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CAB  
KS State Board of Healing Arts

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

In the Matter of: )  
)  
Vijendra Dave, M.D. )  
Kansas License No. 04-28553 )  
Licensee, ) Docket No.: 14-HA00146  
\_\_\_\_\_ )

**FINAL ORDER REVOKING LICENSE  
AND ASSESSING COSTS**

**NOW**, on this 14<sup>th</sup> day of August, 2015, this matter comes before the Kansas State Board of Healing Arts (“Board”) for a Hearing to issue a Final Order in the above-captioned matter against Vijendra Dave, M.D. (“Respondent”). The Initial Order by the Presiding Officer from the Office of Administrative Hearings (“OAH”) was issued on March 13, 2015 (“Initial Order”).

The Board’s Petition requests the revocation of Respondent’s license to practice medicine and surgery in the State of Kansas and to assess costs. The Initial Order was filed following a hearing on the Board’s Petition seeking action against Respondent for alleged violations of the Kansas Healing Arts Act, K.S.A. 65-2801, *et seq.* (“KSHAA” or the “Act”). The Hearing is held pursuant to, and in accordance with, the provisions of the Kansas Administrative Procedure Act, K.S.A. 77-501, *et seq.* (“KAPA”).

Respondent appears in person and pro se. Jane Weiler, Litigation Counsel, appears on behalf of the Petitioner Board. Mark A. Ferguson appears as Special General Counsel to the Board.

A copy of The Transcript of The Proceedings (“Tr.”) is attached hereto and incorporated herein by reference as Exhibit 1. The twenty-two (22) pages of transcript includes only the public portion of the hearing and oral argument of the parties before the Board which was

conducted on August 14, 2015. At the time of the hearing, Respondent supplemented his oral argument with the written statement of his oral argument. The written statement was received by the Board, attached to the Transcript of Proceedings, later marked as Exhibit X, and included in the Agency Record of the proceedings. Exhibit X was accepted for the limited purpose of supplementing the Respondent's oral argument and was not considered as evidence in the proceeding. The Board acted in its quasi-judicial capacity and engaged in private deliberations to reach a decision as permitted by law.

Pursuant to the authority granted to the Board through the KSHAA, and in accordance with the provisions of KAPA, the Board hereby enters a Final Order in the above-captioned matter. After reviewing the entire agency record, having heard the statements and arguments of the parties, having reviewed the Briefs submitted by the parties, having reviewed the applicable Findings of the Fact and Conclusions set forth in the Initial Order, having given due regard to the presiding officer's opportunity to observe and determine the credibility of each witness, engaging in having Board deliberations following the oral arguments of the parties and having been otherwise duly advised in the premises, the Board makes the following Findings of Fact, Conclusions and Orders as follows:

#### **Preliminary Findings**

1. Respondent is a psychiatrist. Respondent was licensed to engage in the practice of medicine and surgery in the State of Kansas, having been issued License No. 04-28553 on approximately February 12, 2000.
2. Confidential

3. It is undisputed that action, inaction and conduct of Respondent has previously come before this Board, which constitutes prior disciplinary action. The cases and limitations upon Respondent's license constitute a pattern and the allegations in the Petition is not considered an isolated incident. The allegations presented herein are repeated and serve as a legitimate ground for disciplinary action by the Board.
4. On May 29, 2014, a Petition was filed by the Board against Respondent. The Petition seeks disciplinary action against Respondent's license based upon a finding that he is not safe to practice the healing arts as a psychiatrist with reasonable skill and safety to patients and should not be permitted to practice in the State of Kansas. The Petition also seeks disciplinary action against Respondent's license based upon the fact that Respondent has repeatedly failed to comply with monitoring provisions required to protect the public's health, safety and welfare.
5. At the Hearing on August 14, 2015, the Board heard arguments of the parties and asked questions of Respondent and Petitioner's counsel. After being duly sworn, Respondent, Dr. Vijendra Dave, appeared in person and provided sworn testimony on his own behalf. He responded to specific questions from the Board.
6. The parties were given proper notice of the Hearing.
7. The parties submitted Briefs in support of their arguments and were permitted adequate time and sufficient opportunity to argue their respective sides of the case. The Board invited presentation of both aggravating and mitigating circumstances and considered all.

8. Petitioner's Brief on the Issues requests that the Board find that the appropriate sanction in this matter is the revocation of Respondent's license and requests that the Board issue an Order that Respondent pay costs.

9. Respondent's Brief is titled "Respondent's Petition to KSBHA for Review of March 12, 2015 Initial Order." The pleading was served on March 25, 2015 and is eighty-five (85) pages in length. Respondent's Brief argues that the sanction of license revocation is not justified and argues that **Confidential**

**Confidential**

presents no potential of imminent harm to the public safety, health and welfare.

Respondent further argues that there is a documented record of continued **Confidential**

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and clinical competence.

10. Respondent also argues that the letter dated January 12, 2014, **Confidential**

**Confidential**

is issued without

"due process" because the Respondent was not provided with the opportunity to provide his written response or additional documentary evidence to refute this finding.

11. Dr. Terry L. Webb has been designated by the Board as the Presiding Officer and is authorized to be the signatory on the Final Order as permitted by K.S.A. 77-514(g)(Tr. at p. 20).

12. The Kansas Healing Arts Act is constitutional on its face and as applied in this case.

13. The Kansas State Board of Healing Arts (“Board”), created in 1957, is the licensing and regulatory Board for many health care providers in Kansas. The Board is comprised of 15 members including 5 Medical Doctors (M.D.), 3 Osteopathic Doctors (D.O.), 3 Chiropractic Doctors (D.C.), 1 Podiatric Doctor (D.P.M.), and 3 public members.
14. Twelve (11) members of the Board participated in the Hearing on August 14, 2015. The Disciplinary Panel members consisted of Garold O. Minns, M.D., M. Myron Leinwetter D.O. and Ms. Anne Hodgdon. As such, these three (3) individuals recused themselves from participating in the Board deliberations and voting on the matter.
15. General Counsel Kelli Stevens and Executive Director Kathleen Lippert were conflicted out of advising the Board on the disciplinary decision in this matter. Mark Ferguson serves as special general counsel to the Board. For the purposes of this proceeding, and to ensure compliance with K.S.A. Supp. 77-514(h), Mr. Ferguson was not supervised or directed by Ms. Stevens in any proceeding arising out of this matter.
16. The Board was provided with a complete copy of the entire Agency record and considered the agency record in rendering its decision.
17. Each party submitted briefs and was given an opportunity to present oral argument on the issues to be considered by the Board. Such briefs of the parties were timely filed with the agency. Each party was afforded time for presentation of oral argument before the Board. The parties were permitted latitude to argue and present their case, answer questions and respond, in an effort to provide full substantive and procedural due process to the parties. Given the lengthy oral argument of Respondent, the Board permitted Respondent to exceed his allocated time for oral argument. Additionally, Respondent’s

written prepared remarks was received by the Board and marked as Exhibit X, and included in the Agency Record of the proceedings.

18. A quorum of members were present and participated in the Hearing and deliberations.

The Board members functioned as presiding officers in this matter.

19. The stated mission of the Board is: "Safeguard the public through licensure, education and discipline of those who practice the healing arts in Kansas." This is consistent with the stated statutory purpose of the Act which sets forth the following purpose: "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." K.S.A. 65-2801.

20. The stated Philosophy of the Agency is: "The Kansas Board of Healing Arts will perform licensing and regulatory functions in accordance with all applicable statutes, rules, and regulations in an open, courteous, and efficient manner. The Board affirms that safeguarding the public is their primary responsibility. The Board and its' staff will approach their responsibilities in a balanced and sensible fashion so regulation can be performed aggressively, but fairly for the benefit of every patron of the State of Kansas."

21. At all times relevant to this proceeding, the Board has retained jurisdiction over Dr. Dave's license to practice medicine and surgery in the State of Kansas.

### Procedural History and Factual Findings

22. On December 13, 1999, the Board and Dr. Dave entered into a Stipulation and Agreement and Enforcement Order in KSBHA Docket No. 00-HA-27 related to Confidential Confidential which could constitute a denial of an application for a license. This Stipulation and Agreement and Enforcement Order required that Dr. Dave enter into and comply with all terms and conditions of a 1999 Confidential
23. From December 13, 1999 to December 18, 2002, Dr. Dave maintained full compliance with all provisions of the 1999 Confidential
24. On December 18, 2002, the Board determined that Dr. Dave had complied with the requirements of the Stipulation and Agreement and Enforcement Order in KSBHA Docket No. 00-HA-27, and terminated the limitations imposed by the aforementioned Order. Further, Dr. Dave was no longer required to comply with the terms and conditions of the 1999 Confidential
25. Confidential

26. Confidential

27. As a result of the findings Confidential

Confidential, the Board and Dr. Dave entered into a Consent Order in KSBHA Docket No. 07-HA00052 on January 17, 2007. Dr. Dave agreed to a temporary limitation on his license, in that he was prohibited from engaging in any direct patient care activities. The temporary limitation was continued until a formal hearing could be held.

28. On January 25, 2007, the Board filed a petition for disciplinary action alleging Dr. Dave had violated K.S.A. 65-2836(i), in that he had the inability to practice the healing arts with reasonable skill and safety Confidential

29. On or about April 19, 2007, Dr. Dave submitted a request to terminate the limitation and suspension of his license to the Board. Further, Dr. Dave argued Confidential Confidential was inaccurate.

30. A formal hearing was held on April 20, 2007 and May 17, 2007. John P. White, D.O., the Board-appointed presiding officer, conducted the proceedings.
31. On June 22, 2007, the presiding officer issued an Initial Order finding that at that time, Dr. Dave was not able to practice the healing arts with reasonable skill and safety. The presiding officer also ordered the continuation of the suspension of Dr. Dave's license.
32. On July 24, 2007, Dr. Dave submitted his proposed findings of fact to the presiding officer. Further, he petitioned the Board to terminate the suspension of his license.
33. On August 3, 2007, the Board submitted a brief in support of the Initial Order.
34. On August 27, 2007, the Board issued a Final Order that denied Dr. Dave's motion to terminate his suspension. The Board found that the conclusion that Dr. Dave was not able to practice with reasonable skill and safety did not require the Board to determine which of the opposing **Confidential** offered were correct, but that the opinions of both the Board and Dr. Dave's experts appeared to **Confidential**  
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35. The Board concluded that Dr. Dave should not practice medicine and surgery, especially in the field of psychiatry, until he was in a practice setting that was **Confidential**  
**Confidential** and that his psychiatric work was under competent tutelage and supervision.
36. On September 13, 2007, Dr. Dave submitted a request to terminate his suspension.
37. On October 30, 2007, the Board issued a Final Order that once again denied Dr. Dave's motion to terminate his suspension. The Final Order indicated that the Board would reconsider Dr. Dave's request based upon **Confidential**  
**Confidential**

38. On November 20, 2007, Dr. Dave submitted another request to terminate his suspension.

39. Confidential

40. On January 8, 2008, following a Conference Hearing, the Board issued a Final Order that required that Dr. Dave enter into and comply with Confidential for the oversight of his practice that would include both monitoring and supervision. Further, this Confidential Monitoring and Supervision Confidential had to be approved by the presiding officer prior to the termination of the suspension of Dr. Dave's license.

41. On February 7, 2008, Dr. Dave entered into a five year monitoring contract Confidential Confidential Pursuant to his Confidential, Dr. Dave was required to comply with all of the terms and conditions Confidential, which included:

- a. Having his practice of medicine and surgery supervised by Ralph Bharati, M.D;
- b. Engaging in clinical supervision with Kevin Warren, Ph.D. at least two times per month;
- c. Confidential
- d. Confidential

42. On February 18, 2008, Dr. Roger D. Warren, the presiding officer, approved the 2008 Confidential and ordered that the suspension of Dr. Dave's license be terminated.

43. On October 28, 2010, Dr. Dave submitted a request to terminate the monitoring and supervision requirements Confidential He also submitted letters with his request, which included a letter from his practice supervisor, dated October 22, 2010, that indicated that Dr. Dave's Confidential Confidential
44. On December 16, 2010, the Board issued a Final Order ("2010 Final Order") that denied Dr. Dave's request to terminate the Confidential monitoring and supervision requirement ordered in the 2008 Final Order. Further, the Board ordered that the Confidential monitoring and supervision requirements continue.
45. From approximately October 12, 2011 through December 9, 2013, Dr. Dave did not actively practice medicine and surgery.
46. On October 3, 2013, Dr. Dave submitted a letter to the Board requesting that Dr. Bharati be approved to fulfill the practice supervisor requirement of his Confidential Confidential as required pursuant to the 2010 Final Order. In the letter, Dr. Dave acknowledged that he was required to continue with the Confidential The Board requested a copy of Dr. Bharati's curriculum vitae ("CV"). Dr. Dave contacted Dr. Bharati's office to obtain the CV. Thereafter, the Board notified Dr. Dave that Dr. Bharati had been approved as his practice monitor.
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48. Confidential Dr. Warren, Dr. Dave's previous Board approved clinical supervisor in the Confidential, had retired in the interim.

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requirements:

- a. Dr. Dave was required to have his practice of medicine and surgery supervised;
- b. Dr. Dave was required to engage in clinical supervision at least two times per month;
- c. Confidential
- d. Confidential

62. Confidential

63. Confidential

64. On January 23, 2014, an e-mail was sent by the Board to Dr. Dave again reminding him that he needed to update his **Confidential** to name a clinical supervisor to replace his previous clinical supervisor.

65. On January 23, 2014, Dr. Dave sent the Board an e-mail stating that he would inform the Board of the name of his clinical supervisor as soon as he found a psychologist to fulfill the clinical supervisor requirement of his **Confidential**

66. On January 24, 2014, Dr. Dave again sent the Board an e-mail stating that he would inform the Board of the name of his clinical supervisor as soon as he found a psychologist to fulfill the clinical supervisor requirement of his **Confidential**  
**Confidential**

67. **Confidential**

68. Just before January 28, 2014, Dr. Dave contacted Stephen Rohner, Ph.D. to fulfill the clinical supervisor requirement of his 2014 KMS-MAP Contract.

69. On January 28, 2014, Dr. Dave sent an e-mail to the Board and **Confidential** informing them that he had found a clinical supervisor, but that his proposed clinical supervisor was

not comfortable with Dr. Dave observing the proposed clinical supervisor providing psychotherapy to patients. Dr. Dave did not give the name of his proposed clinical supervisor to the Board **Confidential** in this e-mail.

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76. On April 9, 2014, Dr. Dave sent an e-mail **Confidential** proposing that Stephen Rhoner, Ph.D. be his clinical supervisor. This was the first time Dr. Dave had provided Dr. Rhoner's name **Confidential** Dr. Dave, however, did not provide Dr. Rhoner's name to the Board. Dr. Dave also did not provide Dr. Rhoner's CV to the Board **Confidential**

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81. On May 20, 2014, Dr. Rohner told Dr. Dave he would not provide clinical supervision for him. Confidential  
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82. Dr. Dave testified that he did not have any contact with Dr. Rohner between January 28, 2014, and May 20, 2014.

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88. On May 23, 2014, Dr. Dave contacted Kerin Schell, Ph.D. regarding the need for a clinical supervisor.

89. Confidential

90. Dr. Dave did not submit the CV of Dr. Schell to the Board.

91. On May 28, 2014, Dr. Dave met with Dr. Schell. Dr. Dave did not provide any patient care that day. He also did not ask Dr. Schell for his CV.

92. On May 29, 2014, the Board filed a Motion for an Ex Parte Emergency Order of Suspension and for Emergency Proceedings against Dr. Dave's license to practice medicine and surgery in the State of Kansas, alleging that his continuation in practice constituted an immediate danger to the public health, safety, or welfare.

93. Confidential

94. In addition, on May 29, 2014, the Board filed the petition for disciplinary action now at issue against Dr. Dave's license to practice medicine and surgery in the State of Kansas alleging that Dr. Dave had violated a lawful order previously entered into by the Board in KSBHA Docket No. 07- HA00052. In addition, the petition alleged that Dr. Dave had the inability to practice the healing arts with reasonable skill and safety to patients by

Confidential

The petition further alleged that Dr. Dave

committed unprofessional and/or dishonorable conduct or professional incompetency when he exhibited other behavior which demonstrated a manifest incapacity or incompetence to practice the healing arts. Additionally, the petition alleged that Dr. Dave committed unprofessional and/or dishonorable conduct when he was not forthright and honest with his dealings with **Confidential** in regards to his **Confidential**

95. On May 30, 2014, the Board appointed a presiding officer to determine whether an order should be entered based upon the Board's Motion for Ex Parte Emergency Order of Suspension.
96. The presiding officer found that Dr. Dave had the inability to practice the healing arts with reasonable skill and safety to patients, and emergently suspended Dr. Dave's license to practice medicine and surgery in the State of Kansas on a temporary basis pending an evidentiary hearing.
97. Also, on May 30, 2014, the Board issued an order appointing a presiding officer from the Office of Administrative Hearings ("OAH") to conduct an administrative hearing on the issue of whether the Ex Parte Emergency Order of Suspension of Dr. Dave's license entered May 29, 2014, should remain in effect. The order further requested that an administrative hearing be conducted regarding the Board's **Confidential** **Confidential** filed on May 29, 2014. Additionally, the order requested that an administrative hearing be conducted and an Initial Order be issued based on the Board's petition for disciplinary action filed May 29, 2014.
98. Dr. Dave acknowledged that he received an e-mail on May 30, 2014, informing him that his license had been emergently suspended.

99. On June 2, 2014, Dr. Schell submitted a letter to the Board informing the Board that Dr. Dave had been conducting psychotherapy on Dr. Schell's patient on June 2, 2014. Further, Dr. Schell acknowledged his awareness that Dr. Dave's license was emergently suspended at the time Dr. Dave had conducted this psychotherapy on Dr. Schell's patient. In addition, Dr. Schell said this was the only time he observed Dr. Dave provide psychotherapy.

100. On June 2, 2014, Stacy Bond, Assistant General Counsel for the Board, notified Dr. Dave that he was in violation of the emergency suspension order by conducting psychotherapy sessions, and that if he continued to conduct psychotherapy sessions, he could face additional legal action by the Board.

101. On June 10, 2014, Dr. Dave submitted a letter to the Board reporting that he had first met with Dr. Schell on May 28, 2014. Further, he reported that he had been unsuccessful in locating a potential clinical supervisor until Dr. Schell agreed to this responsibility.

102. In the June 10, 2014 letter, Dr. Dave provided an extensive explanation of an incident between him and a social worker that occurred in September 2010, which was not related to the present action.

103. On June 20, 2014, Dr. Dave submitted a letter to the Board again reporting that he had been unsuccessful in locating a potential clinical supervisor until May 28, 2014.

104. In the June 20, 2014 letter, Dr. Dave again provided an explanation of the incident that occurred in September 2010.

105. On June 30, 2014, Dr. Dave submitted "quarterly letters" for the April 1, 2014 through June 30, 2014 quarter to the Board. He also submitted letters from Dr. Schell, Confidential In his letter, Dr. Schell provided a review of the September 2010 incident.

106. Confidential

107. On July 7, 2014, Dr. Bharati submitted the June 2014 Quarterly Report regarding Dr. Dave to the Board. Dr. Bharati reported that he was confident Dr. Dave had perceived and comprehended his sessions with patients appropriately. However, Dr. Bharati testified that he was not in these sessions with the patients and Dr. Dave. Further, Dr. Bharati did not speak to these patients immediately following the patients' sessions.

108. On August 12, 2014, Dr. Dave submitted a request to terminate the emergency suspension of his medical license to the Board. In the request, he admitted that he was noncompliant with his Confidential

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112. On September 4, 2014, the Board filed an Amended Motion for an Order  
**Confidential** Pursuant to K.S.A. 65-2836(i) and Request for Hearing,  
requesting that the presiding Administrative Law Judge (ALJ) find that Dr. Dave was  
unable to practice the healing arts with reasonable skill and safety and order him to  
**Confidential**

113 **Confidential**

114. On September 26, 2014, Dr. Dave submitted quarterly letters to the Board for the  
July 1, 2014 through September 30, 2014 quarter from Drs. **Confidential** and Schell.

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125. **Confidential** Dr. Schell's role as the clinical supervisor was to offer an opinion about Dr. Dave's clinical skills in psychotherapy, **Confidential**  
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168. A formal hearing was held on December 16-17, 2014 regarding the petition for disciplinary action against Dr. Dave's license.

169. Dr. Dave had not come into compliance during the pendency of the proceedings, and as of the date of the hearing in December, 2014, was noncompliant with Confidential and the Board's requirements. Dr. Dave remained noncompliant with Confidential Confidential and the Board's imposed requirements at the time of the Hearing on August 14, 2015.

### Applicable Law

#### **K.S.A. 65-2836 of the Healing Arts Act states, in pertinent part.**

A licensee's license may be revoked, suspended or limited, or the licensee may be publicly or privately censured or placed under probationary conditions, or an application for a license or for reinstatement of a license may be denied upon a finding of the existence of any of the following grounds:

... (b) The licensee has committed an act of unprofessional or dishonorable conduct or professional incompetency, except that the board may take appropriate disciplinary action or enter into a non-disciplinary resolution when a licensee has engaged in any conduct or professional practice on a single occasion that, if continued, would reasonably be expected to constitute an inability to practice the healing arts with reasonable skill and safety to patients or unprofessional conduct as defined in K.S.A. 65-2837, and amendments thereto.

... (f) The licensee has willfully or repeatedly violated this act, . . . or any rules and regulations adopted pursuant thereto, or any rules and regulations of the secretary of health and environment which are relevant to the practice of the healing arts.

... (i) The licenses has the inability to practice the healing arts with reasonable skills and safety to patients by reason of physical or mental illness.

... (k) The licensee has violated any lawful rule and regulation promulgated by the board or violated any lawful order or directive of the board previously entered by the board.

#### **K.S.A. 65-2837(a)(3) of the Healing Arts Act states, in pertinent part:**

"Professional incompetency" means:

(3) A pattern of practice or other behavior which demonstrates a manifest incapacity or incompetence to practice the healing arts.

**K.S.A. 65-2837(b) of the Healing Arts Act states, in pertinent part:**

"Unprofessional conduct" means:

... (24) Repeated failure to practice healing arts with that level of care, skill and treatment which is recognized by a reasonably prudent similar practitioner as being acceptable under similar conditions and circumstances.

**K.S.A. 77-527 of the Kansas Administrative Procedure Act states, in pertinent part:**

(d)... 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.

(e) The agency head or designee shall afford each party an opportunity to present briefs and may afford each party an opportunity to present oral argument.

(f) The agency head or designee shall render a final order disposing of the proceeding or remand the matter for further proceedings with instructions to the person who rendered the initial order. . . .

(g) A final order or an order remanding the matter for further proceedings shall be rendered in writing and served within 30 days after receipt of briefs and oral argument unless that period is waived or extended with the written consent of all parties or for good cause shown.

(h) A final order or an order remanding the matter for further proceedings under this section shall identify any difference between this order and the initial order and shall state the facts of record which support any difference in findings of fact, state the source of law which supports any difference in legal conclusions, and state the policy reasons which support any difference in the exercise of discretion. A final order under this section shall include, or incorporate by express reference to the initial order, all the matters required by subsection (c) of K.S.A. 77-526, and amendments thereto.

The whole 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." *Kansas State Bd. Of Healing Arts v. Foote*, 200 Kan. 447, 453, 436 P.2d 828, 833 (1968).

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

**Violation of K.S.A. 65-2836(i)**

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Dr. Dave's inability to cooperate **Confidential** is contrary to the Board's mission of safeguarding the public, and places the public at risk. Therefore, it is the conclusion of the Board that Dr. Dave is presently not able to practice the healing arts with reasonable skill and safety to patients, in violation of K.S.A. 65-2836(i).

**Violation of K.S.A. 65-2836(k)**

Pursuant to the January 8, 2008 Final Order in KSBHA Docket No. 07- HA00052, Dr. Dave was required to enter into and comply with terms and conditions of **Confidential** **Confidential**. Further, the subsequent December 16, 2010 Final Order in KSBHA Docket No. 07-HA00052 required Dr. Dave to continue with the requirements **Confidential** **Confidential**. From approximately October 12, 2011 through December 9, 2013, Dr. Dave did not actively practice psychiatry. However, Dr. Dave returned to the active practice of psychiatry in December 2013, and was aware that he was required to comply **Confidential** **Confidential**.

**Confidential**. However, Dr. Dave did not establish a clinical supervisor as required **Confidential** and thus, failed to comply with the Final Order issued by the Board in 07-HA00052. **Confidential**

**Confidential** Therefore, Dr. Dave has violated a lawful order of the Board issued by the Board in KSBHA Docket No. 07-HA00052, in violation of K.S.A. 65-2836(k).

**Violation of K.S.A. 65-2836(b) as further defined in K.S.A. 65-2837(a)(3)**

Dr. Dave failed to comply with the monitoring and supervision **Confidential**  
**Confidential** required by the Board in the 2010 Final Order in KSBHA Docket No. 07-  
HA00052. These provisions were required to ensure Dr. Dave had the ability to practice the  
healing arts with reasonable skill and safety to patients. **Confidential**  
**Confidential**

**Confidential** in violation of K.S.A. 65-2836(b) as further defined  
in K.S.A. 65-2837(a)(3).

Dr. Dave has presented lengthy arguments, all of which have been carefully considered  
by the presiding ALJ and subsequently by the Board. The crux of his arguments is that he has  
complied with **Confidential**, and that that is  
sufficient. Essentially, Dr. Dave argues substantial compliance is sufficient to satisfy his  
obligations **Confidential**. In making such arguments, it is apparent that Dr.  
Dave lacks a true appreciation of the fact that each requirement **Confidential**

is there for a reason. This was troubling to the ALJ and is troubling to the Board. Dr. Dave has failed to convince the ALJ or the Board that he would ever comply with all the requirements **Confidential**  
**Confidential**

In fact, all the evidence establishes to the contrary.

### **Discussion and Conclusions**

The Respondent has maintained a license to practice medicine and surgery in Kansas since 2000. Respondent has been involved in prior disciplinary actions before the Board. The underlying matter is a disciplinary action filed against Respondent by the Petitioner Board alleging that Respondent was professionally incompetent and committed unprofessional conduct and other violations of the Healing Arts Act. The matter proceeded to a formal hearing before OAH on December 16 and 17, 2014. The parties presented testimony and evidence to the presiding officer. Subsequent to the hearing, the presiding officer issued the Initial Order. The Presiding Officer's Initial Order finds that Dr. Dave committed multiple violations of the Kansas Healing Arts Act. Based upon all of the findings of the Initial Order and after taking into consideration past disciplinary action taken against Respondent, the Board must consider the appropriate sanction, if any, for the violations.

The Board is permitted to consider the Initial Order and has considered and adopted the findings of the Initial Order issued on March 13, 2015. The purpose of the Hearing is to issue a Final Order based upon the Board's review of an Initial Order issued by a Presiding Officer at the OAH. This Board must enter a Final Order on sanctions, if any, for violations, plus consider the potential assessment of costs. The review is conducted pursuant to K.S.A. 77-527 of the Kansas Administrative Procedure Act.

The Board heard arguments of the parties and asked questions of counsel and the Respondent. Parties were given proper notice of the hearing and the Board was provided a complete copy of the Agency Record. The parties submitted Briefs in support of their arguments and were permitted sufficient time to argue their respective sides of the case.

Pursuant to K.S.A. 77-527(d), the Board exercises *de novo* review and has all the decision-making power that the Board would have had to render a final order if the Board presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law. Further, in reviewing the findings of fact, the Board shall give due regard to the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses. The Board shall also consider the whole agency record in rendering its Final Order, which it has done in this matter.

The Petitioner Board has the burden to prove its allegations by a preponderance of the evidence, which it has done. The Petitioner Board must meet the burden of proof to establish that Respondent committed violations of the Healing Arts Act that are sufficient grounds to revoke his license or take other disciplinary action. The Board has carefully considered the facts which were proven and determined that Respondent's actions amount to unprofessional conduct consistent with Kanas case law precedent. These cases are cited by Petitioner in its written arguments and are known to the Board and adopted by reference herein. The Petitioner has proven its case and all of the allegations contained in the petition for disciplinary action filed on May 29, 2014.

Petitioner's Brief requests that the Board find that the appropriate sanction in this matter is the Revocation of Respondent's license and issue an Order for Respondent to pay the costs.

Petitioner makes compelling and persuasive arguments in this regard. The case law, prior decisions of the Board and the Sanctioning Guidelines provide clear direction that revocation is justified, even without applying the mitigating and aggravating factors. When these additional factors are applied, the outcome of revocation is overwhelming and undisputable. The evidence relied upon by this Board is clearly substantial and competent when viewed in light of the entire record.

One significant and pertinent admission by Respondent is that he admitted during the Administrative Hearing that he was not compliant **Confidential** in that he failed to satisfy clinical supervision requirement **Confidential** (See hearing transcript at p. 223, ln. 2-7; Exhibit 34). Additionally, at the Hearing on August 14, 2015, Respondent continued to acknowledge that he was not fully compliant **Confidential** arguing that he “experienced difficulty in finding a clinical supervisor,” but insisted that since he made good faith efforts his noncompliance should be excused (Exhibit X at p. 5)(Tr. at p. 18). Any reference in Exhibit X to testimony of witnesses that purport to support the clinical abilities of Respondent after the evidentiary hearing before ALJ are inadmissible as they lack foundation, are untimely submitted, unreliable as not subject to cross-examination during the evidentiary proceedings, and constitute inadmissible hearsay. Respondent was informed that the purpose of the presentations of the parties at the Hearing on August 14, 2015, was for the purpose of argument, not the taking of evidence or submission of testimony by witnesses. The time for introduction of evidence and testimony passed and, accordingly, any testimony submitted by Respondent in his written argument (marked as Exhibit X) is disregarded and stricken from the record. Specifically, the purported testimony of Drs. **Confidential** Schell, dated June 24, 2015, and submitted

more than six (6) months following the evidentiary hearing before the ALJ is inappropriate, inadmissible and will not be considered by the Board.

Respondent filed a brief for the Board's review, arguing that Respondent asserts it has been able to establish that the entire foundation of allegations on which the decision of Presiding Officer was without factual basis and clearly in error based on the reliable, probative and substantial evidence on the whole record. The Respondent's Brief alleges that the record establishes that Petitioner has improperly placed reliance on illogical and invalid conclusion that non-compliance had failed to be remedied. Respondent asserts that he has established based on the totality of the evidence in the record he remedied the issue of non-compliance two days prior to the imposition of disciplinary sanction on May 30, 2014. Respondent continues to argue that the documentary record that existed about the Respondent's Confidential since the Respondent returned to practice on December 09, 2013, indicated that the Respondent was Confidential Confidential was competent to practice and was doing well in his practice and presented no potential of harm to the public health, safety or welfare. Additionally, Respondent contends that there were no concerns or complaints about the Respondent's functioning or practice performance that had been brought to the attention of the Board, which should mitigate against revocation. Respondent argues that the absence of a situation of specific concern eliminates the need for verification from Confidential Confidential and his practice supervisor, about the existence of any potential of imminent danger to the public health, safety or welfare before resorting to emergency adjudication on the grounds of Respondent not establishing with a clinical supervisor. Respondent believes the proper course of action would have been for Dr. Settich to review the Respondent's new clinical supervisor Dr.

Kerin L. Schell's report and in the event of any suspicion about **Confidential**  
**Confidential**

**Confidential** and only then should have made a decision about the necessity for imposing disciplinary and emergency sanctions.

Respondent asserts that the record and the evidence submitted in this Briefing and testimony has established that that there was no evidentiary justification under applicable statutory provisions for the imposition of emergency proceedings against Respondent and that a more deliberate approach was required. Respondent asserts that the action by the Presiding Officer to impose disciplinary sanction of emergency license suspension following review was in violation of statutory provisions, in excess of the statutory authority of the state agency and was imposed without just cause.

Respondent asserts that the documentary record since 1999 shows a pattern of full compliance by Respondent with all prior Board Orders. Respondent contends that his non-compliance in the present matter was not willful and that he had made good faith efforts to come into compliance. Respondent asserts that he has established in his responsive pleadings and testimony and documentary evidence that **Confidential**

**Confidential**

Respondent asserts that the record since February 18, 2008 shows that Respondent has been able to practice the healing arts at all times with reasonable skill and safety to patients and without posing any potential of harm to the public health, safety and welfare.

Respondent contends that Administrative Law Judge Michele L. Tunnell was in error based on the clearly unwarranted exercise of discretion by her to reach the conclusions she

reached in the Initial Order. Respondent contends that the reliable, probative and substantial evidence in the record and included in his Petition for Review supports a determination that Administrative Law Judge Michele L. Tunnell's conclusion constitutes a grievous error in law with respect to her conclusions. Respondent contends that this error in law by the Administrative Law Judge has perpetuated a severe injustice towards him as Judge Tunnell did not find and properly conclude that the e-mail correspondence **Confidential** to Respondent from October 9, 2014 at 12:57 p.m. to November 17, 2014 at 8:57 a.m. was without factual basis and invalid. Respondent contends that this error in law has also maintained a further severe injustice towards him as the reversal of existing favorable opinion on the date of December 2, 2014 **Confidential** regarding Respondent's fitness to practice was based solely on the email correspondence **Confidential** to Respondent from October 9, 2014 at 12:57 p.m. to November 17, 2014 at 8:57 a.m. Respondent contends that the actions of **Confidential** **Confidential** fall below the standard **Confidential** Respondent asserts that the totality of the evidence in the record and included in his Petition for Review has established there is no valid basis for finding that he violated K.S.A. 65-2836(i).

Respondent asserts that his violation of a lawful order of the Board by his non-compliance with one out of four monitoring requirements of **Confidential** **Confidential** has caused him to violate K.S.A. 65-2836(k). Respondent asserts that under applicable regulation, a single instance of violation under Category of Offence IE "Competency of Practice - Supervision - incompetent acts of supervised person; Fails to meet technical

regulatory requirements" "Prior to Adjustment for Aggravating /Mitigating factors" and would merit sanctioning by Censure and \$ 500-\$ 2499 fine. Respondent requests consideration as mitigating factors that its conduct was not willful and that it had made good faith though unsuccessful efforts to establish a clinical supervisor by contacting six Ph.D. level psychologists, for his history of past good conduct and full compliance with all prior KSBHA actions, and for the severity and length of the disciplinary sanction already imposed. (KSBHA GUIDELINES FOR THE IMPOSITION OF DISCIPLINARY SANCTIONS, approved April 25, 2008).

Respondent asserts that the totality of the evidence in the record and included in his Petition for Review has established there is no valid basis for finding that he violated K.S.A. 65-2836(b) as further defined in K.S.A. 65-2837(a)(3).

Respondent submits that in the absence of a present situation of concern, the Board should reverse the imposed disciplinary sanction of license suspension. Respondent argues that the Guidelines for the Imposition of Disciplinary Sanctions, which are published and easily available to the public, are easily and consistently applied and in existence for many years. The Agency and the Board have consistently and uniformly applied these Sanctioning Guidelines.

#### **Application of the Guidelines for the Imposition of Disciplinary Sanctions**

On August 26, 2008, the Board approved the adoption of the Guidelines for the Imposition of Disciplinary Sanctions ("Sanctioning Guidelines"). These Sanctioning Guidelines are made available to the public and published (*See [www.ksbha.org/documents/publications/guidelines](http://www.ksbha.org/documents/publications/guidelines)*). These Sanctioning Guidelines are recited at length hereafter because the Sanctioning Guidelines provide the detailed policy rationale and guide the application of the sanctions herein.

The Sanctioning Guidelines set forth the basic principle that a licensee of the healing arts holds a respected and elevated position in society with responsibility not only to patients, but also to the public, to colleagues, to the profession, to self, and to the health care system in general. The mission of the Board of Healing Arts is to protect the public by authorizing only those persons who meet and maintain certain qualities to engage in the health care professions regulated by the Board, and to protect the integrity of the profession. This mission is served by creating a regulatory environment that allows competent and honorable practitioners to practice their art and science, by disciplining those who engage in professional incompetence, unprofessional conduct or other proscribed conduct, and by imposing sanctions that appropriately protect the public from immediate harm, remediate and rehabilitate when possible, or punish when necessary, but ordering the least restrictive discipline necessary to meet the proper sanctioning goals.

Inappropriate sanctions can undermine the goals of discipline. Sanctions that are too lenient or that do not adequately address the underlying causes for the violations do not deter and may result in decreased public confidence in the system. Sanctions that are too restrictive may also result in decreased confidence in the system, and may result in fewer reports of violations and create a more litigious environment. As a result, the guidelines do not establish a precise formula for calculating sanctions.

The Healing Arts Act and related regulations both prescribe and proscribe conduct that might be grouped in general categories of administrative requirements, misconduct that is harmful to the health care system in general, failure to perform a duty regarding patient care, and other misconduct that may result in patient harm. Patient harm may be economic harm, delay of

appropriate treatment, or adverse patient outcomes. The guidelines attempt to take into consideration all of these legitimate interests when determining the imposition of disciplinary action.

When the Board finds that a licensee has engaged in conduct constituting grounds for disciplinary action, the range of disciplinary authority that is available is quite broad. In determining which of these sanctions should be imposed, the Board should consider the goal for imposing discipline. The purpose might either be remedial, to protect the public from immediate harm, or punitive.

The Board recognizes the value of a predictable and consistent pattern of disciplinary sanctions. These sanctioning guidelines are intended to lend credibility to the disciplinary process, aid the Board in efficiently achieving its ultimate goal of protecting the public, and give guidance to licensees and their counsel when faced with allegations of misconduct. This framework applies in any matter when issuing a Final Order, announcing the appropriate mitigating and aggravating factors the Board will consider in determining the level of discipline and establishing a graduated scale for multiple and repeated misconduct.

Revocation is appropriate to achieve a remedial purpose, protection, or punishment. Removing a licensee from practice protects the public from future misconduct. Additionally, removing or preventing a person from practice is appropriate when the misconduct demonstrates that the licensee lack the necessary competence or professionalism to merit the privilege of licensure.

By adopting the policy statements as set forth in the Sanctioning Guidelines, the Board does not limit itself to any form of disciplinary order and it may consider its entire range of authority. The Board may depart from the policy as it desires and without giving notice.

The Sanctioning Guidelines are intended to supplement rather than replace the policies that have been previously adopted by the Board regarding disciplinary actions. The guidelines are in addition to other provisions of law that might apply in a specific situation, including the authority of the Board to assess costs in a proceeding.

### **Definitions Provided In Sanctioning Guidelines**

Section IV of the Sanctioning Guidelines define the following terms:

- “Injury” - harm to a patient, the public, or the profession, which results from a licensee’s acts or omissions.
- “Potential for Injury” - harm to a patient, the public, or the profession that is reasonably foreseeable at the time of the licensee’s acts or omissions, but for some intervening factor or event, would probably have resulted from the licensee’s acts or omissions.
- “Intent” - the conscious objective or purpose to accomplish a particular result.
- “Knowledge” - The conscious awareness of the nature of the conduct, but without the conscious objective or purpose to accomplish a particular result.
- “Negligence” - failure to exercise the standard of care that a reasonably prudent licensee would have exercised in a similar situation.
- “Ordinary negligence” - the failure to use ordinary care in the licensee’s practice.
- “Gross negligence” - a conscious, wanton act or omission in reckless disregard for the foreseeable outcome.

- “Inadvertence” - an accidental oversight through unintentional neglect.

### **Instructions for Applying Sanctions Grid and Explanations of Case Types**

In applying the Sanctioning Grid, the Presumed Sanction (Grid column 4) should be the starting point for the conduct described. When licensee is found to have committed multiple categories of offenses, consider whether the offenses are multiple ways of describing the same conduct or are separate occurrences and events. If the offenses are separate and are best described in different categories, the sanctions for each offense should be added together. If the instances of misconduct are similar sanctions, treat as multiple instances of same category and modify the decision to use the Presumed Sanction for Multiple Instances (Grid column 5). If multiple categories of offenses might apply to the same instance or transaction, use only the most severe sanction. Mitigating and aggravating factors should then be applied, with the resulting sanction being within the Range when Presumed Sanction is modified by aggravating and mitigating Factors (Grid column 6).

Respondent’s conduct may be placed into the Impairment Category of the Board Sanctioning Grid Categories in that his inability to practice is by reason of **Confidential** and is potentially harmful to patients and disruptive to Board processes and unable to remediate. Sanctioning Guidelines at Section II, Category 7A, p. 12.

The result in this case should be revocation of Respondent’s license to practice medicine and surgery in the State of Kansas. Revocation of Respondent’s license is the appropriate sanction because the presumed sanction of indefinite suspension and probation is modified for multiple instances, or prior Board action. *See* Section V. Sanctioning Grid, Category of Offense 7A, p. 12. Additionally, the adjustment for aggravating the mitigating factors assures that the

proper sanction is revocation because, on balance the aggravating factors heavily outweigh the mitigating factors. The aggravating factors provide an abundance of justification for seeing that revocation occurs.

### **Aggravating and Mitigating Factors - Policy Considerations**

After it has been established that a violation has occurred, then the Board should consider the facts and circumstances unique to the case to determine whether the presumptive sanction is appropriate in light of any aggravating and/or mitigating factors. Aggravating factors may justify more restrictive or severe discipline. Mitigating factors may justify less severe or restrictive discipline. It is important to note that all factors will not necessarily be given equal weight.

### **Application of Aggravating and Mitigating Factors**

Any of the following factors that the Board considers should be identified in the Final Order, along with a general statement describing how the factor modifies the presumptive sanction:

*A. Factors relevant to the misconduct committed:*

- a.) Nature and gravity of the allegations: Small mitigating factor.
- b.) Age or vulnerability of patient: The vulnerability of the patient is a significant aggravating factor. The mental condition of the patient who seeks diagnosis and treatment from a psychiatrist makes the patient particularly vulnerable.
- c.) Capacity or vulnerability of patient or victim of licensee's misconduct: Aggravating factor. Given that a potential patient is seeking psychiatric counseling and treatment from Dr. Dave, this makes them extremely vulnerable and heavily reliant upon the Respondent.

d.) Number/frequency of acts: Aggravating factor because there are numerous efforts to get Respondent to be compliant and Respondent has engaged in numerous acts of intentional refusal to comply.

e.) Injury caused by misconduct: Neutral as it is both aggravating and mitigating. Aggravating because there is injury to the patient and to the profession. Mitigating because Respondent argues that there was no specific personal injury to an identifiable patient.

f.) Frequency of commission of acts: Mostly an aggravating factor because there have been multiple and repeated acts of violations by the Respondent. Particularly since the acts underlying the Petition filed in 2014 are recent. Partially mitigating because there have been no known acts of violations between February of 2008 and December of 2013.

g.) Potential for injury ensuing from act: Both aggravating as there is certain injury to the patient and the profession. Also considered a mitigating factor because there is no physical injury to a specific patient.

h.) Consensus about blameworthiness of conduct: Aggravating because Respondent is solely to blame for the conduct.

i.) Abuse of trust: This is an aggravating factor because the acts of Respondent abuse the trust of the Board, given that there is a Stipulation and Contract in place that Respondent has failed to satisfy and meet.

j.) Consent of patient: Not applicable.

k.) Intentional vs. inadvertent: Strongly aggravating. The actions of Respondent were clearly and admittedly intentional, willful and knowing. The acts were not inadvertent.

l.) Motivation of criminal, immoral, dishonest or personal gain: Mitigating factor because the actions of the Respondent are attributable to **Confidential**  
**Confidential** There was no financial incentive created by failure to satisfy the full terms of the Contract. Aggravating because Respondent was dishonest in his dealings and attempted to cover up and deflect the inquiry into his failure to fully satisfy the terms **Confidential**

m.) Length of time that has elapsed since misconduct: Both mitigating and aggravating factor. Partially mitigating because there have been no known acts of violations or non-compliance **Confidential** between February 18, 2008 and December 9, 2013. Perhaps also mitigating because it appears to be very difficult for Respondent to find a suitable clinical supervisor. However, the time of compliance does not mitigate his violations to a point where revocation is inapplicable. Furthermore, the length of time since compliance does not necessarily diminish the violation given the nature of the problems and noncompliance.

Various stages and the disciplinary process have been protracted. More aggravating because there have been multiple and repeated acts. Furthermore, various people expended significant time and energy in attempting to make sure that Respondent was aware of his obligations, by sending reminders and communicating regularly with the Respondent.

*B. Factors relevant to the licensee:*

a.) Age: Aggravating because Respondent is not young or new to the practice, which might provide some leniency. Instead, Respondent is mature in age and presumably more experienced in life and should know how to satisfy the legal obligations of the profession. Respondent is not new to the profession as he has been a licensee since 2000. He is an experienced practitioner who should know of his duty to comply **Confidential**

b.) Experience in practice: Aggravating factor because the Respondent is experienced, not only in the practice, but in the methods and requirements of the Kansas Healing Arts Act.

c.) Past disciplinary record: Aggravating, given that there is a past record of disciplinary activity for this same issue. The Respondent continues to have problems with compliance despite prior instances which would typically impress upon a practitioner the importance and significance of full compliance with all terms of the Contract.

d.) Previous character: Partially mitigating factor in that there is no evidence to support that Respondent is of poor moral or social character outside of the practice of psychiatry.

e.) Mental or physical health: Severely aggravating. Respondent **Confidential**  
**Confidential** and have several findings that he is not fit to practice medicine.

f.) Personal circumstances: Mitigating because Respondent has had to address **Confidential**  
**Confidential** with his spouse, resulting in taking time away from the profession.

*C. Factors relevant to the disciplinary process:*

a.) Admission of key facts: Aggravating factor as the key facts are admitted or undisputed based upon the record. The key facts establish numerous acts and suggest that revocation is warranted.

b.) Full and free disclosure to the Board: Aggravating factor because there is evidence that Respondent has attempted to conceal facts. Respondent has not fully and freely disclosed information to the Board. The Presiding Officer found that Respondent's testimony was lacking in credibility and persuasiveness.

c.) Voluntary restitution or other actions taken to remedy the misconduct: Aggravating factor because there is no credible or admissible evidence that Respondent has taken any initiative to seek out or receive additional training, education, or clinical supervision over the years that this matter has been proceeding. However, someone who recognizes that they have been found to engage in numerous and repeated violations and shows a genuine desire to change past wrongful behavior should take the initiative in this area. The failure to take steps toward further training, education to correct deficiencies and secure appropriate clinical supervision, is evidence of a general disregard for the spirit, intent and language of the Act.

d.) Bad faith obstruction of disciplinary process or proceedings: Aggravating factor because Respondent has failed to fully cooperated with the disciplinary process and proceedings.

e.) False evidence, false statements, other deceptive practices during disciplinary process or proceedings: Strong Aggravating factor.

f.) Remorse and/or consciousness of wrongfulness of conduct: Aggravating because it appears that Respondent has not learned from prior actions taken by the Board and the Respondent fails to express contrition or otherwise acknowledge the wrongful nature of his conduct or the negative impact it has upon the profession. The Board observed that Respondent felt justified in his actions and showed no signs of remorse.

g.) Impact on patient: Aggravating factor because it has the potential to negatively impact the patient. While there was no evidence that Respondent provided an actual threat to a specific patient, the potential for impact is great. The Board expressed grave concern that the potential patients affected are extremely vulnerable because the Respondent would be treating patients who have mental illness or psychiatric problems.

h.) Public perception of protection: Aggravating factor because the public perception is damaged, and the negative impact upon the public trust in the profession, by the actions of Respondent through his complete disregard for adequate clinical supervision.

*D. General aggravating and mitigating circumstances:*

a.) Licensee's knowledge, intent, degree of negligence: Aggravating because the actions of Respondent were clearly intentional, willful and knowing. Mitigating in that it appears that Respondent has had a difficult time locating an appropriate clinical supervisor.

b.) Presence of other violations: Aggravating.

c.) Present moral fitness: Neutral, because there was no evidence of the present moral fitness of the Respondent. Aggravating because the recent evidence and testimony is that Respondent is not fit to practice medicine.

d.) Potential for successful rehabilitation: Strong Aggravating factor because history and the record indicates that Respondent is incapable of successful rehabilitation.

e.) Petitioner's present competence in medical skills: Presently an aggravating factor because there is no credible or admissible evidence that Respondent has taken the initiative to seek or receive any additional training, education or clinical supervision over the time that this matter has been proceeding. There is also inadequate evidence that Respondent has taken the initiative to seek out or receive additional training, education or supervision or find an appropriate mentors.

f.) Dishonest/Selfish motives: Aggravating based upon the finding of dishonest conduct.

g.) Pattern of misconduct: Strongly aggravating because there have been multiple and repeated acts by the Respondent, both present and past. The recent acts which form the basis for the Petition involve dishonest conduct.

h.) Illegal conduct: Mitigating factor because the Board is not aware that Respondent has ever been charged with a crime and this is not an immoral act.

i.) Heinousness of actions: Not applicable because there is no allegation that the Respondent committed heinous acts as those acts are defined.

j.) Ill repute upon profession: Strongly aggravating because the public perception is damaged, and the negative impact upon the public trust in the profession, by the actions of Respondent. The Mission of the Board, the Philosophy of the Agency and the policies behind the Sanctioning Guidelines are all implicated by Respondent's actions and failure to act.

k.) Personal problems (if there is a nexus to violation): This factor is not applicable because there are no personal problems which contributed to the violations, as compared to the emotional problems identified below.

l.) **Confidential**  
**Confidential**

m.) Isolated incident unlikely to reoccur: Aggravating because the facts established and the history presented by Respondent indicate that the incidents are likely to reoccur; Respondent lacks any potential for rehabilitation or remediation by this Board based, in part, upon the fact that Respondent failed to learn from his prior misconduct and correct his behavior. Respondent has taken no action to prove otherwise. There is no admissible evidence that

Respondent has taken any initiative to seek out or receive additional training, education or appropriate clinical supervision over the years that this matter has been proceeding.

n.) Public's perception to protection: Strong aggravating factor because an action of revocation would send a strong message to the general public that the Board is interested and committed to protecting the integrity of the profession and protecting the public. The Mission of the Board, the Philosophy of the Agency and the policies behind the Sanctioning Guidelines are all implicated by Respondent's actions and failure to act.

### **Additional Considerations for the Imposition of Disciplinary Actions**

The interest of the patient is paramount. Failure to perform these duties regarding patient care has the potential to cause patient harm. In addition to the general aggravating and mitigating circumstances that apply to all categories of misconduct, the Board may also consider the pervasiveness of such misconduct with regard to the licensee's practice in determining the appropriate remedy.

### **Conclusions**

The Board accepts, adopts, and incorporates by reference herein, each Finding of Fact set forth in the Initial Order.

The Board must decide whether Respondent committed a violation of the Healing Arts Act as set forth in the Initial Order as alleged in the Petition. The Board finds that, upon full consideration of all relevant facts, arguments, and circumstances in this proceeding, for Respondent's violations of the Healing Arts Act, Respondent's license to practice medicine and surgery in Kansas should be revoked.

K.S.A. 65-2846 provides that if the Board's decision is adverse to Respondent, costs may be assessed to the parties in a proportion that the Board may determine based on "all relevant circumstances...." The Board finds that, upon full consideration of all relevant facts, arguments,

and circumstances in this proceeding, the costs of this proceeding, should be assessed against Respondent. Respondent's obligation to remit payment of the costs of this proceeding and the Board determines the amount to be paid is \$6,533.51 based upon the Statement of Costs submitted.

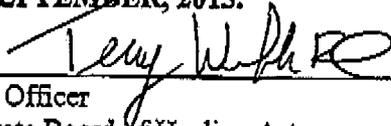
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**ORDER**

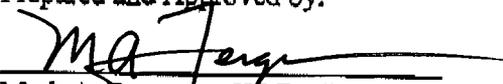
**IT IS THEREFORE ORDERED, BY THE KANSAS STATE BOARD OF HEALING ARTS**, that Respondent's license to practice medicine and surgery in Kansas, No. 04-28553, is hereby REVOKED.

**IT IS FURTHER ORDERED, BY THE KANSAS STATE BOARD OF HEALING ARTS**, that the costs of this proceeding are hereby assessed against Respondent. The amount of costs to be paid by Respondent are awarded based upon the Bill of Costs submitted in the amount of \$ 6,533.51. These costs are assessed against Respondent.

**IT IS SO ORDERED THIS 14th DAY OF SEPTEMBER, 2015.**

  
\_\_\_\_\_  
Presiding Officer  
Kansas State Board of Healing Arts

Prepared and Approved by:

  
\_\_\_\_\_  
Mark A. Ferguson; KS Bar# 14843  
Special General Counsel to the  
Kansas State Board of Healing Arts  
Gates, Shields & Ferguson, P.A.  
10990 Quivira, Suite 200  
Overland Park, KS 66210

\_\_\_\_\_  
**Final Order: Vijendra Dave, M.D.**  
**KSBHA Docket No. 14-HA00146**

## NOTICE OF 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, 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 and correct copy of the above and foregoing **FINAL ORDER REVOKING LICENSURE TO PRACTICE MEDICINE AND SURGERY AND ASSESSING COSTS** was served this 14th day of September, 2015 by depositing the same in the United States Mail, first-class, postage prepaid, and addressed to:

Vijendra Dave, M.D.  
**Confidential**  
Wichita, KS 67216

And a copy was emailed to the following:

Jane Weiler  
Ann Baker Hall  
Litigation Counsel  
Kansas State Board of Healing Arts  
800 SW Jackson, Lower Level-Suite A  
Topeka, Kansas 66612

The original will be filed with the office of:

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

  
Mark A. Ferguson