A meeting of the New Jersey State Board of Medical Examiners was held on Wednesday, December 12, 2007 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


EXCUSED


ALSO PRESENT

Assistant Attorney General Joyce, Deputy Attorneys General Dick, Ehrenkrantz, Flanzman, Fredericks, Gelber, Jespersen, Levine and Warhaftig, Executive Director Roeder and Medical Education Director Blanks.

RATIFICATION OF MINUTES

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO APPROVE THE MINUTES FROM THE NOVEMBER 14, 2007 BOARD MEETING AS SUBMITTED.

APPEARANCES

10 A.M. TRAVERSO, Joseph L. M.D. 25MA04115700
  John P. Miscione, DAG
  Ms. Urbanowicz-Pandos Esq.
  Debra Levine, DAG Counseling

A Motion for Summary Decision filed by the Attorney General on October 26, 2007, was adjourned until the December 12, 2007 Board Meeting. Oral arguments on the Motion for Summary Decision were scheduled for 10 A.M. This matter was adjourned prior to the meeting when the parties agreed to accept the conditions of a Consent Order and the Board announced the following:

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO ACCEPT THE TERMS OF THE CONSENT ORDER WHICH INCLUDED THE VOLUNTARY PERMANENT SURRENDER OF HIS LICENSE WHICH SURRENDER SHALL BE DEEMED A REVOCATION WITH PREJUDICE TO REAPPLY IN THE FUTURE WITH THE PAYMENT OF $25,000 FOR PARTIAL REIMBURSEMENT OF COSTS AND ATTORNEYS FEES WITHIN THIRTY DAYS OF THE FILING OF THE ORDER.

11 A.M. VUYYURU, Lokesh Babu M.D. 25MA05488000
  Doreen Hafner, DAG
  Christopher E. Torkelson, Esq.
  Michelle Albertson, DAG

The Board entered a Provisional Order of Discipline (the "POD") on August 17, 2006 seeking to revoke Respondent's license. Respondent filed a response to the POD dated September 26, 2006. After reviewing the POD and responses, the Board voted to finalize the POD and entered a FOD revoking Respondent's license. Thereafter, Respondent appealed the Board's decision and raised the issue of the necessity of providing an
opportunity to be heard based on the Fanelli case. Subsequently, the State filed a Motion to Remand the matter to
the Board for a mitigation hearing. The Board at its October 10, 2007 meeting, upon motion made and seconded,
voted to grant Dr. Vuyyuru a mitigation hearing in compliance with the Appellate Division Order. The doctor
rescinded his application to the Appellate Division. Prior to the hearing, the parties agreed to an Interim Consent
Order and the Board announced the following:

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO GRANT DR. VUYYURU'S
REQUEST TO RETURN TO A LAPSED LICENSE STATUS WITH AN AGREEMENT NOT TO SEEK
REINSTATEMENT UNTIL AFTER HIS APPEAL IN VIRGINIA HAS CONCLUDED AND HE HAS
APPEARED BEFORE A COMMITTEE OF THE BOARD TO DISCUSS HIS REINSTATEMENT
APPLICATION.

1 P.M. EATOUGH, Philip B. D.O. 25MB02599600
Siobhan B. Krier, DAG, Prosecuting
Alex J. Keoskey, Esq. for Respondent
Steven Flanzman, DAG Counseling

This matter was opened to the New Jersey State Board of Medical Examiners by the filing of a Temporary
Suspension Application and Verified Administrative Complaint seeking the suspension or revocation of the
license of Respondent to practice medicine and surgery. The attorneys, DAG Siobhan B. Krier, on behalf of the
Attorney General, and Mr. Alex J Keoskey, Esquire, on behalf of Dr. Eatough, placed their appearances on the
record.

Counsel for Dr. Eatough estimated that it would take at least six hours to present his case and requested an
adjournment. He further explained that Dr. Eatough would agree to have a monitor in place during the period of
adjournment, however, he was not willing to give up prescribing of Schedule 3 and 4 prescriptions. The Attorney
General continued to maintain that she would only agree to the adjournment if Dr. Eatough gave up his Schedule
3 and 4 prescribing privileges. She did note, however, that the Attorney General would comply with whatever the
Board ordered.

The parties did agree that the matter would be heard on Wednesday, December 19, 2007 at 124 Halsey Street,
Newark, New Jersey in the Monmouth Room beginning at 9:00 AM before a Committee of the Board. The
parties also agreed that the hearing committee would have the same authority as if the full Board rendered the
decision, including the authority to impose disciplinary sanctions. While the Attorney General did not agree to the
following, in the interim, and in lieu of not prescribing Schedule 3 and 4, Respondent offered that Dr. Berman act
as a monitor who would review any proposed prescriptions for Schedule 3 and 4. It was proposed that Dr.
Eatough would fax to Dr. Berman the latest progress note and the proposed prescription for any patient for whom
he wanted to prescribe a Schedule 3 or 4 prescription. Dr. Eatough would not issue any prescriptions without the
prior approval of Dr. Berman. The Attorney General again noted her objection and reiterated that any limitation
that did not include the forfeiting of his Schedule 3 and 4 prescribing privileges was not acceptable to her.

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

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

Returning to open session, the Board requested that the parties acknowledge on the record that they will not
appeal the Consent Order or the authority of the Committee to render a decision on behalf of the Board. This
included acknowledgment that the Committee's decision would be as binding as if the full Board rendered it and
would be effective upon pronouncement. Agreement to these terms was acknowledged by the Attorney General
and Respondent's counsel.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO GRANT THE ADJOURNMENT ON
THE TERMS OUTLINED WHICH INCLUDED THAT THE MATTER WOULD BE HEARD ON
WEDNESDAY, DECEMBER 19, 2007 AT 124 HALSEY STREET, NEWARK, NEW JERSEY IN THE
This matter was opened to the New Jersey State Board of Medical Examiners with the filing of an Application for Temporary Suspension and Verified Administrative Complaint seeking the suspension or revocation of Dr. Costino's license to practice medicine and surgery. The attorneys, DAG David Puteska, on behalf of the Attorney General, and Mr. Edwin J. Jacobs, Esquire, on behalf of the Respondent, placed their appearances on the record.

Mr. Jacobs made a preliminary motion to the Board arguing that the entire matter should be adjourned because of due process concerns. He noted that he was served with the papers on December 6, 2007, although he did admit that he learned that there may be a proceeding on November 29th when the Attorney General offered his client a Consent Order which included a voluntary suspension. The following day, he spoke with Mr. Puteska informing him that his client would not consent to a voluntary suspension order. At that time, Mr. Jacobs asked for an adjournment until January so that he could have the opportunity to properly prepare. He only learned on December 6th that the request for adjournment would be denied. At best, he only had ten days to prepare. He also pointed out that he delivered twenty-one copies of his partial defense which contained over 150 pages and represented just a fragment of information that can be presented in his client's defense. He learned around 10:35 A.M. that the materials had just been handed out to the Board. He offered at that time to postpone until later in the day to permit the Board members ample time to review the lengthy submission. Mr. Jacobs again renewed his request for an adjournment. Relying on the tenets of basic fairness to both parties, he asked that the Board have the same amount of time to review his material as it did in reviewing the Attorney General's papers which the Board had at least a week to review, and think about the allegations.

DAG Puteska responded by arguing that back in September 2007, Dr. Costino knew about this investigation. Additionally, by at least November 5, 2007, Mr. Jacobs received a copy of the entire investigatory file and that should have provided him with sufficient time to defend the allegations. He also noted that there was a hearing in the Chancery Division the day before and the Court dismissed Dr. Costino's application to suspend the hearing. Mr. Jacobs also went to the Appellate Division, based on the same argument that Mr. Jacobs made before the Board, and the Appellate Division also denied the application for a suspension of the hearing.

Mr. Jacobs added that the Court application was filed on Friday and the judge set it for yesterday morning. The denial, however, was without prejudice on jurisdictional grounds and the judge did note that he questioned whether there was sufficient notice and opportunity to defend. DAG Puteska reminded the Board that the statute and case law has defined what is sufficient notice and the Attorney General maintained, based on the allegation, that this case was clearly within the four corners of the law. While Mr. Jacobs argued that there were over 100 witnesses within the investigatory file provided to him, DAG Puteska clarified that the charging pages did not rely on all the witnesses identified in the file. The temporary application was based on two "patients" and consisted of a total of nine prescriptions. Clearly, the Attorney General argued, Mr. Jacobs had sufficient time to review the pertinent materials on these limited allegations to prepare a proper defense.

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

All parties, except for Administrative and Counseling staff, left the room. Returning to open session, the Board announced its decision.


IT ALSO WAS NOTED THAT THE BOARD MEMBERS HAD SUFFICIENT OPPORTUNITY TO REVIEW ALL THE SUBMISSIONS MADE AND WERE AFFORDED ADDITIONAL TIME TO REVIEW RESPONDENT'S SUBMISSION PRIOR TO RECONVENING THE HEARING.

Dr. Haddad left the Board meeting and did not participate further in these proceedings.

DAG Puteska opened by explaining that the case before the Board was about nine prescriptions of Schedule II narcotics which were prescribed to undercover police investigators. He stated that they did not have a legitimate medical complaint, and even fewer, pain management problems. This subsequently resulted in even more violations of the Board's regulations insofar as Dr. Costino submitted false bills thereby committing insurance fraud. The evidence in the case, according to DAG Puteska would demonstrate that Dr. Costino's medical judgment is so flawed that his continued practice presents a clear and imminent danger to the public.

In his opening statement, Mr. Jacobs argued that his client has not been indicted and that there are only charges pending. He reminded the Board members that the investigations were conducted from mid April through mid September, 2007. Dr. Costino submitted a certification and his defense relied on this, the brief in opposition and the various certifications submitted in support of his defense. Mr. Jacobs argued that these documents demonstrate the flaws of the investigation and that the matter should be dismissed, or at best, a denial of the application of temporary suspension. He stated that Dr. Costino in his certification explained what he did and why he did it. The regulation, as Dr. Costino understands it, defined the way in which he was to prescribe and the only dispute is whether there was a recognized medical condition sufficient to justify the prescriptions given. According to Dr. Costino, the information provided by the undercover agents provided a basis to prescribe and it was only when he was pushed by the undercover agent, that he counseled his "patient" about the use of these types of medications. These medications, he continued, were mild and were prescribed based on the information provided by the patient. He suggested that the transcripts relied on by the Attorney General could be interpreted two ways -- the rational and the radical. Dr. Costino's interpretation, Mr. Jacobs argued, was the rational one and believed that the Board would reach the same conclusion after all the evidence was presented. The allegations asserted by the Attorney General, he continued, were patently false. He noted that the Board had been provided with certifications of other patients that attested that his practice of medicine has always been well within the normal standard. He assured that Board that when it considered all the evidence, it would conclude that Dr. Costino's practice was, and continues to be, well within the appropriate standard of care. Upon reaching such a conclusion, he believed that the Board could do nothing more than deny the Attorney General’s application.

After the opening arguments, DAG Puteska entered into evidence the following documents:

Costino I- May 28, 1998 Order of the Board

Costino II - Transcript of April 12 undercover visit provided by the Cape May County Prosecutor's office.

Mr. Jacobs objected to the introduction of Costino II and noted that he has read the transcripts, however, he has not had the opportunity to have them certified or corrected where appropriate. He was aware of errors within the transcripts and therefore, objected because the Attorney General has not had them certified. Without the appropriate certification, Mr. Jacobs suggested that there was a question as to their reliability. DAG Puteska responded by reminding Mr. Jacobs that he had been previously provided with copies of the audio tapes and any
lack of verification of the content was due to Mr. Jacobs' failure to do so. Again, Mr. Jacobs renewed his objection for its admission because of the lack of certifications. If the Board chose, the Attorney General was prepared to play the audio tapes, except for the interview which took place on June 7 because the tape has technical difficulties.

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

All parties, except Administrative and Counseling staff, left the room. The Board returned to open session and announced the following ruling of the Chair.

THE RULING OF THE BOARD CHAIR WAS TO ACCEPT THE TRANSCRIPT INTO EVIDENCE CONTINGENT ON THE PLAYING OF THE AUDIO TAPES AND THE BOARD WILL GIVE THE UNCERTIFIED TRANSCRIPT ITS APPROPRIATE WEIGHT.

Costino III - April 12th Prescription.

Costino IV - April 12th Patient record, pain management contract and billing records.

Costino V - May 2nd Transcript

Costino VI - May 2nd Prescription

Costino VII - May 2nd Patient record, pain management contract, and billing records

Costino VIII - June 7th Transcript

Mr. Jacobs renewed his objection for the reasons stated earlier. The Chair ruled that it would be admitted after the Board heard the audio tapes and counsel could renew his objection at that time.

Costino IX - June 7th Prescription

Costino X - June 7th Patient record, pain management contract and billing record

Costino XI - June 26th Transcript

The Chair recognized that Respondent had an ongoing objection to the admission of the transcripts for reasons stated earlier. She also ruled as to each objection that the transcripts would be admitted after the Board heard the audio tapes and counsel could renew his objection, if any, at that time.

Costino XII - June 26th Prescription

Costino XIII - June 26th Patient record and billing record

Costino XIV - July 13th Transcript

Costino XV - July 13th Prescription

Costino XVI - July 13th Patient record and billing record

Costino XVII - August 3rd Transcript

Costino XVIII - TS August 3rd Prescription

Costino XIX - TS August 3rd medical record and billing record.
Mr. Jacobs objected because the investigator misunderstood the record. There is one transcript for both patients and the investigator represents that there is only one patient record, however, the Respondent discovered that the second patient record MO exists.

DAG Puteska requested to amend the complaint to reflect that the patient record MO exists. There was not any objection by the Respondent and the Board permitted the amendment.

Costino XIX 'A' - August 3rd MO patient record.

Costino XIX 'B' - August 3rd MO prescription (both documents were attached to the Respondent's Answer).

Costino XX - August 23 Transcript

Costino XXI - August 23 Prescription TS

Costino XXII - August 23 Patient record and billing record (TS)

Costino XXII 'A' - August 23 Patient record and billing record (MO)

Costino XXIII - August 23 Prescription record for MO

DAG Puteska played the audio tapes of each of the above noted transcripts, except for the June 7th patient encounter. After listening to each transcript, the Chair admitted the transcripts into evidence.

The Attorney General rested her case.

Mr. Jacobs presented Dr. Costino as his first witness. The court reporter swore in the witness.

John G. Costino, M.D. informed the Board that he is aware of his Fifth Amendment privilege not to testify during the hearing in light of the pending criminal charges and that he discussed this right with his attorney. He also acknowledged that the transcript of the hearing could be used against him at the criminal trial, if any, as well as other proceedings. Nonetheless, Dr. Costino decided to testify before the Board.

Turning his attention to the August 23, 2007 office visit, Dr. Costino explained that when he was asked by the undercover patient for a clarification about what she meant by how many could she take, he responded, "one at a time" because he believed that was the appropriate dose. Later during that same examination, Dr. Costino explained that when she asked the difference between Percocet and Oxycontin, he explained the difference and that the latter could potentially create a drug addiction problem. He believed that he explained to the patient that this drug (i.e., Oxycontin) was not appropriate for her because her pain level was not at the level that required a prescription for Oxycontin. He did not believe that she had any problems as it related to addiction, diversion or abusing drugs. He thought the same of the other undercover patient that he saw during that same examination. In fact, according to Dr. Costino, when he addressed both undercover patients, he believed that both were employed as exotic dancers. He had no idea that the office visit was being recorded. From his own life experiences, he was aware what exotic dancers do and how they perform. Based on the information provided, specifically that they were exotic dancers, Dr. Costino believed that there would be pain/muscle aches because of their profession. He has also had a number of patients that were exotic dancers over the years and was aware of many problems that they can experience after years of the rigorous activity which is performed over many hours. According to the witness, this belief was confirmed by the two undercover patients in the various questions that he asked them during the examination. Even after suggesting the prescription of Percocet, neither undercover patient denied that they did not have any pain or refuse the prescription. He thought he was prescribing one a day, to be taken after their work shift, before going to bed. In the witness' mind, he believed that he was prescribing the appropriate medicine for a patient based on the work performed. The undercover patient also told him that she had been taking Percocet and had gotten it from a friend. The witness testified that Percocet was appropriate because he consulted with the 2007 PDR (Physician Desk Reference) which noted under clinical pharmacology, that Percocet contained an analgesic component, which would make it appropriate for someone experiencing muscle
spasms or for one that needed to relax. The undercover patient complained that after work, she was not able to "wind down" and according to the witness, the analgesic compound would give her the relief and ability to sleep which was a problem. He was also concerned that she was getting the medication illegally and based on his interaction with other drug addicted patients, wanted to legitimize her taking the drug with a valid prescription. He also recalled that the undercover patients were obtaining results from the Percocet that she had been taking prior to the office visit. In fact, the undercover patient specially told Dr. Costino that she sought a legitimate prescription for the drug that she already had been taking. Dr. Costino affirmed that these statements are contained in his Certification which was part of the materials submitted to the Board in his papers opposing the application for a temporary suspension.

The witness then addressed his interactions with TS based on the examination during her first office visit. She explained, he recalled, that she presented to obtain a physical and because she was having a problem "un-winding" after the long hours of work. She also told him that one of the girls she used to work with referred her to him and she had given her some Percocet to help her out. Dr Costino acknowledged that he tried to talk her out of talking the Percocet, but when the transcript was examined, it was not so much that he was talking her out of taking the Percocet, but rather he talked about the various uses of the prescription. The witness also recalled that he had spoken to the undercover patient about Valium and its various uses. Dr. Costino asked the Board to understand that he was trying to elicit information from the undercover patient, figure out why she was taking the Percocet for the last month, and attempted to get her to take other medications. He believed all the information was necessary to assure himself that she was not addicted or simply a drug seeking patient. He finally wrote the prescription because she informed him that she was taking it and that she had received relief from it coupled with his knowledge and experience of her profession. Under the circumstances, Dr. Costino maintained that this was an appropriate prescription for this particular patient based on the information that she presented to him.

Dr. Costino told the Board that he is certified by the DEA for treatment of suboxone, which is the product currently used for opiate addiction. He is one of a handful in the Wildwood area. He estimated that 30 to 35 % of his patient population are being treated with suboxone.

Addressing the May 2nd visit, he acknowledged that it was earlier than he had expected because generally his patients return in thirty days for follow up visits. He informed the Board that he was well versed in the rules relating to refills and how often an insurance carrier would reimburse for filling a prescription. In follow up, the patient informed him that she was doing well with the medications that he had previously prescribed. Again, based on the fact that she was an exotic dancer working an eight hour shift, information that the medication was providing her some relief, at least she was able to relax, and the type of work performed, he renewed the prescription for Percocet.

He admitted that he examined the patient the first time that she presented to the office and this would have included a neurological examination, an examination of the pupils, tongue, throat, heart, chest, lungs, abdomen, and the overall observation of the demeanor and movement of the patient. After the first visit, her working diagnosis was a strain/sprain and pain in the lower extremities (such as the muscles or tendons) because of the type of work and hours that she worked. During this same May 2nd. visit, Dr. Costino noted that he believed the transcript provided contained a mistake insofar as it omitted that he told her that her girlfriends would steal it if she did not keep it secure, although, he never had any indication that she was trading or selling the medication. He also reviewed a copy of his pain management contract for this patient and explained that when her chart was photocopied, only the first half was copied and that is why the copy attached to the application was not a signed copy. As Dr. Costino recalled he would have told the undercover patient that he was not interested in treating all the dancers at the club. Dr. Costino recalled that the undercover patient wanted to bring in a girlfriend who did not have insurance. He explained the charges for the patient.

When questioned about the increase in medication, Dr. Costino testified that based on the information that she provided that she was not getting as much relief as she should have, he increased the dosage. He also recalled that he informed the patient not to take the medication on the days that she was not working. He assured the Board that it is always his goal with every patient to encourage the patient to have 'free' days which he explained were days in which the patient takes no narcotics at all from time to time.
During the June 7, 2007 examination, he examined the patient prior to giving the prescription. He testified that he examines the patient every time they are in the office prior to issuing a prescription. He also mentioned that whatever the profession of the patient, he always talks to the patient about his or her profession or trade as this is useful information in having a composite understanding of one's personal and medical history. This, according to the doctor, was the reason he spoke at length with the undercover patients about their work.

When questioned about the July 13th visit, he referred to the patient record and reported that he again examined the patient, which included listening to the lungs. At this visit, he also cautioned the undercover patient that she needs to be careful with her medications.

The undercover patient TS introduced him to MO (the second undercover patient) when TS came in for the August 3rd visit. Dr. Costino recalled asking MO what was wrong and MO talked about the pain and the long hours at work. He believed that MO also was an exotic dancer who had the same problems as did TS. He further understood based on the information provided that she worked long hours, sometimes until six in the morning. He surmised that undercover patient I brought MO to see him because she had the same problems. He noted that the transcript provided demonstrated that he performed a physical examination which included listening to the lungs. He also noted that every patient during an office visit has their weight and blood pressure taken. Dr. Costino takes the pulse through the stethoscope when he listens to the heart and lungs. Even though the patient described her general overall health as fine, he believed that because of her occupation/profession, she was experiencing the pain and stress of her dancing. Based on this, he believed it was appropriate to conclude that she was having problems unwinding or sleeping when she got off of work. As with all his dancer patients, he informed MO that she needed to be careful with her medications and only take them when she gets off of work. His working diagnosis was that MO had acute and chronic stress and sprain, muscle issues, tendon stress. Both undercover patient I and II had the same diagnosis, primarily because of their profession and the long hours of rigorous activity. At the last visit, both patients explained they may be going to Florida and that they may relocate there. In light of the difficulty they may have had in finding a pain management doctor quickly, he increased the dosage (e.g., the number of pills to take) to carry them over in the interim.

Finally, the doctor testified that he has obtained statements from about fifty patients that explain his type of practice. He also acknowledged that in his pain management contract, the patient must explain why they go to a different pharmacy than the one specified in the contract. Dr. Costino is aware that CR does go to different pharmacies and pays cash for some of his prescriptions. He explained that CR is a 40 year old male with a number of neurological symptoms and it has resulted in spinal compression. Although DAG Puteska objected to this testimony as irrelevant because CR was not part of the allegations of the Temporary Suspension Application, the Chair gave Respondent some latitude in this regard. Dr. Costino continued to explain that when CR originally presented to Dr. Costino, he ordered an MRI of his head and neck and it revealed that CR has a tumor. He set him up at University of Pennsylvania for a surgical procedure and the doctor told him he was unable to operate and CR returned to Dr. Costino for continued pain management. He has acute pain problems and a spinal cord tumor. Dr. Costino has referred him to Johns Hopkins. Dr Costino said CR couldn't get his pain medicine since the insurance company wouldn't pay for it. Dr. Costino said CR had to go to different pharmacies because one pharmacist had problems with CR's insurance company and refused to fill more prescriptions. Lastly, Dr. Costino said there were 4 prescription thefts from his office, which included entire prescription pads.

On cross examination, DAG Puteska questioned Dr. Costino on his certification dated December 10, 2007. Dr. Costino explained that he understood undercover patient I had discomfort from dancing and this was based on his observation and what the patient told him during the visit. Although his patient record indicated that this patient explained that she had pain and that she was strung out, Dr. Costino was not able to find a corresponding reference in the transcript that confirmed she told him this. Dr. Costino did explain that she told him that she worked on her feet and that she could not unwind after work and he may have interpreted that to mean that she was strung out. He did agree that the transcripts did not refer to any information that the patient was strung out. He estimated that he spent 20 to 25 minutes with the patient, however, DAG Puteska suggested that he only spent 13 minutes with the patient based on the time of the recording of the visit. The doctor denied that the visit was that short. Dr. Costino further explained that he billed the appointment for an initial visit and believed that the time he spent with the patient justified the code that he selected because he took a comprehensive history,
performed a comprehensive physical examination and made a medical diagnosis and developed a treatment plan. In reviewing the record, Dr. Costino believed that he did this in the first visit.

Justifying his diagnosis and treatment plan, Dr. Costino testified that he believed that she was an exotic dancer and that he wanted to legitimize the prescription that she was already taking illegally. He treated both of these women as if they worked hard in their profession and that they suffered sprains and strains. Additionally, they already were taking this medication already. He believed that the treatment he offered the patients was medically appropriate.

When further questioned about the first visit of undercover patient I, on April 12, Dr. Costino again confirmed that he performed a comprehensive examination and physical. In the history, he did not list anything and he explained that although he was trying to elicit this from her, he had difficulty. When focused on other areas of the medical record, he could not explain why information was lacking in spite of his comprehensive history and physical. He further attempted to clarify that his diagnosis was appropriate due to the information that he did elicit from her concerning her profession and the type of work that she performed. In the information provided to the insurance company, he noted neck sprain, although his diagnosis was acute LS sprain on the medical record. In Costino IV (attached to the complaint as Exhibit 3), he could not explain what the second page was, but he confirmed that the record was for TS (undercover patient I) and that it read acute and chronic LS sprain and strain. He did acknowledge that the second page could be a template.

During his first visit with undercover patient I, his therapeutic options were various medications that would alleviate her pain and allow her to relax. According to Dr. Costino, the patient explained she wanted to see a pain management doctor and explained the rigors of her job and that she had been taking Percocet for more than a month. She also told him that she was doing well with the Percocet. He believed based on all the information that he had, both from the patient and his own examination and observation, the prescription was appropriate. He still maintained that it was a reasonable choice to prescribe one pill for her after work. Now looking back retrospectively, he admitted that he was very confused with these patients because of the lack of information or strange history that he was obtaining from these patients. He now realizes why - because they were fake patients.

Dr. Costino explained that Percocet was appropriate because it was indicated for moderate to moderate severe pain. During the first visit, he believed that she was in moderate pain because of her description of her profession and that she could not unwind. Even when pushed, Dr. Costino continued to affirm his belief that based on her profession, and the information he obtained, that this was the appropriate medication for this patient. He also noted that there was no indication that this patient had any issues with diversion, abuse or misuse of Percocet. The witness did acknowledge that Percocet was a Schedule II because of its potential addictive nature.

Dr. Costino, when reviewing his medical record for these patients, acknowledged that certain information was not in the medical record, but he maintained that his examination was comprehensive. He also continued to assert that the billing code was appropriate because he performed a comprehensive examination, made a diagnosis, counseled the patient and prescribed the medication. While he testified a number of times that the pulse was important to him to determine whether the patient is addicted, he agreed that the pulse was not noted on the medical record for the first visit, or for that matter, any of the medical records. He tried to explain that it was indicated under the heart, in indicating that the exam was negative. In looking at the second page, which he could not explain the genesis, he denied that it was a template, although he previously acknowledged that it might be a template. When he reviewed the other records, it appeared that the same information that was contained on the second page for which he could not explain the genesis, was the same on each one. Although all the information, spacing, circling was identical, Dr. Costino could not explain why and denied that it was a template for information elicited on the physical exam.

He did testify that the undercover patient's' physical examinations were unremarkable. He also could not explain why he told the patient that her lungs were "clear as a bell" when the medical record indicated that the lungs had rhonchi. Dr. Costino attempted to explain this away by claiming he did not want to scare the patient and that he would watch it over time. He also explained that he counseled her to stop smoking because of the rhonchi. If a patient has an abnormal finding, he does not always tell the patient. According to the witness, it would depend on
the severity of the findings.

Dr. Costino testified that in some cases, he will examine two patients at the same time. In the event that they were husband and wife or brother and sister, and if the two patients specifically requested to be in the same room at the same time for the exam, he would honor their request. He believes that TS and MO requested to be examined together. He could not recall if these two patients gave the other patient's name on the HIPAA form.

In trying to clarify his testimony about undercover patient II, he acknowledged that she talked about pain once, but he had to be reminded that she withdrew her complaint that she had pain at a later point during the examination. Also, the witness stated that his work up would have included an interview, knowledge about her profession, her complaint about pain and a physical examination. Dr. Costino also tried to explain that some of the confusion can be because when the patient comes in, especially a dancer, after she has rested and therefore may not be experiencing the same pain or hyper behavior as when she completes her shift, she may downplay the effect of stress and pain that she experiences.

Generally speaking, Dr. Costino requires his pain management patients to agree to the ways in which the patient will obtain the prescriptions. He again explained that when undercover patient I came and told him that she had been taking Percocet illegally, this fortified his belief that he should legitimately prescribe the medication. Dr. Costino could not explain why this patient came back prior to when the medication would have expired from the original prescription. When questioned, he explained that he did not refer them to a physician in Florida because he did not know anyone.

Dr. Costino further testified that during his examination of each patient, he performed a comprehensive examination. This would have included, according to the doctor, active range of motion of the spinal area by having the patient move. He found the patient to be very flexible. Basically, both patients were healthy individuals and their problems really stemmed because of their professions. Most of his findings as to their range of motion were determined by his observations of the patients. When pushed further, he was not able to indicate anywhere in the medical record or on the transcript that he asked the patients to do many of the usual and customary actions (such as stick out your tongue, touch your toes) during a physical examination. He tried to explain that he did not need to ask the patients to do this because he knew that they were in good shape because of their profession. If a patient did not complain about abdominal pain or express any concerns, he would not perform an abdominal, but would rely on his observations of the patient. He continually suggested that because both of these patients were dancers, it was reasonable for him to conclude that overall they were in good physical condition. Even when questioned why the medical record seemed to indicate that many examinations were performed when in fact they were not performed, Dr. Costino continually attempted to explain this away by relying on his observations and the fact that the patients were dancers.

It was noted that the line that said allergies, indicated Percocet, yet he prescribed Percocet. He explained that he writes any medications which the patient is taking at the time of the examination in this space. While he acknowledged that this may be confusing for a subsequent practitioner, he also acknowledged that he writes the medications there.

Concerning his use of a template, he admitted that he would use the left hand side of the record where the information for the physical examination information is recorded. He admitted that on the records provided, although he could not explain why, the information was identical for every visit.

During one of the visits, the transcript recording indicated that he took a lengthy telephone conversation while he was with a patient. He admitted that it looks like the conversation was about stock, although he could not remember the substance of the conversation. He also assured the Board that from time to time he excuses himself from patients to take a telephone call and generally he will leave the room. He could not explain why he did not do this in this circumstance in particular because of the nature and length of the telephone call.

When the questioning of Dr. Costino was concluded, Mr. Jacobs addressed the Board for his closing statement. Mr. Jacobs asked the Board to remember five points. Dr. Costino has practiced for thirty one years and that there are 1500 patients in a solo practice with a 35 % concentration of a pain management specialty. He continued by
noting that there was a seven month investigation which involved several law enforcement authorities and that has all been boiled down to seven visits of two patients. This is not a case of the wholesale issuance of controlled dangerous substance prescriptions. It may be a case where there were some mistakes made, but it is not one that merits the immediate suspension of his license. Mr. Jacobs also argued that while Dr. Costino's orientation and intent may be different, it is still within acceptable practice standards. The transcripts demonstrated that Dr. Costino attempted to discourage the prescribing and use of Percocet and that he attempted to prescribe other medications. The testimony showed that he attempted to limit the amount of prescriptions and repeatedly counseled the patients. Consistently, he reminded the patient to take one pill only after work, which included five or six hours of rigorous activities and not to take any medication when it was a day off. He reminded that Board that TS complained of pain and the inability to unwind - she complained of something - and he attempted to gather as much information as possible. He questioned what were the alternatives. He could have been correct and this was appropriate. But even assuming that it was not, Dr. Costino's motive was not ill motivated. At the very least, he made some mistakes with these two patients and in part, that may be due to the fact that the patients were fake and could not provide the correct information to treat them in a medically sound manner. He was duped into believing that they were exotic dancers and that because of their work, they were in pain and could not sleep, get up and do it all over again. A mistake, he argued, should not result in a temporary suspension. Again, he asked the Board to put it into perspective that this was only nine prescriptions over seven visits for two patients.

Mr. Jacobs suggested that if the Board believed that something should be done in this case, Dr. Costino would be able to secure a monitor who could oversee his practice. While during the testimony, it may be that his medical record keeping may not be the best, but that he would remedy that and would take a medical record keeping course, or any other remedial work that Board believed appropriate and necessary.

DAG Puteska thanked the Board for its time and posited that based on the evidence presented, Dr. Costino demonstrated an appalling lack of professional judgment. DAG Puteska pointed out the various demonstrations of his flawed professional judgment. His medical records were a template and substandard. What these patients wanted was drugs and that is what they got from Dr. Costino. Many of the standard questions that make up a proper initial or follow up examination, according to DAG Puteska, were never asked. He reminded the Board that at best the physical examination consisted of listening to the patient's lungs. His lack of appropriate medical care was then compounded by the false billing submitted. DAG Puteska concluded by asking the Board to focus on the testimony that he treated these two patients as if they were real patients. If that is the case, then DAG Puteska argued that this alone should justify a temporary suspension. When the evidence was taken as a whole, the Board could not conclude anything but that the Attorney General has maintained her burden of proof in establishing that Dr. Costino's continued practice posed a significant risk of harm to the health, safety and welfare of the citizens of New Jersey.

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

All parties, except Administrative and Counseling Staff, left the room. The Board returned to open session and announced its decision.

ON THE PRESENT RECORD THE EVIDENCE DEMONSTRATED SUCH A LACK OF JUDGMENT AND FUNDAMENTAL KNOWLEDGE, A LACK OF REGARD TO THE BASIC TENETS OF MEDICINE IN GENERAL AND IN PRESCRIBING IN PARTICULAR THAT THE BOARD CANNOT TRUST THE RESPONDENT TO CONTINUE TO PRACTICE IN AN APPROPRIATE FASHION AND THAT A CLEAR AND IMMINENT DANGER EXISTS IF HE WERE PERMITTED TO PRACTICE FURTHER, THE DOCUMENTS, TESTIMONY AND EVIDENCE DEMONSTRATED A CHARADE OF ACTIVITIES EVIDENCING POOR JUDGMENT SO FUNDAMENTALLY FLAWED SUCH AS A CURSORY HISTORY PERFORMED BY JUST ASKING A FEW QUESTIONS OF THE PATIENT, NO REVIEW OF FAMILY HISTORY, NO REVIEW OF THE PATIENT SYSTEMS AND PRESCRIBING MEDICATIONS WHEN THEY WERE NOT INDICATED. THIS WAS FURTHER CONFIRMED BY HIS OWN TESTIMONY AND A REVIEW OF THE RECORDS THAT DEMONSTRATED THAT HE PERFORMED A CURSORY PHYSICAL
EXAM AND OBSERVED RATHER THAN PERFORMED THE PHYSICAL EXAM. ADDITIONALLY THE EVIDENCE DEMONSTRATED HIS CONTINUED FAILURE TO EXAMINE THE PATIENT AND THE USE OF AN IDENTICAL TEMPLATE OF THE PHYSICAL EXAM ON EVERY VISIT FOR TS. DR. COSTINO ALSO FAILED INSO FAR AS HIS RECORDS CONTAIN SIGNIFICANT FINDINGS YET THEY CONFLICT WITH WHAT HE TOLD PATIENTS ABOUT THE FINDINGS DURING THE EXAM. ADDITIONALLY, HE IGNORED DRUG SEEKING BEHAVIOR AND PRESCRIBED ADDICTIVE DRUGS ON A REPEATED BASIS WITHOUT A MEDICAL NEED AND THAT HE DOCUMENTED OBJECTIVE FINDINGS OF PAIN IN A PATIENT THAT REPEATEDLY DENIED HAVING PAIN. FINALLY, THE BILLING OF RELATIVELY BRIEF VISITS AND CURSORY EXAMS WERE MISREPRESENTED AS COMPREHENSIVE MEDICAL EXAMS FURTHER DEMONSTRATE HIS FAILURE TO ADHERE TO APPLICABLE STANDARDS OF THE FUNDAMENTALS OF A GOOD PRACTICE. HIS JUDGMENT IS SO FLAWED AND THE POTENTIAL DAMAGE TO THE PUBLIC IS SO IMMINENT THAT NO MEASURE SHORT OF TEMPORARY SUSPENSION COULD PROTECT THE PUBLIC.

The order of temporary suspension was effective on Monday, December 17th to afford Dr. Costino an opportunity to transfer his patients, however, he was not permitted to take on any new patients during the period of wind down.

The parties were urged to seek an expedited hearing at the Office of Administrative Law.

3 p.m. TZENG, Sun C. M.D. 25MA0281800
Kathryn Mendoza, DAG, Prosecuting
Matt Mandel, Esq., Respondent

This matter was opened to the New Jersey State Board of Medical Examiners by the filing of a Verified Administrative Complaint seeking the suspension or revocation of the license of Respondent to practice medicine and surgery and for such other relief deemed appropriate. The parties have conferred and Dr. Tzeng consented to a voluntary surrender of his license effective immediately upon entry of the this order by the Board.


OLD BUSINESS

ZAH, Kenneth M.D. 25MA05641300
Jeri Warhaftig, DAG, Prosecuting
Robert J. Conroy, Esq., Respondent
Sandra Y. Dick, DAG Counseling

This matter was before the Board, on the papers, upon petition of Robert J. Conroy, Esquire on behalf of his client, requesting that the Board vacate its March 9, 2006 Order or, in the alternative, to determine that Dr. Zahl has satisfied the penalty imposed and reinstate his license to practice medicine and surgery in the State of New Jersey.

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

All parties, except Administrative and Counseling Staff, left the room.

Drs. Criscito, Ciechanowski, and Cheema recused in this matter and did not participate in the discussion or vote and left the room during the deliberation.

The Board returned to open session and announced its decision.
THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO DENY THE APPLICATION TO VACATE THE DECISION OF ZAHL I. THE BOARD'S FINAL ORDER WAS UPHELD BY THE SUPREME COURT OF THE STATE OF NEW JERSEY. IN ADDITION, NO VALID RATIONALE HAS BEEN GIVEN TO RECONSIDER THE DECISION GIVEN THE WEALTH OF FINDINGS OF DISHONESTY AND LACK OF MORAL CHARACTER. THE BOARD FINDS IT INAPPROPRIATE TO CONSIDER THE VACATION OF ZAHL I OR THE REINSTATEMENT OF DR. ZAHL'S LICENSE.

NEW BUSINESS

Nothing scheduled

Respectfully submitted,

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