


**BEFORE THE BOARD OF THE HEALING ARTS
OF THE STATE OF KANSAS**

FILED 

JAN 22 2019

KS State Board of Healing Arts

In the Matter of)
Bryan W. Burns, M.D.)
)
Ks. License #04-27222)
_____)

Docket No. 17-HA00073

FINAL ORDER ON REVIEW OF INITIAL ORDER

On December 14, 2018, the above-captioned matter came before the Kansas State Board of Healing Arts (“Board”) for review of the Initial Order filed with the Board on August 16, 2018. Dr. Burns (“Respondent”/“Licensee”) appeared in person and through counsel, Diane Bellquist. Susan Gering appeared as Board Litigation Counsel to present the case of the Petitioner on behalf of the Disciplinary Panel of the Board. The members of the Board who served on the Disciplinary Panel for this case were recused.

Pursuant to the authority granted to Board by the Kansas Healing Arts Act, K.S.A. 65-2801 *et seq.* (“Act”), and in accordance with the provisions of the Kansas Administrative Procedure Act (“KAPA”), K.S.A. 77-501 *et seq.*, specifically K.S.A. 77-527, the Board enters this Final Order.

SUMMARIZED BACKGROUND, PROCEDURAL POSTURE, AND CONCLUSIONS

A Petition for discipline was filed alleging Licensee violated the Act by engaging in a sexual relationship with Patient 2 [REDACTED] and treating [REDACTED] (Patient 1) after the sexual relationship with Patient 2 began [REDACTED]. There was no dispute the sexual relationship occurred or that Licensee treated Patient 1 [REDACTED]. Both Licensee and Patient 2 described the relationship as consensual. Patient 1 asserted that the [REDACTED]

During the sexual relationship between Licensee and Patient 2 there were instances in which Licensee ordered medical tests and wrote prescriptions for Patient 2, including for drugs currently categorized as controlled substances. There was no documentation associated with these orders.

The Office of Administrative Hearings (“OAH”) was appointed to conduct a formal hearing and issue an Initial Order. The initial order of the Administrative Law Judge (“ALJ”) concluded that Licensee violated the Act because the care provided to Patient 2 was not documented. The ALJ did not find the relationship with Patient 2 constituted an “act of sexual abuse, misconduct or other improper sexual contact, which exploits the licensee-patient relations, with a patient or a person responsible for health care decision concerning such patient” pursuant to K.S.A. 65-2837(b)(16). The ALJ did not find Licensee violated any provision of the Act by

The ALJ found a “private censure” to be the appropriate sanction.

The Board filed a notice to review the Initial Order. The matter was fully briefed by both parties, and the Board held a hearing on review of the Initial Order on December 14, 2018 at which the parties were given an additional opportunity to be heard on the matter.¹

Upon de novo consideration of the issues and the entire agency record after giving due regard to the ALJ’s witness credibility determinations, the Board concludes, as more fully described below: Licensee violated K.S.A. 65-2836(b) by committing acts of unprofessional or dishonorable conduct; Licensee violated K.S.A. 65-2836(b) by committing acts of unprofessional or dishonorable conduct as more specifically defined at K.S.A. 65-2837(b)(12) in that he committed conduct likely to deceive or harm the public; Licensee violated K.S.A. 65-2836(k) and K.A.R. 100-24-1 by his failure to create and maintain medical records in regard to his treatment of Patient 2. The Board concludes that the appropriate sanctions under the unique facts of this case are public censure, with costs assessed against Licensee.

FINDINGS OF FACT

The Board incorporates the findings of fact contained in paragraphs 1 through 18, on pages 1 through 3 of the Initial Order, by reference, here. In addition, the Board finds that:

1. The notice of intent to review the initial order was filed and served on September 5, 2018. It was filed and served 16 days after service of the initial order but prior to the expiration of 30 days after service of the initial order. The hearing on review of initial order occurred on December 14, 2018.
2. Patient 2 was not a member of Licensee’s family at any time.
3. The witness designated as an expert witness for Licensee was a retained witness for Licensee, approached and hired by Licensee’s attorney. Until the time he gave testimony in this case, the information he had about the case was generally limited to the information Licensee’s attorney chose to provide him. (Tr. at 133-148.)
4. Licensee’s expert had no training or education in identifying sexual professional misconduct. (Tr. at 133-148.)
5. Licensee’s expert initially testified that Licensee’s treatment of Patient 1 after Licensee had begun a sexual relationship with Patient 2 would be dishonorable conduct but later indicated that such conduct would not be unprofessional in his view. (Tr. at 141-148).

¹ In advance of the oral arguments, the Board was provided the entire agency record to facilitate a comprehensive understanding of the underlying matter, including the hearing transcript and all exhibits, briefs, and motions filed by the parties in advance of oral arguments. The entire agency record was considered by the Board in rendering its decision. In reviewing the Initial Order, the Board gave due regard to the Presiding Officer’s opportunity to observe the witnesses and determine their credibility during the formal hearing.

CONCLUSIONS OF LAW AND POLICY

I. Applicable statutes and regulations, and relevant professional guidelines.

The Board incorporates paragraphs 1 through 4, under the heading “Applicable Law”, on pages 3 through 4 of the Initial Order, by reference, here. The Board adds the following.

K.S.A 77-527 states, in most relevant parts:

(a) The agency head, upon its own motion may, and upon petition by any party or when required by law shall, review an initial order, except to the extent that:

(1) A provision of law precludes or limits state agency review of the initial order; or

(2) the agency head (A) determines to review some but not all issues, or not to exercise any review, (B) delegates its authority to review the initial order to one or more persons, unless such delegation is expressly prohibited by law, or (C) authorizes one or more persons to review the initial order, subject to further review by the agency head.

...

(d) Subject to K.S.A. 77-621, and amendments thereto, in reviewing an initial order, the agency head or designee shall exercise all the decision-making power that the agency head or designee would have had to render a final order had the agency head or designee presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the agency head or designee upon notice to all parties. In reviewing findings of fact in initial orders by presiding officers, the agency head shall give due regard to the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses. The agency head shall consider the agency record or such portions of it as have been designated by the parties.

K.S.A. 77-526(d) states, in most relevant part:

Findings of fact shall be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding.

K.S.A. 77-530(b)(3) states, in most relevant part:

... an initial order shall become effective and shall become the final order ... 30 days after service if ... the agency head has not given written notice of its intention to exercise review ...

Although not binding, the Board finds the following provision of the Code of Medical Ethics of the American Medical Association (§ 8.14, pp. 307-308 (2012-2013 Edition)) relevant to the discussion and analysis of issues in this case:

Sexual contact that occurs concurrent with the patient-physician relationship constitutes sexual misconduct. Sexual or romantic interactions between physicians and patients detract from the goals of the physician-patient relationship, may exploit the vulnerability of the patient, may obscure the physician's objective judgment concerning the patient's health care, and ultimately may be detrimental to the patient's well-being. If a physician has reason to believe that nonsexual contact with a patient may be perceived as or may lead to sexual contact, then he or she should avoid the nonsexual contact. At a minimum, a physician's ethical duties include terminating the physician-patient relationship before initiating a dating, romantic, or sexual relationship with a patient.

II. Case law.

The case law most relevant to this case include the following.

“Where substantial evidence is presented that supports a finding of a violation of the [Kansas Healing Arts Act], Board members are entitled and expected to rely on their own expertise and experience in making these decisions.” *Hart v. Bd. of Healing Arts of State*, 27 Kan. App. 2d 213 (2000).

“[T]he [Act] is entitled to broad and liberal construction.” *Patel v. Kansas State Board of Healing Arts*, 22 KanApp.2d 712, 716 (1996). The Kansas Supreme Court held, in reviewing the Kansas Healing Arts Act, that consideration must be given to the entire act and that the legislatures “enumerating certain acts and classifying them as unprofessional conduct” did not serve to “exclude all other acts or conduct in the practice of the healing arts” that, by “common understanding” could be considered unprofessional conduct. *Kansas State Bd. of Healing Arts v. Foote*, 200 Kan. 447, 453, 436 P.2d 828, 833 (1968). The Court went on to identify the impracticality of listing “each and every specific act or course of conduct which might constitute such unprofessional conduct of a disqualifying nature.” *Id.* Finally, the Court concluded that “The determination whether by common judgment certain conduct is disqualifying is left to the sound discretion of the board.” *Id.*, at 454.

The Kansas Healing Arts Act does not require a finding of actual harm to a patient for a licensee's acts and/or conduct to be grounds for disciplinary action under the provisions of the act. *Fieser v. Kansas State Bd. of Healing Arts*, 281 Kan. 268,130, P.3d 555 (2006).

III. Conclusions.

The Board incorporates paragraphs 1, 2, 10, and 13 under the heading “Discussions and Conclusions of Law”, on pages 4 through 7 of the Initial Order, by reference, here.

The Board incorporates the first four sentences of paragraph 6 under the heading “Discussions and Conclusions of Law”, on page 5 of the Initial Order, by reference, here.

The Board otherwise departs from the conclusions of the Initial Order, as described herein.

The Board overrules Licensee’s procedural objection to the Board’s review of the of the Initial Order

Licensee objected that he was served the notice of intent to review the initial order one day later than the procedural timeline required in K.S.A. 77-527(b), which directs that notice should be served by the Board within 15 days after service of the Initial Order. However, the Board’s jurisdiction to review an initial order is described at K.S.A. 77-527(a), not K.S.A. 77-527(b). K.S.A. 77-527(b) does not limit the Board’s discretionary power to review an initial order due to lack of timeliness of notice by the Board of its intent to review. To the extent that there is any jurisdictional hard deadline² for service of the notice *by the Board*, it could only be the point at which the initial order becomes a final order – the 30 day time period described in K.S.A. 77-530(b)(3), which states" ... an initial order shall become effective and shall become the final order . . . 30 days after service if . . . the agency head has not given written notice of its intention to exercise review . . . "

Here, there is no dispute that the Board served its notice well before the Initial Order became the final order of the Board. The Licensee moved for the Board to withdraw the notice. The Board considered the Licensee’s motion. Under the circumstances of this case (including but not limited to the facts that the notice was only one day late, the delay was due to an inadvertent clerical error, and that no material prejudice was caused by the delay), the Board declined to withdraw the notice, as described in the September 11, 2018 Journal Entry declining to withdraw the notice and granting Licensee’s motion to continue the hearing. Under these facts, the Board acted well within the jurisdictional discretion described in K.S.A. 77-527(a) and K.S.A. 77-530(b)(3) when it moved forward with its review of the Initial Order.

In addition to the conclusion drawn from a plain reading of K.S.A. 77-527(a) and K.S.A. 77-530(b)(3), it is well established that rules that “seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times” are not be considered jurisdictional unless there is “clear indication” that the legislature intended for the rule to be jurisdictional. *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). See also, *Expert Envtl. Control, Inc. v. Walker*, 13 Kan. App. 2d 56, 58 (1988). The United States Supreme Court described this general rule as follows:

² As it is unnecessary to review the broader question of the jurisdictional impact of the 30 day time period described in K.S.A. 77-530, the Board makes no affirmative conclusions in this regard.

We have urged that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction. [citations omitted]. Other rules, even if important and mandatory, we have said, should not be given the jurisdictional brand.

Id. at 435. The rule described in both *Henderson* and *Expert Envtl. Control* points to the distinction between an act that is untimely and an act that is void because it falls outside the power granted to the adjudicative body.

Here, there is no question that the notice was untimely by one day pursuant to K.S.A. 77-527(b). However, the relevant question presented in this case is the scope of the Board's legal power – its jurisdiction – to review an initial order. The legislature gave the Board the jurisdiction to review an initial order prior to the time it becomes a final order. See K.S.A. 77-526; K.S.A. 77-527(a); K.S.A. 77-530. Not only is there no “clear indication” that the timeliness rule stated in K.S.A. 77-527(b) limits the Board's jurisdiction to review an initial order on its own motion, the more jurisdictionally specific provisions of K.S.A. 77-527(a) and K.S.A. 77-530(b)(3) clearly indicate that the Board's jurisdiction to review an initial order is not, per se, threatened prior to the time that the initial order becomes a final order.

Although the 15 day timeliness rule stated in K.S.A. 77-527(b) is important and potentially dispositive in any case (the violation of this rule could alone serve as a basis to dismiss a notice without further cause), the Board had the power in this case to decline to dismiss the notice. Further, under the unique facts of this case,³ this decision was reasonable and well within the bounds of common-sense notions of fair play that inform the Board's discretion under due process principles.

Licensee violated K.S.A. 65-2836(b) by committing acts of unprofessional or dishonorable conduct.

Based on the facts described and incorporated above, and the discretion given to the Board to take disciplinary action under K.S.A. 65-2836(b) based acts of unprofessional or dishonorable conduct in a licensee's professional capacity that are not more precisely enumerated under the Act (see *Kansas State Bd. of Healing Arts v. Foote*, 200 Kan. 447, 453 (1968)), the Board finds that Licensee committed acts of unprofessional conduct in regard to his choice to treat Patient 1, including treatment for anxiety and depression, while simultaneously engaging in a romantic relationship with Patient 2 and not disclosing the relationship to Patient 2. Licensee has not shown that it would have been impossible to refer Patient 1 to another provider, or that his course of action in regard to his treatment of Patient 1 was otherwise unavoidable.

³ The Licensee's argument regarding the timing of the notice of intent would have had more relevance (although not necessarily jurisdictional relevance) to the extent Licensee had alleged that the delay substantially interfered with the ability of the Licensee to exercise another procedural right granted by the Act. No such argument was made in this case. The Board notes that the Board granted Licensee's request to continue the hearing an additional 60 days from the original scheduled date, giving the Licensee a total period of more than 90 days' notice prior to the hearing.

Under the particular facts of this case, the Board finds Licensee's chosen course of action in regard to his treatment of Patient 1 was unprofessional and/or professionally dishonorable.

Further, Licensee violated K.S.A. 65-2836(b) by committing acts of unprofessional or dishonorable conduct as more specifically enumerated at K.S.A. 65-2837(b)(12) in that he committed conduct likely to deceive or harm the public. Under the facts of this case, Licensee knew or should have known that his chosen course of action in regard to Patient 1 was likely to harm to Patient 1. Again, Licensee has not shown that other, professionally appropriate, courses of action were unavailable to him in regard to his treatment of Patient 1.

The Board is unable to conclude that Licensee violated K.S.A. 65-2836(b)(16)

The Board agrees with the argument presented by Litigation Counsel that sex between a doctor and his or her patient ultimately tends to put the patient's safety at risk to some extent. Even if no actual harm occurs, the potential for harm is always present in such a relationship. The Board also believes that any sexual contact between a patient and a physician will, in most cases, tend to involve some aspect of inherent exploitation even if such exploitation is unintended. Further, the inherent power dynamics between a physician and a patient causes the Board to view any sexual contact between a physician and a patient with great concern.⁴

Notwithstanding the Board's serious concern relating to any such contact between a physician and patient, Kansas law requires that, in order for the Board to find a violation of K.S.A. 65-2837(b)(16), the Board must find both: (1) an "act of sexual abuse, misconduct or other improper sexual contact"; **and** (2) that such act exploited the physician patient relationship. *Id.* The problem the Board faced in this case is that the evidentiary record was somewhat vague regarding the combination of these two factual questions. The Board must conclude that the record does not contain sufficient evidence to prove that the acts of improper sexual contact exploited the physician patient relationship in this case. Factors that contributed to the Board's inability to find a violation of K.S.A. 65-2837(b)(16) in this case were the undisputedly very limited physician-patient clinical interactions with Patient 2 in this case, the lack of clarity in the record in regard to the extent of temporal overlap of the sexual contact and the limited clinical interactions, and the lack of other evidence in the record to demonstrate exploitation of the physician patient relationship.

⁴ The Board notes that both Licensee's counsel and the ALJ appeared to give overriding weight to the fact that there was no allegation of lack of consent in this case. It is undisputed that both Licensee and Patient 2 agree that they willingly participated in the sexual relationship. However, while legal consent is always relevant to the analysis under K.S.A. 65-2837(b)(16), the Board's consideration of the professional duties of a physician in the context of a professional disciplinary matter includes broader considerations not directly relevant to the question of legal consent. This includes the inherent power dynamics of the physician patient relationship that tend to impinge upon the ability for full and knowing consent between two individuals of substantially equal relational power to exist. Sexual contact between a physician and patient is generally "improper" pursuant to K.S.A. 65-2837(b)(16) even if the contact is legally consensual.

Licensee violated K.S.A. 65-2836(k) and K.A.R. 100-24-1 by his failure to create and maintain medical records in regard to his treatment of Patient 2.

The Board does not depart from the Initial Order on this point. Licensee's violation is essentially undisputed.

Sanctions

The Board approaches every case according to the totality of the evidentiary record and the circumstances and facts unique to the case. Based on the above findings, the Board concludes a wide range of sanctions could be justified in this case. The oft-cited 2008 Guidelines for The Imposition of Disciplinary Sanctions is a general and non-binding informational document that litigants and the Board often use as a reference in framing the sanctions discussion. However, the boxes contained in the guidelines do not always precisely fit the substantive contours of the case. More importantly, the Board's sanctioning authority is limited only by Kansas law and the bounds of due process. The Board finds that the appropriate sanction under the unique facts of this case are public censure, with costs assessed against Licensee as described below.

Costs

This Final Order, finding multiple violations of the Healing Arts Act, is adverse to Licensee. Therefore, it is appropriate to assess costs against him pursuant to K.S.A. 65-2846. Based on consideration of the circumstances described in this order and review of the Petitioner's statement of costs, the costs of the proceedings are assessed against Licensee in the amount of \$4,129.92. These costs shall be paid in full within 30 days of the filing of this Final Order, or, in the alternative, Licensee may submit a proposed payment schedule for the Board's consideration and approval within that time frame.

Stay

The Board having considered Licensee's motion to stay this order pending judicial review, and being fully advised of the agency record as a whole, grants the motion. The effectiveness of the Final Order is stayed pursuant to K.S.A. 77-528. This stay shall immediately cancel upon the earlier of the following dates: (1) the date on which judicial review, as described under Kansas law, is complete, or, (2) if no timely petition for judicial review has been filed, the date on which a petition for judicial review is no longer timely under K.S.A. 77-613(b).

ORDERS

IT IS THEREFORE ORDERED, BY THE KANSAS STATE BOARD OF HEALING ARTS, that Respondent, Bryan W. Burns, M.D., license No. 04-27222, is PUBLICLY CENSURED.

IT IS FURTHER ORDERED that Respondent is hereby ordered to pay **COSTS** in the amount of \$4,129.92. These costs shall be paid in full within 30 days of the filing of this Final Order, or, in the alternative, may submit a proposed payment schedule for Board's consideration and approval within that time frame. Payment shall be submitted to the attention of: Compliance Coordinator, Kansas State Board of Healing Arts, 800 SW Jackson Street, Lower Level, Suite A, Topeka, Kansas 66612.

IT IS FURTHER ORDERED that this Final Order is hereby **STAYED** pursuant to K.S.A. 77-528. This stay shall immediately cancel upon the earlier of the following dates: (1) the date on which judicial review, as described under Kansas law, is complete, or, (2) if no timely petition for judicial review has been filed, the date on which a petition for judicial review is no longer timely under K.S.A. 77-613(b).

IT IS SO ORDERED THIS 22nd DAY OF JANUARY, 2019, IN THE CITY OF TOPEKA, COUNTY OF SHAWNEE, STATE OF KANSAS.

KANSAS STATE BOARD OF HEALING ARTS



Kathleen Selzler Lippert, Executive Director

NOTICE OF APPEAL RIGHTS

PLEASE TAKE NOTICE that this is a Final Order. A Final Order is effective upon service, and service of a Final Order is complete upon mailing. Pursuant to K.S.A. 77-529, Parties may petition the Board for Reconsideration of a Final Order within fifteen (15) days following service of the final order. Additionally, a party to an agency proceeding may seek judicial review of a Final Order by filing a petition in the District Court, as authorized by K.S.A. 77-601, *et seq.* Reconsideration of a Final Order is not a prerequisite to judicial review. A petition for judicial review is not timely unless filed within 30 days following service of the Final Order. A copy of any petition for judicial review must be served upon Kathleen Selzler Lippert, Executive Director, Kansas State Board of Healing Arts, 800 SW Jackson, Lower Level-Suite A, Topeka, KS 66612.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I served a true and correct copy of this document by United States mail, postage prepaid, on this 22nd of January 2019 to the following:

Bryan W. Burns, M.D.
11400 W 135th Street
Overland Park, KS 66221

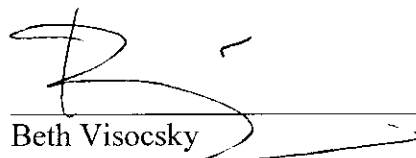
Diane L. Bellquist
Joseph Hollander & Craft, LLC
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And a copy was hand-delivered to the office of:

Susan Gering, Deputy Litigation Counsel
Jared Langford, Associate Litigation Counsel
Kansas Board of Healing Arts
800 S.W. Jackson, Lower Level-Suite A
Topeka, Kansas 66612

And the original was filed with the office of the Executive Director:

Kathleen Selzler Lippert
Executive Director
Kansas Board of Healing Arts
800 S.W. Jackson, Lower Level-Suite A
Topeka, Kansas 66612


Beth Visocsky
Operations Manager