

FILED

JUL 24 2012

KS State Board of Healing Arts *W*

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

In the Matter of
Subpoena Duces Tecum #14216
_____)

KSBHA Docket No. 12-HA00078

**FINAL ORDER DENYING MOTION TO COMPEL PRODUCTION OF RECORDS
AND ENFORCEMENT OF SUBPOENA DUCES TECUM #14216**

NOW on this 10th day of July 2012, comes on for hearing before Presiding Officer, Gary L. Counselman, D.C., the Motion To Compel Production of Records and Enforcement of Subpoena Duces Tecum filed on May 2, 2012. David Jernigan, D.C. appears through his counsel, Gregory P. Forney of Shaffer, Lombardo, Shurin. Joshana Offenbach, Associate Disciplinary Counsel, appears on behalf of the Board.

Pursuant to the authority granted to the Board by 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.*, the Presiding Officer hereby enters this Final Order Denying Motion to Compel Production of Records and Enforcement of Subpoena Duces Tecum #14216 in the above-captioned matter. After reviewing the file, hearing the arguments of both counsel, and being otherwise duly advised in the premises, the Presiding Officer makes the following finding, conclusions and order:

I. Findings of Fact

1. David Jernigan, D.C. (“Dr. Jernigan”) is licensed in Kansas to practice chiropractic and holds license number 01-04309, issued by the Board.
2. The Board received a complaint about an advertisement which indicated that Dr. Jernigan may be using experimental treatments in the care of his patients.
3. Based on the complaint, an investigation was opened and a special investigator sent a letter to Dr. Jernigan stating that based on the advertisement, “[t]here is concern that some of these treatments and therapies may fall within the scope of experimental.”

4. Subsequently, Dr. Jernigan submitted a response to the Board Investigator's inquiry indicating that his treatments may be considered experimental.
5. On or about September 28, 2011, Subpoena Duces Tecum #13836 was issued by the Board to Dr. Jernigan in the course of the investigation.
6. On or about November 1, 2011, Dr. Jernigan filed a Petition to Revoke Administrative Subpoena of the Kansas State Board of Healing Arts in the District Court of Shawnee County, Kansas, in Case No. 11C1269, pursuant to Chapter 60 of the Kansas Statutes Annotated. A motion and memorandum requesting the same remedy was concurrently filed.
7. On February 10, 2011, oral arguments were heard on Dr. Jernigan's Motion to Revoke Administrative Subpoena and the Board's Motion to Dismiss in the District Court of Shawnee County, Kansas. The Court subsequently sustained the Board's motion.
8. After oral arguments were heard, the Board's legal counsel and Dr. Jernigan's legal counsel verbally agreed that a new subpoena would be issued by the Board to provide for more clarity.
9. On or about February 21, 2012, Subpoena Duces Tecum #14216 was issued to Dr. Jernigan in the course of the investigation.
10. Dr. Jernigan provided the Board with records in response to Subpoena Duces Tecum, #14216.
11. Board counsel contends that Dr. Jernigan did not fully comply with Subpoena Duces Tecum #14216 in that he did not provide all records which were responsive to the requests contained therein.
12. Dr. Jernigan asserts that the Board does not have authority to enforce its own subpoena.
13. A hearing was conducted before the Presiding Officer on July 10, 2012, at which the parties presented oral arguments.
14. During oral arguments, counsel for Dr. Jernigan offered to make records in question available for in-camera review by the Presiding Officer.

II. Applicable Law

1. K.S.A. 65-2839a states:
 - (a) In connection with any investigation by the board, the board or its duly authorized agents or employees shall at all reasonable times have access to, for the purpose of examination, and the right to copy any document, report, record or other physical evidence of any person being investigated, or any

document, report, record or other evidence maintained by and in possession of any clinic, office of a practitioner of the healing arts, laboratory, pharmacy, medical care facility or other public or private agency if such document, report, record or evidence relates to medical competence, unprofessional conduct or the mental or physical ability of a licensee safely to practice the healing arts.

(b) For the purpose of all investigations and proceedings conducted by the board:

(1) The board may issue subpoenas compelling the attendance and testimony of witnesses or the production for examination or copying of documents or any other physical evidence if such evidence relates to medical competence, unprofessional conduct or the mental or physical ability of a licensee safely to practice the healing arts. Within five days after the service of the subpoena on any person requiring the production of any evidence in the person's possession or under the person's control, such person may petition the board to revoke, limit or modify the subpoena. The board shall revoke, limit or modify such subpoena if in its opinion the evidence required does not relate to practices which may be grounds for disciplinary action, is not relevant to the charge which is the subject matter of the proceeding or investigation, or does not describe with sufficient particularity the physical evidence which is required to be produced. Any member of the board, or any agent designated by the board, may administer oaths or affirmations, examine witnesses and receive such evidence.

(2) Any person appearing before the board shall have the right to be represented by counsel.

(3) The district court, upon application by the board or by the person subpoenaed, shall have jurisdiction to issue an order:

(A) Requiring such person to appear before the board or the boards duly authorized agent to produce evidence relating to the matter under investigation; or

(B) revoking, limiting or modifying the subpoena if in the court's opinion the evidence demanded does not relate to practices which may be grounds for disciplinary action, is not relevant to the charge which is the subject matter of the hearing or investigation or does not describe with sufficient particularity the evidence which is required to be produced.

(c) The board may receive from the Kansas bureau of investigation or other criminal justice agencies such criminal history record information (including arrest and nonconviction data), criminal intelligence information and information relating to criminal and background investigations as

necessary for the purpose of determining initial and continuing qualifications of licensees and registrants of and applicants for licensure and registration by the board. Disclosure or use of any such information received by the board or of any record containing such information, for any purpose other than that provided by this subsection is a class A misdemeanor and shall constitute grounds for removal from office, termination of employment or denial, revocation or suspension of any license or registration issued under this act. Nothing in this subsection shall be construed to make unlawful the disclosure of any such information by the board in a hearing held pursuant to this act.

(d) Patient records, including clinical records, medical reports, laboratory statements and reports, files, films, other reports or oral statements relating to diagnostic findings or treatment of patients, information from which a patient or a patient's family might be identified, peer review or risk management records or information received and records kept by the board as a result of the investigation procedure outlined in this section shall be confidential and shall not be disclosed.

(e) Nothing in this section or any other provision of law making communications between a physician and the physician's patient a privileged communication shall apply to investigations or proceedings conducted pursuant to this section. The board and its employees, agents and representatives shall keep in confidence the names of any patients whose records are reviewed during the course of investigations and proceedings pursuant to this section.

2. K.S.A. 65-2864 states:

The board shall enforce the provisions of this act and for that purpose shall make all necessary investigations relative thereto. Every licensee in this state, including members of the board, shall furnish the board such evidence as he may have relative to any alleged violation which is being investigated. He shall also report to the board the name of every person without a license that he has reason to believe is engaged in practicing the healing arts in this state.

3. K.S.A. 65-2851a(b) states:

(b) Judicial review and civil enforcement of any agency action under article 28 of chapter 65 of the Kansas Statutes Annotated shall be in accordance with the Kansas judicial review act.

II. Conclusions

1. The issuance of Subpoena Duces Tecum #14216 by the Board constitutes agency action.
2. The Board enforces the Healing Arts Act, and as provided in K.S.A. 65-2864, the Board has authority and is required to investigate alleged violations.
3. K.S.A. 65-2839(a) authorizes the Board to subpoena evidence during the course of an investigation for alleged violations of the Healing Arts Act.
4. Kansas administrative agencies do not have common-law powers, and any authority claimed by an agency must be statutorily conferred. *Ft. Hays St. Univ. v. University Ch., Am. Ass'n of Univ. Profs.*, 290 Kan. 446 Syl. 1, 228 P.3d 403 (April 2011).
5. K.S.A. 65-2839(a) does not contain any provision which vests the Board with subject matter jurisdiction to *adjudicate* and *enforce* its own agency action on its own motion.
6. K.S.A. 65-2851a(b) of the Kansas Healing Arts Act provides that “civil enforcement of any agency action under article 28 of chapter 65 of the Kansas Statutes Annotated shall be in accordance with the act for judicial review and civil enforcement of agency action.”
7. While K.S.A. 65-2839(a) provides a mechanism for the subpoenaed individual to contest a subpoena at the agency level, the only way the Board may seek enforcement of its own subpoena is by application to the Court pursuant to K.S.A. 65-2839(b)(3)(A) in a civil enforcement proceeding brought under K.S.A. 77-624 of the Kansas Judicial Review Act.

8. The Presiding Officer concludes that that there is no purpose for an in-camera review of Dr. Jernigan's medical records as the appropriate jurisdiction for enforcement lies with District Court.

V. Order

IT IS THEREFORE ORDERED that the enforcement of Subpoena Duces Tecum #14216 is hereby **DENIED**.

IT IS SO ORDERED THIS 24 DAY OF JULY, 2011, IN THE CITY OF TOPEKA, COUNTY OF SHAWNEE, STATE OF KANSAS.



Dr. Gary L. Counselman
Presiding Officer

NOTICE OF RIGHTS

PLEASE TAKE NOTICE that this is a Final Order. A Final Order is effective upon service. 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, the Board's Executive Director, at 800 SW Jackson, Lower Level-Suite A, Topeka, KS 66612.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true copy of the foregoing **Final Order Denying Motion to Compel Production of Records and Enforcement of Subpoena Duces Tecum #14216** was served this 24th day of July, 2012 by depositing the same in the United States Mail, first-class, postage prepaid, and addressed to:

Dr. David A. Jernigan, D.C.
12219 E. Central
Wichita, KS 67206

Jacques G. Simon
2174 Hewlett Avenue, Suite 201
Merrick, NY 11566
Attorney Pro Hac Vice for Dr. Jernigan

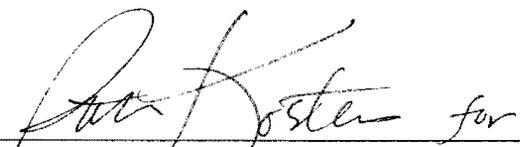
Gregory P. Forney
Shaffer Lombardo Shurin
911 Main Street, Suite 2000
Kansas City, MO 64105
Local Counsel for Dr. Jernigan

and a copy was hand-delivered to:

Joshana L. Offenbach
Associate Disciplinary Counsel
800 SW Jackson, Lower Level-Suite A
Topeka, KS 66612

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

Kathleen Selzler Lippert
Executive Director
800 SW Jackson, Lower Level-Suite A
Topeka, KS 66612



Cathy Brown, Executive Assistant