**

A meeting of the New Jersey State Board of Medical Examiners was held on Wednesday, September 10, 2008 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 Ms. Karen Criss, Chairperson for Open Disciplinary Matters.

**PRESENT**

Board Members Cheema, Ciechanowski, Criscito, Criss, DeGregorio, Jordan, Lambert, Lomazow, Mendelowitz, Nussbaum, Paul, Reichman, Scott, Stanley, Wheeler and Weiss.

**EXCUSED**

Board Members Haddad, Lomazow, Salas-Lopez, Strand and Walsh.

**ALSO PRESENT**

Deputy Attorneys General Dick, Ehrenkrantz, Flanzman, Gelber, Jespersen, Levine, Merchant, Palan, Puteska and Warhaftig, Executive Director Roeder and Mary Lou Mottola, Executive Director of the Medical Practitioner Review Panel.

**RATIFICATION OF MINUTES**

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO APPROVE THE MINUTES FROM THE AUGUST 13, 2008 BOARD MEETING.

**HEARING**

1. COSTINO, John, D.O. 25MB02575800  
Glenn Zeitz, Esq. for Respondent  
David Puteska DAG

This matter was before the Board based on the Attorney General's Motion for Interlocutory Review of ALJ Bruce Gorman's decision to permit the Respondent to take the depositions of two of the Attorney General's witnesses.

DAG David Puteska for the Attorney General and Mr. Glenn Zeitz for Respondent placed their appearances on the record.

Ms. Criss informed the parties that the Board would rule on Board President Mendelowitz's decision to grant the interlocutory review given the Respondent's objection to the timeliness of the appeal and the objection to consideration of the Attorney General's response and also the substantive arguments regarding the interlocutory appeal. Ms. Criss stated that Mr. Zeitz asked that the Board address all the issues in one presentation rather than break out each issue.

DAG Puteska addressed the procedural issues first, in particular, the timing of the filing of the interlocutory appeal. The Board was asked to look at it pursuant to the OAL rule which allowed a relaxation of the rule for an honest mistake. He was aware that although technically not compliant with the rules as noted in the Attorney General's submission, DAG Puteska asked for relaxation of the time for an honest mistake which was due to his being on vacation at that time. DAG Puteska returned on the 11th and filed the appeal on the 14th. Under the provisions of the honest mistake, DAG Puteska requested that it be considered as appropriately filed. He added that there was no harm to Dr. Costino and was within the exception of the

OAL rules.

DAG Puteska continued with the issue regarding the filing of a response to submission to Dr. Costino's objection. He stated that nothing in the OAL rules preclude such a submission, and it should be at the discretion of the Board to hear the matter and consider the additional submission. DAG Puteska requested the Board consider the reply brief and give it due consideration.

DAG Puteska then moved onto the more substantive issue that Dr. Costino was charged with, relating to the indiscriminate prescribing of Percocet and insurance fraud for charging for enhanced visits. The audio recordings state that after only spending a few minutes with the patient and with a limited exam, the undercover agent left Dr. Costino's office with a prescription for narcotics. DAG Puteska stated that there was nothing to document a medical condition that related to the prescription that was given. He continued that the so called treatment was a charade to cover the prescribing of Percocet and the Board temporarily suspended Dr. Costino's license.

DAG Puteska continued by stating that last month the Board was asked to intervene and modify an Order of ALJ Gorman and the Board ordered a limited scope to the depositions. DAG Puteska opined that, once again, Dr. Costino had gone outside the bounds of the Administrative rule and asked that the ALJ be permitted to review the undercover agent's medical records, before, during and after the visits with Dr. Costino. ALJ Gorman asked in the discovery request that all medical records for the last thirty or so years be revealed to him and included everything including pediatric records. DAG Puteska stated that this was an outstandingly broad order and far exceeded the bounds of the allegations. DAG Puteska stated that discovery must support or limit a party's position or lead to the discovery of admissible evidence and the party from whom they are sought can not be overburdened. On these grounds, DAG Puteska advised that ALJ Gorman's order must be overturned.

It was DAG Puteska opinion that a lifetime of medical records would not support or limit Dr. Costino's position. He stated that only the appropriate records – those related to the prescriptions issued, are at the basis of this case. In fact, he noted that while treating these patients, Dr. Costino never requested copies of the patient's prior records. DAG Puteska stated this was a thinly veiled attempt to embarrass the investigators and he felt it was a "fishing expedition" to dissuade the investigators from testifying. DAG Puteska continued that any discovery should be least burdensome in nature – which the rules required. The medical records do not exist in one place. Investigators would have to identify every center/ facility and practitioner that they had ever seen. DAG Puteska stated that the courts have consistently ruled that parties should not be assigned this type of burdensome request.

DAG Puteska further noted that investigators should be protected from the disclosure of a personal nature of their health care history. He stated that it is not appropriate for the officers to disclose, or have reviewed, health information not relevant to this case. He added that it would have a chilling effect if the officers were asked to surrender rights in order to do an undercover investigation. He continued that this would indeed have a chilling effect on the ability to perform undercover investigations, which often are the only way to uncover cases of healthcare fraud.

In the alternative, DAG Puteska requested limited depositions. He stated that the Board should, if necessary, permit Dr. Costino's counsel to question the witness only about any neck/back strain, before, during or after their visits to Dr. Costino. Since Dr. Costino diagnosed these patients with back and neck strain, in that limited universe, it would be appropriate. If they had sought medical treatment, then those records could be produced. This would allow access to reasonable and appropriate records that are relevant to the case at hand.

DAG Puteska added that ALJ Gorman's Order should be reversed since it would be an over burdensome request that would strip the investigator's privacy and have a chilling effect on future undercover operations. He asked that the Board overturn ALJ Gorman's Order and find that no medical records be produced in this matter.

Mr. Zeitz stated that with regard to the procedural issue, the Attorney General acknowledged the fact that this was untimely; the same as last month. He said the Attorney General's office has been on notice that it should strictly adhere to the rules. In instances where a lawyer missed a deadline – usually certifications are required. Mr. Zeitz continued that there was supposed to be an Attorney General that was taking care of the file in DAG Puteska's absence.

Mr. Zeitz continued that Judge ALJ Gorman thoroughly considered all the information before him. The Attorney General argued that under Administrative Code, on a de novo basis, can have this matter reviewed. Mr. Zeitz argued that citations that the Attorney General relies on addressed initial decisions or dispositive issues. Mr. Zeitz stated that this was a discovery Order which is not dispositive of all the issues of the case and therefore, did not require a de novo review. The standard needed to be applied here and the proper standard is abuse of discretion standard. Mr. Zeitz continued that the Attorney General has not sustained the burden to demonstrate that the Judge abused his discretion in granting the discovery request.

Mr. Zeitz continued on the substantive issue, and he stated that ALJ Judge Gorman analyzed and determined good cause existed to grant the Respondent's discovery request. He stated that the standard is flexible in its meanings and within the four corners of the pleadings, the Judge reached a sound decision. In this case, Mr. Zeitz stated that undercover agent #1 presented herself as an exotic dancer, working all night, on her feet all day, taking some medication for pain. Undercover agent #2 admitted that she had pain that kept her up all night and also neck sprain, strain, back sprain and strain. Mr. Zeitz stated, in some ways, this was a form of entrapment. He continued that the description of the occupation would infer that there would be problems with neck and back strain. Dr. Costino examined them, and the diagnosis fell into the category of subjective findings of neck and back sprain and strain and he prescribed medication.

Mr. Zeitz stated that the entire case is centered around two undercover agents. With regard to the medical records, Mr. Zeitz explained that he didn't want the agent's pediatric records. DAG Puteska objected and said that Mr. Zeitz was in contempt, in so far as, he misstated his discovery requests that he did not request any and all medical records. DAG Puteska then asked that Mr. Zeitz withdraw his earlier statement that he did not request any and all medical records. Chairperson Criss asked if he was now saying that he did not request any or all records. Mr. Zeitz tried to clarify and attempted to make clear that he needed records for a relevant time period. DAG Puteska objected and said there was never oral argument before the court on this motion. He stated Mr. Zeitz is again misstating the record. Chairperson Criss asked that Mr. Zeitz explain his relevant time period. Mr. Zeitz stated he asked for records for the agent's adult life, the time period before, during and after they saw the doctor, for any pre-existing back or neck problems.

Mr. Zeitz said he was interested in problems from age 18 to the present and if either agent had a condition that was not related then he was not interested in them. He did believe that the Attorney General should be the one to determine which records are relevant. He requested that the records be turned over to the Judge and allow the ALJ determine the relevance. He was not suggesting that the doctor be provided with the records, but he believed it might be relevant for the ALJ to know, if they had any injuries that related to these parts of the body. Mr. Zeitz applied to the Court because the Attorney General resisted the attempt to gather the materials prior, using excuses that the Board did not have the records or did not have access to them. He continued that the Judge was satisfied that the records were relevant and that Dr. Costino was entitled to examine whether the "patients" had injuries in these areas.

Mr. Zeitz asked the Board to affirm the Order, to produce medical records, produce them en camera to the Judge. If necessary, a protective Order can be entered for the limited purpose of this case. Mr. Zeitz continued that the only fair way to let Dr. Costino prepare a defense was to let him know if what he diagnosed and was treating was not a condition that already existed. Mr. Zeitz said nothing in these files indicated that healthy individuals were sent out on these undercover operations.

In response, DAG Puteska noted that there is no dispute that the Board can perform a de novo review as the entire hearing procedure is within the purview of the Board as it is the administrative head. DAG Puteska said that Mr. Zeitz claimed that he was not aware of any examinations. However, Dr. Costino did perform

an exam, and in each, he indicated normal physical findings, yet he diagnosed neck and back strain/sprain.

DAG Puteska explained that medical records are protected and even if the scope (as Mr. Zeitz represented) could be limited, there is no reason to have anyone review the patients records. DAG Puteska stated that to ask the undercover agents if they had any neck or back injury would be the only appropriate course of action.

DAG Puteska asked the Board to disallow unfettered production of those medical records.

In response, Mr. Zeitz noted that Dr. Costino did ask for the en camera review, and the Judge appeared to indicate that he would perform such a review. The Judge would make the call as to what is relevant; limited to just this case in a protective Order. Even the Attorney General implied that he had no idea if past records existed. Mr. Zeitz asked that the Judge be allowed to review records and determine relevancy.

Dr. Paul asked Mr. Zeitz the reason Dr. Costino failed to ask for past medical records. Mr. Zeitz did not respond but when pressed did acknowledge that no other doctor's records were in the file. Dr. Paul continued by asking if there was a reason the witnesses could not be asked these questions at the deposition rather than to obtain all the medical records. Mr. Zeitz said questions could be asked, but there is no substitution for the actual records. He continued that there might be a way in which the witness may characterize the condition and what appears in the patient records may be markedly different.

Dr. Mendelowitz asked if the two undercover officers, as private citizens, were entitled to their rights to privacy in a physician/patient relationship. Mr Zeitz indicated he did not seek to cast their rights aside however, in this case, two people masqueraded as having medical conditions.

Mr. Zeitz said there were circumstances where the privileges can be broken, or waived. In this case, law enforcement personnel were working on behalf of the Government. He continued that there are cases, both state and federal, where fairness dictates that the privilege, although sacred, can be waived or ordered to be released. Based on what is at stake in this matter, it should be permitted.

Mr. Zeitz said Dr. Costino asked for the records from the past (age 18 on) which could contain information from the past that impacts the current health condition of the individual. Especially with neck or back issues, which could have been from 10 or 20 years ago.

DAG Puteska noted that Dr. Costino did know what the condition was when he examined them – his medical records indicated normal/negative findings. Those records did not indicate any prior problems in the past medical history. Mr. Zeitz said, in response, because it was a sting operation, you can't always trust the information provided by the undercover. Mr. Zeitz said, for example, a fake insurance card was used.

**THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO MOVE INTO CLOSED SESSION FOR ADVICE OF COUNSEL AND DELIBERATIONS.**

All parties, except counseling and administrative staff left the room.

Returning to open session the Board stated the following:

**THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO RATIFY THE DECISION OF THE BOARD PRESIDENT TO GRANT INTERLOCUTORY REVIEW SINCE THE TIMING OF THE STATE'S NOTICE MAY BE EXTENDED AND WAS CONSISTENT WITH DUE DILIGENCE.**

**THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO MODIFY ALJ GORMAN'S ORDER. WITHIN 14 DAYS OF THE SEPTEMBER 10, 2008 ORAL ORDER, THE STATE SHALL OBTAIN AND PRODUCE ALL MEDICAL RECORDS OF UNDERCOVER AGENT #1 AND UNDERCOVER AGENT #2 THAT EXIST OF MEDICAL HISTORY, AND INJURY OR MEDICAL CONDITION INVOLVING THE CERVICAL, THORACIC OR LUMBAR SPINE FOR VISITS**

OCCURRING ONE YEAR PRIOR TO THE UNDERCOVER VISITS OF EACH OFFICER AND FOR THE PERIOD OF EACH OF THE UNDERCOVER OFFICER'S VISITS TO DR. COSTINO. IN THE EVENT THAT THE UNDERCOVER WITNESSES DID NOT HAVE RELEVANT MEDICAL COMPLAINTS AND THEREFORE DID NOT HAVE SUCH RECORDS, THEN A CERTIFICATION STATING SUCH WILL BE PRODUCED TO ALJ GORMAN AND TO THE RESPONDENT WITHIN THE SAME 14 DAY PERIOD. AN ORDER MORE FULLY DETAILING THE BOARD'S DECISION WILL FOLLOW.

## **OLD BUSINESS**

1. STAMBAUGH-LUPO, Lynda A. D.O. 25MB05929700  
Jeri Wharhaftig, DAG

By way of background, a Provision Order of Discipline ( "POD") was entered on or about February 8, 2007. The matter was subject to finalization 30 days after issuance and, to date, no response had been received. The Attorney General recommended that the POD be finalized without modification.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO FINALIZE THE PROVISIONAL ORDER OF DISCIPLINE WITHOUT MODIFICATION.

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Karen Criss, R.N., C.N.M.  
Vice-President