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NOV 13 2017

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

<b>In the Matter of</b>	)	KS State Board of Healing Arts
<b>DANIEL MYERS, M.D.</b>	)	
	)	<b>KSBHA Docket No. 16-HA00037</b>
<b>Application for Reinstatement of</b>	)	
<b>License to Practice Medicine and Surgery</b>	)	<b>OAH Docket No. 16-HA0016</b>

**FINAL ORDER DENYING REINSTATEMENT OF LICENSURE  
AND ASSESSING COSTS**

NOW on this 13<sup>th</sup> day of October, 2017, the above-captioned matter comes before the Kansas State Board of Healing Arts (“Board”) on the Petition for Review of Initial Order filed by Daniel Myers, M.D. (“Petitioner”). Petitioner appears in person, and through counsel, Mark Stafford, Forbes Law Group. The Respondent agency appears through Susan Gering, Deputy Litigation Counsel.

Pursuant to the authority granted to Board by the Kansas Healing Arts Act, K.S.A. 65-2801 *et seq.*, and in accordance with the provisions of the Kansas Administrative Procedure Act, K.S.A. 77-501 *et seq.*, specifically K.S.A. 77-527, the Board hereby enters this Final Order. After reviewing the Initial Order, the parties’ briefs, and the agency record in this matter; hearing the oral arguments of the parties; and being otherwise duly advised in the premises, the Board makes the following findings, conclusions and order:

**Procedural History**

1. On June 24, 2013, Petitioner entered into a Consent Order (CO) for the surrender of his Kansas license to practice medicine and surgery. The CO provided that such surrender was to be treated as a revocation of his license to practice medicine and surgery in the State of Kansas for all purposes, including reporting.

2. On June 3, 2015, Petitioner submitted an application for reinstatement of his license to practice medicine and surgery in the State of Kansas. The application was deemed complete and filed with the Board on December 14, 2015.
3. On December 14, 2015, the Respondent agency (Respondent) filed a Response in Opposition to Application for Reinstatement of License to Practice Medicine and Surgery. Respondent also filed a Motion to Dismiss, citing the premature filing of Petitioner's application for reinstatement.
4. On December 23, 2015, Petitioner filed a Response to Respondent's Motion to Dismiss, and requested a formal hearing.
5. On February 12, 2016, Petitioner appeared before the Board for consideration of pending motions. The Board denied the Motion to Dismiss. The Board stayed Petitioner's application for reinstatement until June 24, 2016, as the application was premature and contrary to statute. The Board appointed the Office of Administrative Hearings (OAH) to conduct a formal hearing on this matter and to issue an initial order.
6. On January 30 and 31, 2017, Petitioner, appeared in person and with counsel, Mark W. Stafford. Counsel for the Respondent also appeared and a formal hearing was conducted. The parties presented witnesses and exhibits. Upon the conclusion of the hearing, the parties were given an opportunity to submit their proposed findings of fact and conclusions of law. The Presiding Officer (PO) issued an Initial Order (IO) on August 10, 2017.
7. On August 25, 2017, Petitioner filed a Petition for Review of Initial Order. Petitioner subsequently filed a supplemental Petition for Review of Initial Order on September 12, 2017.

8. On September 12, 2017, Respondent agency filed Respondent's Brief on Review of Initial Order and Request for Oral Argument.
9. On October 13, 2017, the Board heard oral arguments from the parties on the Review of the Initial Order in the above captioned case. 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.

#### Applicable Law

10. K.S.A. 65-2801, Purpose of the healing arts act,

Recognizing that the practice of the healing arts is a privilege granted by legislative authority and is not a natural right of individuals, it is deemed necessary as a matter of policy in the interests of public health, safety and welfare, to provide laws and provisions covering the granting of that privilege and its subsequent use, control and regulation to the end that the public shall be properly protected against unprofessional, improper, unauthorized and unqualified practice of the healing arts and from unprofessional conduct by persons licensed to practice under this act.

11. K.S.A. 65-2809(e) provides

Any license canceled for failure to renew may be reinstated within two years of cancellation upon recommendation of the board and upon payment of the renewal fees then due and upon proof of compliance with the continuing educational requirements established by the board by rules and regulations. **Any person who has not been in the active practice of the branch of the healing arts for which reinstatement is sought or who has not been engaged in a formal educational program during the two years preceding the application for reinstatement may be required to complete such additional testing, training or education as the board may deem necessary to establish the licensee's present ability to practice with reasonable skill and safety.** (Emphasis added)

12. K.S.A. 65-2844 provides,

Reinstatement of license, registration, permit or certificate; application; burden of proof; reapplication for reinstatement, when; proceedings. **A person whose license, registration, permit or certificate has been revoked may apply for reinstatement after the expiration of three years from the effective date of the revocation.** Application for reinstatement shall be on a form provided by the board and shall be

accompanied by a reinstatement of a revoked license, registration, permit or certificate fee established by the board under the applicable practice act. **The burden of proof by clear and convincing evidence shall be on the applicant to show sufficient rehabilitation to justify reinstatement.** If the board determines a license, registration, permit or certificate should not be reinstated, the person shall not be eligible to reapply for reinstatement for three years from the effective date of the denial. All proceedings conducted on an application for reinstatement shall be in accordance with the provisions of the Kansas administrative procedure act and shall be reviewable in accordance with the Kansas judicial review act. The Board, on its own motion, may stay the effectiveness of an order of revocation of license, registration, permit or certificate. (Emphasis added)

13. K.S.A. 2015 Supp. 65-2846 provides,

For all professions regulated by the Board, if the Board's order is adverse to the Applicant or applicant for reinstatement of license, costs incurred by the board in conducting any proceeding under the Kansas administrative procedure act may be assessed against the parties to the proceeding in such proportion as the board may determine upon consideration of all relevant circumstances including the nature of the proceedings and the level of participation by the parties. If the board is the unsuccessful party, the costs shall be paid from the healing arts fee fund.

14. K.S.A 77-527 (d) of the Kansas Administrative Procedure Act states, in pertinent part,

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.

15. K.A.R. 100-15-4 sets forth the standards upon which continuing education is to be reviewed and measured to determine if it meets the requirements for Category I or II education in the state of Kansas.

16. K.A.R. 100-15-5 sets forth the continuing education requirement for healing arts licensees. In summary, each licensee is required to obtain 50 hours of continuing education each year; of which 20 hours must be Category I and the remaining may be Category II.

17. In the case of *In re B.D.-Y*, 286 Kan. 686, 697 (2008), the Kansas Supreme Court defined clear and convincing evidence as, "... as that which is sufficient to establish the truth of the facts asserted is "highly probable"".

18. *Kansas State Bd. Of Healing Arts v. Foote*, 200 Kan. 447, 453, 436 P.2d 828, 833 (1968), provides the purpose and tenor of the healing arts act is the protection of the public against unprofessional, improper, unauthorized, and unqualified practice of the healing arts. The goal is to secure to the people the services of competent, trustworthy practitioners.

19. *Zoeller v. State Bd. Of Healing Arts*, Case No. 12-C-50, slip opinion at p. 12 (Shawnee County District Court July 2, 2012), provides,

When presented with a doctor who poses a possible threat to his patients, the Board must act in accordance with the interests of the public before the interests of the doctor. Therefore, the Board's responsibility is not to weigh the benefit and harm of this agency action as it pertains to [Applicant/Petitioner] and his personal life, but to the benefit and harm to the public and the public's perception of the Board as a regulatory agency. If the Board is to perform its regulatory function, the public must perceive the Board as acting in the public's best interest, rather than catering its decision to the benefit of the doctors it is tasked with regulating.

20. *Vakas v. Board of Healing Arts*, 248 Kan. 589, 600 (1991) sets forth the standard for determining when a person has been sufficiently rehabilitated to justify reinstatement of a license after revocation. The eight *Vakas* factors are:

- 1) The present moral fitness of the applicant;
- 2) The demonstrated consciousness of the wrongful conduct and disrepute which the conduct has brought the profession;
- 3) The extent of the applicant's rehabilitation;
- 4) The seriousness of the original misconduct;
- 5) Conduct subsequent to discipline;
- 6) The time which has elapsed since the original discipline;
- 7) The applicant's character, maturity, and experience at the time of revocation; and
- 8) The applicant's present competence to practice medicine and surgery.

### **Findings of Fact**

21. The Board adopts all the Findings of Fact made by the Presiding Officer in the Initial Order and provides emphasis to specific points in considering this Final Order.

22. Petitioner / Applicant (Petitioner) was originally granted a license to practice medicine and surgery in Kansas in 1988.

23. Petitioner entered into a Consent Order in April 2010 which contained monitoring and chaperone provisions among other terms. See KSBHA Docket No. 11-HA00082.

24. A petition for discipline was filed in March 2013 alleging a variety of violations of the healing arts practice act. This petition for discipline was resolved with a Consent Order for Surrender of License in June 2013. See KSBHA Docket No. 13-HA00059, petition and consent order.

25. The CO in 13-HA00059 specifically states that the surrender shall be treated as a revocation. This CO, signed by Petitioner, specifically states that an application for reinstatement of the licensee will be considered in accordance with the provisions of K.S.A. 65-2844 and governed by the *Vakas* factors.

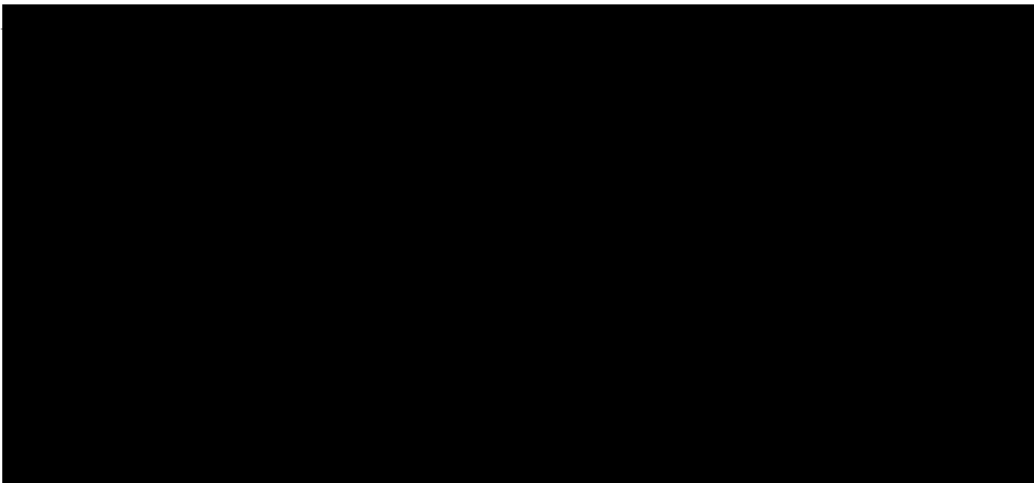
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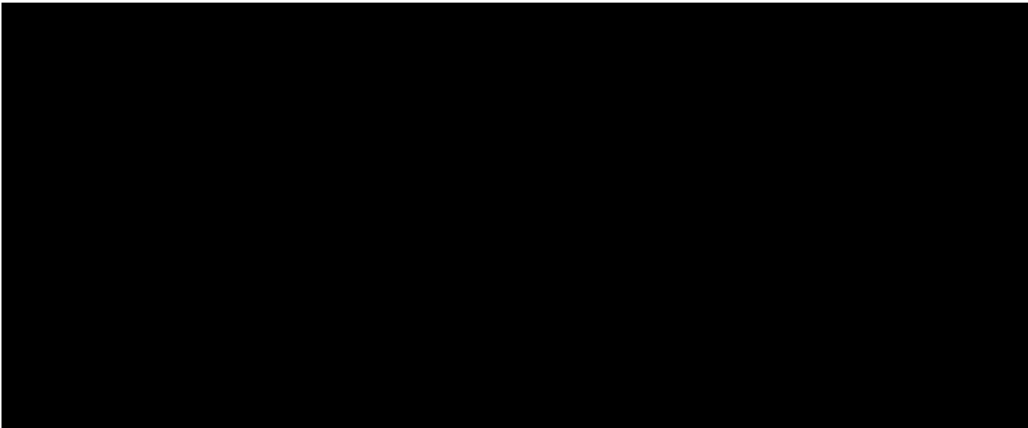


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31. The petition for discipline in 13-HA00059, which culminated in Petitioner surrendering his license, alleged one or more counts of violating prior CO and / or Board requirements.

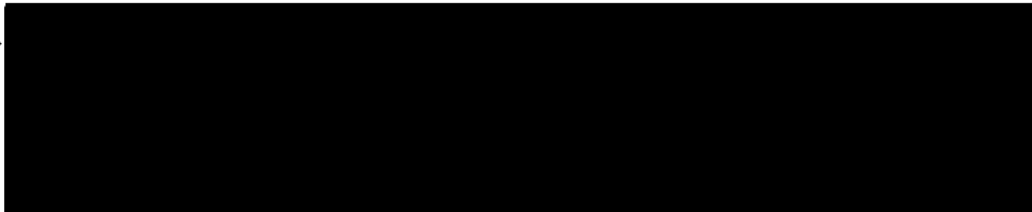
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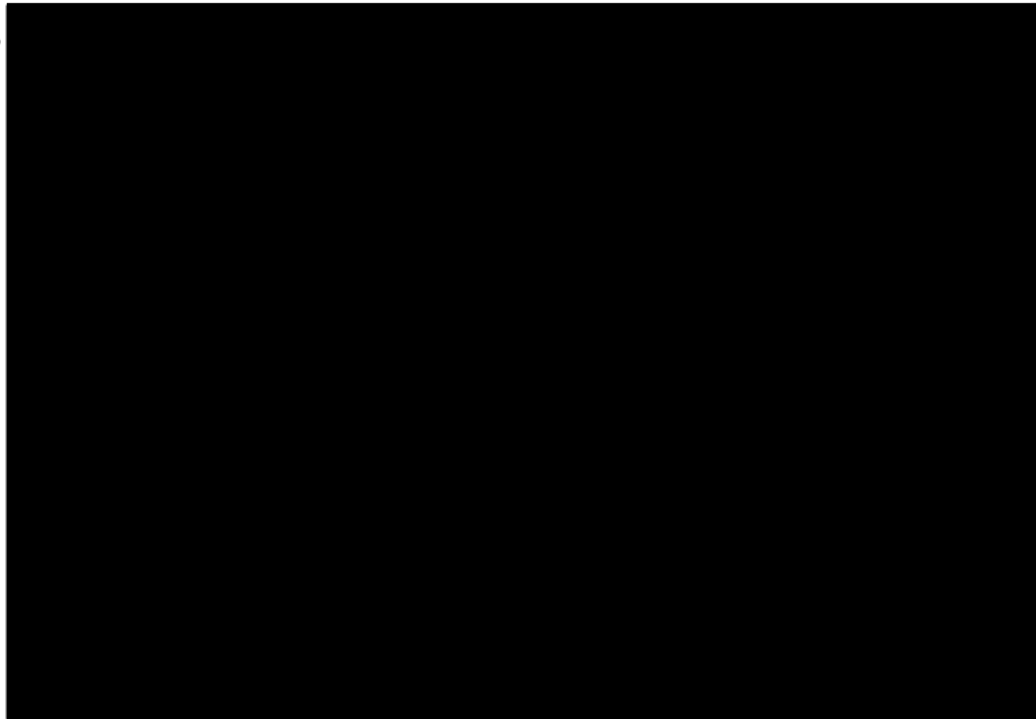
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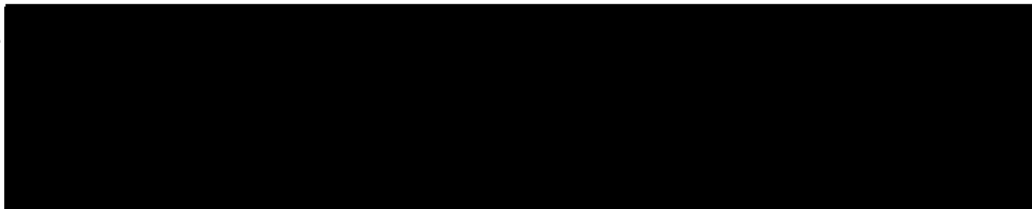
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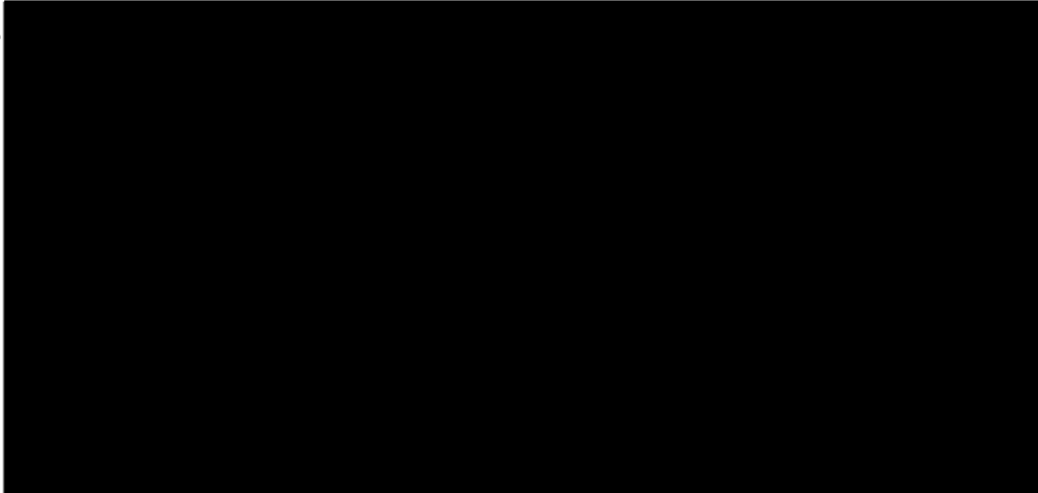


36.





37.



38. In June 2015 Petitioner initiated his application for reinstatement of his Kansas medical license. Pursuant to statute, Petitioner was not eligible to apply for reinstatement of his revoked medical license until June 2016.

39. Petitioner engaged in activities he previously acknowledged could result in adverse licensure action. Petitioner's original deposition testimony denied looking at the Facebook page of a female who was at issue in his unprofessional conduct and corrected this false statement in January 2017 during the formal hearing in the above captioned case.

40. Respondent agency filed a statement of costs in the case at bar for costs totaling, \$10,573.20. Petitioner has not challenged the statement of costs or supporting documents.

#### **Discussion**

41. Petitioner asserts several errors in the Initial Order; including:

- 1) The Presiding Officer's witness credibility determinations were not supported by the record; and
- 2) The Petitioner has demonstrated compliance with K.S.A. 65-2844 and the *Vakas* factors.

42. Petitioner provides his credibility determination for his witnesses and asserts the PO's credibility is based on personal bias. [REDACTED]

43. Statutes provide that deference should be given to the trier of fact who is able to observe witnesses testimony.

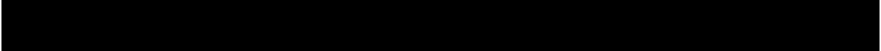
44. [REDACTED]

45. [REDACTED]

46. [REDACTED]

47. After a careful review of the entire agency record, the Board finds no reason to disregard the PO's witness credibility assessments.

48. Petitioner's Petition For Review of Initial Order articulates concern that Respondent agency's case and witnesses did not have any knowledge and presented little evidence about Petitioner's current personal or professional status. [Petitioner's Petition For Review Of Initial Order filed September 12, 2017; page 18] Petitioner repeated this concern during oral argument when he stated that Respondent's case did not include evidence of where Petitioner is now or provide any information on this issue.

49. Petitioner's argument, however, is contrary to the applicable statute that tasks Petitioner with the burden to prove, by clear and convincing evidence, there is sufficient rehabilitation to justify reinstatement. 

50. The Board finds that Petitioner has provided marginal evidence to support the eight requirements under *Vakas*.

51. The Board carefully considers Petitioner's assessment of the *Vakas* requirements, and his claims on review of the Initial Order, as follows:

**3) The present moral fitness of the applicant;**

a. 

b. Petitioner submits that his correction at the hearing of false testimony given during a deposition is further evidence of his moral fitness. The

Board expects truthful testimony at a hearing and deposition; in fact it is the law. The Board refuses to adopt the concept that a person should be rewarded for not lying at the hearing, especially as it relates to previous testimony in which the person was dishonest.

- c. Petitioner focuses on whether the PO was biased based on discussions related to Petitioner's actions of taking notes and including first names of speakers [REDACTED]

- d. Additionally, Petitioner, as a medical professional, should be well acquainted with confidentiality [REDACTED] If Petitioner needed to take notes [REDACTED] there is no need to attach even a first name with learning points spoken by participants.

- e. The Board concludes there is a lack of evidence to support this *Vakas* requirement.

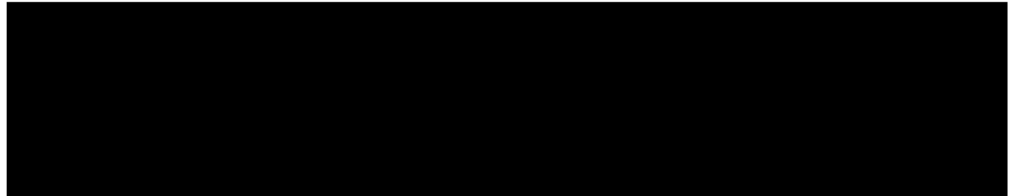
**4) The demonstrated consciousness of the wrongful conduct and disrepute which the conduct has brought the profession;**

- a. Petitioner asserts he has demonstrated and acknowledged his past wrongs.
- b. The Board recognizes that Petitioner is not an unbiased witness.
- c. These self-serving statements must be viewed in light of his false statement during the deposition of the case at bar.

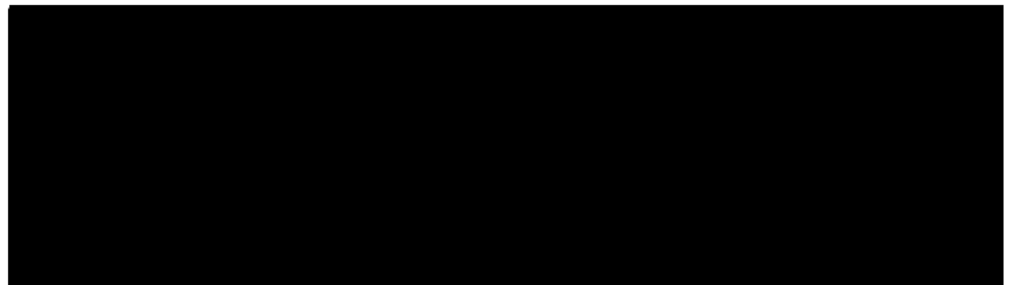
- d. The Board concludes the PO's determination of a lack of evidence to support this *Vakas* requirement is appropriate.

**5) The extent of the applicant's rehabilitation;**

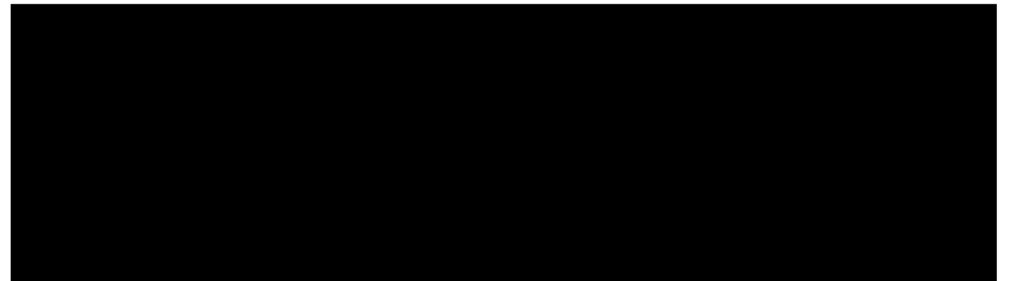
a.



b.



c.



- d. The Board concludes there is a lack of evidence to support this *Vakas* requirement.

**6) The seriousness of the original misconduct;**

- a. Petitioner asks the Board to consider that because there is no one single source or specific original misconduct; it minimizes the nature and extent of his violations to the healing arts act.
- b. The Board observes there is no single instance of behavior or conduct underpinning the Petitioner's suspension and predicament. The Board determines that Petitioner's long-standing pattern of inappropriate

behavior and conduct, combined with his disregard of professional recommendations for remediation, is as significant, if not more serious, than a single event of misconduct.

- c. The Board concludes there is a lack of evidence to support this *Vakas* requirement.

**7) Conduct subsequent to discipline:**

- a. Petitioner points to his volunteering, [REDACTED] and correction of his false deposition testimony as evidence which supports this *Vakas* factor.
- b. Petitioner's volunteer work and [REDACTED] is positive and should not be minimized.
- c. The Board concludes that while these efforts are positive, they do not meet a preponderance or clear and convincing standard for this *Vakas* requirement.
- d. [REDACTED]
- e. [REDACTED]
- f. Petitioner did not fully comply with prior CO requirements.
- g. The Board concludes there is a lack of evidence to support this *Vakas* requirement.

**8) The time which has elapsed since the original discipline:**

- a. Petitioner states that the amount of time that elapsed since the discipline does not appear to be significant factor.

b. Board does not agree with this assessment. Petitioner surrendered his license in June 2013.

c.

d.

e. The Board concludes there is a lack of evidence to support this *Vakas* requirement.

9) **The applicant's character, maturity, and experience at the time of revocation;**

**and**

a. Petitioner asserts that this *Vakas* factor is not material.

b. Petitioner was issued a Kansas medical license in 1988 and [REDACTED] [REDACTED] after approximately 18 years of practice.

c. Petitioner's inappropriate behavior, conduct, and violations of the practice act did not occur when he was a young and immature practitioner. To the contrary, Petitioner was a seasoned medical professional who was required to comply with continuing medical education requirements for 18 years.

d. Petitioner was offered multiple opportunities of assistance and support to change course; to correct his behavior and conduct. Yet, the Petitioner persisted in unprofessional conduct.

- e. The Board determines this factor is relevant.
- f. The Board concludes there is a lack of evidence to support this *Vakas* requirement.

**10) The applicant's present competence to practice medicine and surgery.**

- a. Petitioner provides evidence of completion of Category I continuing education.
- b. The Board recognizes that CME is required for all actively practicing physicians. However, CME alone for an individual who does not actively practice is not evidence of present competence.
- c. The Board regularly requires a professional skills assessment for any physician who has been out of practice for more than two years; as authorized by K.S.A. 65-2809(e).
- d. Petitioner proffers that regular gardening and the use of fine motor skills feeling bulbs and plants underground is evidence that he has maintained feeling and dexterity when his hands are in places he cannot see.
- e. The Board considers Petitioner's gardening to maintain feeling and dexterity as evidence of his desire to maintain his skill.
- f. Petitioner castigates the PO for use of "absurd" in the context of gardening to support his proffer of competence.
- g. Petitioner recognizes the Board's ability to use their own knowledge, training, and experience to understand the value of Petitioner's activities to determine his current professional competency. [See Petitioner's Petition For Review of Initial Order filed August 25, 2017; page 2,



paragraph 15] The Board, several members of which are surgeons, finds no link between Petitioner's testimony regarding gardening, feeling or dexterity when his hands are in places he cannot see, to required competence in the practice of medicine and surgery.

h. The Board concludes there is a lack of evidence to support this *Vakas* requirement.

52. The Board determines, after review of the whole agency record, Petitioner does not meet the *Vakas* requirements for reinstatement of a revoked license.

#### **Conclusions of Law**

53. Petitioner has clearly demonstrated an inability to comply with remedial recommendations designed to enhance his ability to comply with the healing arts act. Petitioner has established his inability to comply with prior Board Orders. Petitioner has confirmed his inability to comply with statutes that provide when an application for reinstatement of a revoked license can be filed. The Board determines Petitioner has not proved by a preponderance or clear and convincing evidence that he is sufficiently rehabilitated to justify reinstatement as provided by K.S.A. 65-2844.

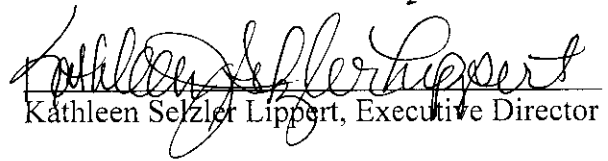
54. It is appropriate to assess costs to Petitioner when the Board's order is adverse to his applicant for reinstatement. Pursuant to K.S.A. 2015 supp. 65-2846, costs of \$10,573.20 are assessed against Petitioner.

**IT IS THEREFORE ORDERED, BY THE KANSAS STATE BOARD OF HEALING ARTS** that Petitioner Dr. Myers's application for reinstatement of licensure is hereby **DENIED**.

**IT IS FURTHER ORDERED** that Petitioner Dr. Myers is hereby ordered to pay **COSTS** in the amount of \$10,573.20, due and payable in full on February 28, 2018.

**IT IS SO ORDERED THIS 13<sup>th</sup> DAY OF NOVEMBER, 2017.**

**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, Licensee 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 a true and correct copy of the above and foregoing **FINAL ORDER DENYING REINSTATEMENT OF LICENSURE AND ASSESSING COSTS** was served this 13<sup>th</sup> day of November, 2017, by depositing the same in the United States Mail, first-class, postage prepaid, and addressed to:

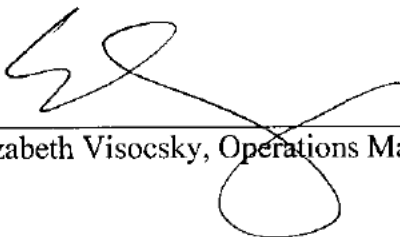
Daniel L. Myers, MD  
[REDACTED]  
Overland Park, KS 66204

Mark Stafford  
Attorney for Applicant  
FORBES LAW GROUP  
6900 College Blvd., Suite 840  
Overland Park, KS 66211

And a copy was delivered to:

Susan R. Gering, Deputy Litigation Counsel  
Kansas State Board of Healing Arts  
800 SW Jackson, Lower Level-Suite A  
Topeka, Kansas 66612

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

  
\_\_\_\_\_  
Elizabeth Visocsky, Operations Manager