

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

FILED *CAB*

OCT 24 2007

KS State Board of Healing Arts

In the Matter of)
German Zhitlovsky, MD)
)
Application for Reinstatement of License)
_____)

Docket No. 07-HA00092

FINAL ORDER

NOW ON THIS 20th Day of October 2007, this matter comes on for review of an Initial Order issued by Presiding Officer John P. White, D.O. Applicant German Zhitlovsky, M.D. appears in person and through Robert D. Gaines of Krigel & Krigel, P.C. Kelli J. Stevens, Litigation Counsel, appears for the Board.

Having the agency record before it, and having heard the arguments of counsel, the Board adopts the findings and conclusions of the Initial Order, and modifies the remedy stated in that order as follows:

1. This is a proceeding to reinstate a revoked license. The Board concludes K.S.A. 65-2844 establishes that an applicant for reinstatement of a revoked license has the burden to establish, by clear and convincing evidence, of sufficient rehabilitation to warrant the public trust. Additionally, K.S.A. 65-2836(c) requires that an application for a license by a person who has been convicted of a felony must be denied unless two-thirds of the Board members find clear and convincing evidence of rehabilitation, and that the individual will not pose a threat to the public as a licensee.

2. Applicant was previously licensed to practice medicine and surgery, a branch of the healing arts, in the State of Kansas in 1994. He also has similarly been licensed by the States of Indiana (1984), New York (1995), and Missouri (1997). At the time of the hearing he did not hold a license to practice medicine and surgery in any state.

3. Since being licensed in the United States, Applicant has had multiple criminal convictions. Between 1980 and 1984, he had five convictions for offenses involving driving while intoxicated. He was convicted again of driving while intoxicated in 1988. Those are believed to be misdemeanors equivalent to those designated as Class A misdemeanors in this state. In 1990, Applicant pleaded guilty to and was convicted of forgery. In 1994 he pleaded guilty to and was convicted of conspiracy to commit Medicaid fraud. Each of these convictions occurred in the State of New York. In 2004, Applicant was pleaded guilty to and was convicted of making false statements in connection with the Medicare program in the United States District Court for Kansas.

4. The criminal convictions, accompanied by Applicant's failure to disclose them when asked, resulted in several disciplinary actions by medical licensing boards. In 1991, he surrendered his New York license (**Confidential**) That license was reinstated after four months, but was then later suspended based upon his criminal convictions and his failure to disclose them. In 1994, the State of Missouri denied his application for a license based upon his failure to disclose convictions. That same year, his Medicaid privileges in New York were suspended.

5. This Board granted Applicant a license with limitations in 1994. Because he had failed to disclose the conviction for conspiracy, Applicant surrendered that Kansas license in 1995. The Department of Health and Human Services excluded Applicant from participating in Medicare in 1995. That same year Applicant surrendered his New York license while under investigation.

6. The Board reinstated Applicant's license in 1996.

7. In 1997, Kansas Medicare denied Applicant privileges because of his other exclusions. The State of Missouri granted Applicant a license with 10 years probation.

8. The Department of Health and Human Services excluded Applicant in December 2003 based upon fraud, receiving kickbacks, and other prohibited activities.

9. The Board initiated a disciplinary proceeding based upon the 2004 felony conviction. Applicant surrendered his Kansas license in December 2004, and the surrender is deemed a revocation.

10. In 2006, The State of Missouri denied Applicant's request for reinstatement.

11. The multiple administrative and criminal actions might be described in several different statutes identifying grounds to deny the application. Ultimately, each would result in the same inquiry, which is whether Applicant is sufficiently rehabilitated. As a result, the Board does not find it necessary to discuss each statute separately, and makes its determinations applying the statutory standard applicable to a felony conviction requiring denial unless two thirds of the Board members find rehabilitation.

12. In determining whether an applicant for reinstatement of a revoked license is rehabilitated, the Board may consider the factors identified in *Vakas v. State Board of Healing Arts*, 248 Kan. 589 (1991). Those factors include the applicant's present moral fitness, the demonstrated consciousness that the conduct was wrongful and that it brought disrepute upon the profession, the extent of the applicant's rehabilitation, the nature and seriousness of the misconduct, the applicant's subsequent conduct, the length of time elapsed since the original misconduct, the applicant's character, maturity and experience at the time of the misconduct, and present medical competency. These factors do not

establish a precise formula for measuring rehabilitation, and the extent to which individual factors weigh equally or even are relevant depends upon the circumstances of a given case.

13. Applicant testified that the revocation of his license has devastated him financially, and he and his wife now reside with a former patient. He states that he is sorry for his misconduct. He also offers character witnesses from friends who support him. However, at least one of those character witnesses testified in the 1996 reinstatement case, offering the opinion that Applicant was not likely to re-offend.

14. Given the history of criminal conduct that has spanned more than 25 years, and with the related disciplinary actions, the Board is not able to find clear and convincing evidence that Applicant is now any more morally fit than prior to the time his license was last surrendered.

15. Applicant does seem to show that he knows his conduct was wrongful, and that it resulted in his current situation. He also appears to recognize that his conduct reflects poorly upon the profession

16. The Board concludes that the factor regarding the “extent” of rehabilitation is recognition that rehabilitation is an ongoing process. The Board may consider how far an applicant has progressed toward rehabilitation, and whether that progress is sufficient to warrant the public trust. Applicant completed probation earlier than expected, and that is noteworthy. Additionally, Applicant does acknowledge the wrongfulness of his conduct, as indicated above. The Presiding Officer sought, but did not find, evidence in the record that might explain Applicant’s recurring encounters with the criminal and disciplinary systems. **(Confidential)**
(Confidential) Most of the more recent encounters involved Applicant’s dishonesty. His **(Confidential)**
(Confidential) The Board found that his earlier dishonesty with governmental agencies resulted in part from cultural differences; specifically, he maintained that his misrepresentations when obtaining licensure stemmed from his growing up in the Soviet Union where it is acceptable and necessary to lie to the government. However, the pattern of dishonesty has continued. As a result, the Board does not find that Applicant has identified and overcome his problems with honesty, and as a result his rehabilitation is not found to be complete, and has not progressed as the Board had hoped in the past.

17. Applicant’s misconduct is not likely to pose an immediate threat to patients’ health. However, his misconduct does not represent mere technical violations. Honesty in transactions is necessary for our healthcare system to work. Honesty is also a crucial trait for a licensed professional to promote public confidence.

18. Applicant’s conduct subsequent to the discipline involves two aspects. First, the agency record does not disclose additional misconduct. The Board does not find that the denial of registration by the State of Missouri in 2006 involved additional misconduct, but rather was based upon the events that are part of the record in this matter.

The second aspect involves what remedial actions Applicant took after the misconduct. His description of daily activities is useful in considering this issue. Other than doing what was necessary as part of his probation and pursuing continuing education, the record does not show any significant effort to repay society or to correct whatever leads him to offend.

19. The Board finds that the length of time that has elapsed since the misconduct is not a relevant factor in this case in light of the number of Applicant's transgressions that have occurred over several years.

20. The Board finds that Applicant's maturity and experience are not factors in this case. Applicant was not new to the profession. Immaturity and inexperience might result in poor judgment when professional development would guide decision making. But Applicant was mature and had practiced for many years when he engaged in misconduct.

21. Applicant has not practiced medicine and surgery since December 2004. He has completed continuing education in excess of what would be required for renewal of a license. Continuing education does not necessarily ensure competency of a physician who is not actively engaged in practice. Applicant should be required to pass the Special Purpose Examination to better measure medical competence prior to reinstatement.

22. Considering the *Vakas* factors in together, and giving due regard to the common understanding of rehabilitation, the Board finds that Applicant has made some progress toward rehabilitation, but does not find that Applicant has met his burden of establishing by clear and convincing evidence that he warrants the public trust.

23. As a policy matter, the Board historically has worked with licensees to allow opportunities that might facilitate the rehabilitation process. Applicant's rehabilitation efforts might be enhanced by his reintegration into practice under appropriate conditions. The Board will allow Applicant to present such a plan for the Board's consideration prior to the expiration of the next three-year period that Applicant would otherwise have to wait to reapply. At a minimum, any such plan must include practice limitations so that Applicant is not involved with billing, direct supervision by a person licensed to practice medicine and surgery, professional mentorship by a peer, a personality evaluation by a person with whom Applicant has not had a professional, business, or social relationship, and successful completion of the SPEX.

IT IS, THEREFORE, ORDERED that the application for reinstatement of the license of German Zhitlovsky is denied.

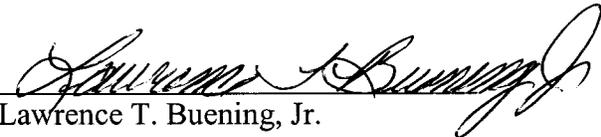
IT IS FURTHER ORDERED that Applicant may propose a plan for reentry to practice as described herein.

PLEASE TAKE NOTICE that this is a final order. A final order is effective upon service. 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 the Board's Executive Director at 235 SW. Topeka Blvd., Topeka, KS 66603.

Dated this 24th day of October, 2007.

Kansas State Board of Healing Arts


Lawrence T. Buening, Jr.
Executive Director

Certificate of Service

I certify that a true copy of the foregoing Final Order was served this 24th day of October, 2007, by depositing the same in the United States Mail, first-class postage prepaid, and addressed to:

German Zhitlovsky, M.D.
8443 Pflumm Circle
Lenexa, KS 66215

and

Robert D. Gaines
Krigel & Krigel, P.C.
4550 Belleview
Kansas City, MO 64111

and a copy was hand-delivered to the office of

Kelli J. Stevens, Attorney
Kansas State Board of Healing Arts
235 S. Topeka Blvd.
Topeka, KS 66603

