

FILED

APRIL 27, 2009

**NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS**

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

IN THE MATTER OF THE SUSPENSION :
OR REVOCATION OF THE LICENSE :
ISSUED TO: :

KENNETH ZAHL, M.D. :
LICENSE NO. MA56413 :

TO PRACTICE MEDICINE AND SURGERY: :
IN THE STATE OF NEW JERSEY :
: :
: :

ORDER

This matter was opened before the New Jersey State Board of Medical Examiners upon the Board's receipt of a Motion for Sanctions filed on February 3, 2009 by Respondent Zahl. Respondent originally filed this Motion before ALJ Gerson in connection with the trial of the above referenced matter. The Motion was heard on February 1, 2007 at which time Respondent argued that Deputy Attorneys General assigned to the case had destroyed evidence they gathered through the use of a Demand For Statement Under Oath. Specifically Respondent alleged that the Deputy Attorneys General destroyed medical records and operative reports, x-ray films and schedules that Dr. John Yulo attached to a statement under oath and sent via mail in late December of 2005. Dr. Zahl further alleged that Dr. Yulo kept no inventory of what he sent and Yulo acknowledged at a deposition on November 1, 2007 that he had destroyed a folder of the procedures and schedules and any other

CERTIFIED TRUE COPY

medical records that he had taken from Dr. Zahl's office.

The State at oral argument at the OAL indicated that Dr. Yulo had testified that no one had told him to destroy anything, that Dr. Zahl had the originals of all documents that were in question as Dr. Yulo only had copies, that Dr. Yulo had testified that he never took x-rays out of the building, that certifications in the file indicated all documents the DAG received from Yulo had been turned over to respondent, and finally that respondent had not shown in any manner that the absence of the documents he asserted were missing worked an undue prejudice upon him.

At the time of argument the ALJ denied Dr. Zahl's motion informing him that it was premature, that there was no showing at that point, that the Deputy Attorneys General had informed Dr. Yulo to destroy records, nor had any responsibility for those actions, nor any showing that the records were "crucial records" to this matter, and indeed indicated that Dr. Yulo's destruction of records might be to respondent's benefit (in that the records might be necessary to the State's proofs in their case). The ALJ found that as of the time he heard the motion there was

"absolutely no reason in the world to sanction the Deputy Attorneys' General. I don't even think there is a case at this point that is close."

Following denial of respondent's motion, the Court on February 1, 2007 instructed Dr. Zahl that while his proofs were insufficient at that point, Dr. Zahl had the opportunity after the testimony of

Dr. Yulo, the only witness who could establish Dr. Zahl's arguments, to renew his application for sanctions. Respondent did not renew his motion to the ALJ following Yulo's testimony or at any time during the trial of the matter. Instead, on February 3, 2009, at the extended time for the filing of exceptions from the Initial Decision of the ALJ, respondent renewed his motion for sanctions, disqualification or recusal of the prosecuting DASG and dismissal of the matter, to the Board.

Under the rules of the Office of Administrative Law, orders or rulings on motions seeking such sanctions under N.J.A.C. 1:1-14.14 may only be appealed interlocutorily under N.J.A.C. 1:1-14.10(j) and (l). A party may not seek review of such orders or rulings after the judge renders the initial decision in a contested case. For this reason alone, the Board could decline to consider this matter. Nevertheless the Board considered arguments of respondent and heard this matter, permitting oral argument on March 11, 2009.

At the hearing before the Board respondent alleged that DASG Kenny and Warhaftig failed to reveal all discovery to him including records they received from Dr. Yulo. Additionally, respondent alleged that another DAG secured "perjured" testimony from Dr. Yulo as to whether he had received a subpoena. As to the records, although Zahl acknowledged that copies of records were eventually supplied to him, he asserted that the originals (actually copies of records Yulo took from Dr. Zahl's office) had never been located,

and that the night before a deposition of Dr. Yulo was held, DAG Warhaftig forwarded to him "marked up" or work copies of some of the records (schedules) which she indicated she had located.

The Attorney General presented certifications, argument and documents indicating that in response to a Demand For Statement In Writing Under Oath issued in December 2005 by the Attorney General's office, Dr. Yulo, a former colleague of respondent, provided handwritten answers which apparently contained attachments which were copies of operative reports, pay stubs, and schedules, all from Dr. Zahl's office. At a later time when respondent issued a Demand For Documents in September of 2006 documents were found and produced to Dr. Zahl including operative reports, and pay stubs. At a later time a work copy of schedules that Dr. Yulo had produced was located by DAG Warhaftig and turned over to respondent. At deposition respondent asked Dr. Yulo extensively about these documents and Yulo testified that he had destroyed them, after forwarding copies (with the DSUO) and that no one had instructed him to do that.

As to Respondent's accusation that a Deputy Attorney General deliberately caused Dr. Yulo to lie under oath regarding whether or not he received a subpoena, Dr. Zahl has produced nothing to connect Dr. Yulo's testimony (even if it was in error) to the Deputy Attorney General, and Dr. Yulo was represented by

independent counsel. Whether or not Dr. Yulo received a subpoena appears to have been immaterial to any of the substantive issues in the case, and nothing has been presented by way of impeachment or otherwise to demonstrate the Attorney General was responsible for the testimony regarding this subpoena.

Respondent has offered no evidence or facts which would support any allegation that any of the Deputy Attorneys General had destroyed documents or kept documents away from Dr. Zahl.

In order to prevail on his motion for sanctions, respondent must demonstrate that he was unduly prejudiced by a failure of the State to produce evidence to him in this matter. Kimball Intern. v. Northfield Metal, 334 N.J. Super. 596 (App. Div. 2000), cert. den. 167 N.J. 88 (2001). The existence of "substitutionary evidence" obviates justification for penalizing a party for loss of evidence. Id. All of the evidence produced has indicated that the items at issue here were mere copies of documents, the originals of which respondent had under his control at all times, that copies of all documents discovered were produced to him (albeit some were found and provided late) and no support whatsoever for a bold assertion that the Deputy Attorney General must have destroyed documents. To the contrary Dr. Yulo testified that no one told him to destroy documents, and the Attorney General promptly and voluntarily turned over its copies of every document it found to respondent. Additionally, Respondent appears to have suffered no

harm from the production of documents just prior to his deposition of John Yulo, which was well in advance of the plenary hearing in this matter. Finally, no one, including Dr. Zahl, introduced any of the documents at the hearing (despite the fact that Dr. Zahl at all times had the original schedules that he alleges would have been beneficial to him). Therefore it appears that a misfiled copy of inconsequential documents, which were provided to respondent when located prior to the deposition of Dr. Yulo, is at most what is in question in this matter.

Respondent has also asserted he is entitled to a "spoliation inference." However, he has not met his burden in support of his application as he has not satisfied the elements necessary to sustain a claim of spoliation. In order to prevail on a claim of spoliation, respondent would have to demonstrate five elements, including 1) that the evidence must be material to the litigation, 2) that the party deprived could not reasonably obtain access to the evidence from another source, 3) that the party allegedly concealing material evidence intentionally withheld, altered or destroyed it in order to disrupt the litigation, 4) that the party claiming concealment was damaged by having to rely on an evidential record that did not contain the evidence, and 5) that there was a legal obligation to disclose the evidence. Other than the last prong, respondent has not demonstrated any of the elements necessary to even support a claim of spoliation of evidence. See

Tataglia v. UBS Paine Weber Inc. 197 N.J. 81 (2008). As respondent clearly had possession of the original documents at all times, as there has been no showing the State withheld, altered or destroyed documents (indeed there is a showing that documents were turned over when located), and as respondent never entered any of the records - though he possessed the originals - he cannot claim he was damaged by the failure of the evidential record to contain the documents. Respondent has failed to support his claim of spoliation of evidence.

Based on these circumstances there has been no demonstration of spoliation of any evidence, nor any foundation for the disqualification, recusal, monetary sanctions, adverse evidential inferences or dismissal of the charges sought by respondent in this matter.

**IT IS THEREFORE ON THIS 24TH DAY OF APRIL, 2009
AS ORALLY ANNOUNCED ON THE RECORD ON March 11, 2009,**

ORDERED:

1. Respondent's motion for sanctions is denied.

NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS

By: _____


Paul Mendelowitz, M.D., President