

**STATE OF NORTH DAKOTA
BOARD OF MEDICAL EXAMINERS
March 21, 2014**

Call to Order

Dr. Johnson, Chair, called the meeting of the North Dakota State Board of Medical Examiners to order at 8:00 o'clock a.m., at the board offices in Bismarck, North Dakota.

The following members were in attendance:

Investigative Panel A

Gaylord Kavlie, M.D., Chair
Burt Riskedahl, Vice-Chair
Larry Johnson, M.D.
Genevieve Goven, M.D.
Robert Olson, Jr., M.D.

Investigative Panel B

Kent Hoerauf, M.D., Chair
Kent Martin, M.D., Vice-Chair
Kayleen Wardner
Kate Larson, PA-C
Manuel Colón, M.D.
William Haug, Jr., M.D.
Sara Solberg, M.D.

Duane Houdek, executive secretary; Lynette McDonald, deputy executive secretary; Marijo DeMott, recording secretary; Stacy Moldenhauer, counsel; were also present.

Members of the public in attendance were Courtney Koeble, North Dakota Medical Association; Cheryl Ulven, PA-C, North Dakota Academy of Physician Assistants; Ed Christensen and Steven Little.

Minutes

Dr. Olson requested a correction of the minutes to indicate he abstained from a vote on issuing a license to Jon Norberg, M.D.
With that correction, Dr. Kavlie moved approval of the minutes as distributed. Dr. Martin seconded the motion. The motion passed unanimously.

Chiropractors performing WSI medical examinations

Mr. Christensen and Mr. Little, his counsel in an action involving WSI, presented an issue in his WSI case involving a chiropractor giving an impairment rating that

is claimed to be out of his scope of practice. Mr. Christensen presented this issue before in 2006. The issue is currently being litigated.

Physician Waiver of Interview

Dr. Hoerauf moved to approve the list of applicants for a license whose interview would be waived. Dr. Goven seconded the motion, which passed unanimously.

IPA report

Dr. Kavlie, Chair of Investigative Panel A, reported that the panel met March 20, 2014, and reviewed seven cases: two complaints were authorized, one letter of concern was issued, one stipulation approved and three cases dismissed.

IPB report

Dr. Hoerauf, Chair of Investigative Panel B, reported that the panel met March 20, 2014, and reviewed 10 cases: one letter of concern was issued, one stipulation approved, two cases referred for further review, and six cases dismissed.

IPA vs. Susan DeLap, M.D.

Dr. Hoerauf moved to approve the stipulation resolving the case, which related to the physician's breach of confidentiality in a single instance by texting the mother of an adult patient. Dr. Haug seconded the motion, which passed unanimously.

The stipulation provides Dr. DeLap's license will be suspended for one year, with the suspension stayed provided she attends a board-approved ethics course addressing confidentiality and the use of social media by physicians, and pays the costs of investigation.

IPB vs. Yolanda Hamilton, M.D.

Dr. Kavlie moved to approve the stipulation resolving the case, which related to the physician's having been disciplined by the Texas Medical Board for improper prescribing practices, and her failure to report the Texas investigation on her North Dakota renewal application. Dr. Olson seconded the motion, which passed unanimously, with members of Investigative Panel A voting.

The stipulation provides Dr. Hamilton's license will be suspended for one year, with the suspension stayed for a period of two years, provided she completes the requirements of the August 30, 2013, Texas order, refrains from practicing in

North Dakota until she provides acceptable proof of completion of those requirements, and pays the costs of investigation.

Applications for Special license

Mr. Houdek explained that since the time the board established rules and policies to allow consideration of license applicants who do not meet one of the specific license eligibility requirements, for example, passing the USMLE in three attempts or within a seven year period, we have received inquiries from potential applicants questioning whether they may be considered eligible to apply for a license.

The board considered four such questions from potential applicants. Because these were questions of potential eligibility, with no applications having been filed, they do not constitute either issuance or denial of a medical license.

The board, by motion made by Dr. Kavlie and seconded by Dr. Olson, unanimously indicated that a double-boarded child psychologist with no adverse practice history would not be deemed ineligible because he took four attempts to pass one component of the USMLE and took seven years, 10 months to pass all components. It also determined by consensus that a physician would not be deemed ineligible solely because the time it took to pass all components of the USMLE was one month in excess of the seven year limit.

By motion made by Dr. Martin and seconded by Dr. Goven, the board unanimously determined that a physician who had not practiced for the ten year period required under 50-02-11-03.1, NDAC, should be advised he is ineligible at this point in time.

In the discussion of these cases, the board articulated that exemptions to the specific license requirements will be considered only in cases where it is demonstrated that North Dakota citizens will benefit as patients, and then only when the applicant has demonstrated unique ability and accomplishment.

The board discussed allowing staff, in conjunction with the board Chair, to determine whether such exemptions should be made provisionally, until the board can consider them at its next meeting, in the same process that allows the board Chair and executive secretary to grant provisional temporary licenses in between board meetings.

Pharmacy collaborative agreements

Dr. Goven reviewed three collaborative agreements, two from Sanford Health and one from Craven-Hagen Clinic, for the board. Upon motion of Dr. Goven, seconded by Dr. Olson, the board approved the three agreements unanimously.

Richard Nybakken, MD

The board considered the matter of Dr. Nybakken, who is seeking to have his medical license reinstated. The board reviewed his history of alcohol dependence, which included a significant relapse in June of 2013. Since that time, he has maintained sobriety.

The sense of the board was that Dr. Nybakken needs to demonstrate a longer period of sobriety and that, if a conditional license is granted, participation in the PHP would be required and, given the length of time since he practiced, a competency exam or assessment may be in order, as well.

Interview candidates

Kenneth Thaler, MD

Mr. Riskedahl led the interview of Dr. Thaler. Dr. Thaler outlined his medical career, which was successful for approximately twenty years until 2003, when he became involved in a scheme to admit patients from the homeless population in Los Angeles, California, subject them to a number of tests and examinations that were not medically necessary, and then return them to the street population. This was done to obtain unwarranted fees from Medicare and the California medical assistance programs.

Dr. Thaler admitted that he would falsify medical records to make symptoms, vital signs, etc., worse than they were to justify hospital admission and testing. This practice continued for four years, from 2003 to 2007.

Dr. Thaler said he then cooperated with the FBI in 2009-10 to uncover the scheme and those involved in it.

Dr. Thaler was convicted in federal court and spent eight months in a federal prison facility and 10 weeks in a half-way house. This sentence was reduced from 48 months because of his cooperation. He was released January of 2014.

As a result of his conviction, he lost his California medical license and may reapply for it in May of 2014. He is excluded from Medicare for a period of 25 years. The board discussed the seriousness of his violations and the fact that he continued with the billing scheme for four years, knowing it was illegal. The board also discussed his practice of approximately 20 years without adverse incidents, and the remorse he demonstrated for his actions.

Dr. Colón moved to grant Dr. Thaler a license. Dr. Haug seconded the motion. The motion failed, with Drs. Colón and Kavlie voting in favor, and Drs. Hoerauf, Martin, Haug, Solberg, Goven, Johnson and Olson, Mr. Riskedahl, Ms. Wardner and PA-C Larson opposed.

Jeremiah Donovan, MD

Mr. Houdek led the interview of Dr. Donovan. Dr. Donovan had a *locum tenens* license in 2010 and was granted a Provisional Temporary License just prior to this meeting. Dr. Donovan was asked to interview to answer questions about specific matters that arose in his application.

Dr. Donovan was questioned about a precautionary suspension of his privileges that occurred in an Orlando hospital. He explained that it occurred because he had performed an endoscopy with a surgical team who said they were ready to do it when the charge nurse did not authorize the team to do the procedure. He reported that a misdemeanor charge of theft/assault occurred when he moved merchandise from one area of a retail store to another, was confronted by a store employee, who felt threatened and reported it as an assault. Dr. Donovan said he did not commit any assault or theft, and the charges were dismissed by the prosecution and expunged from his record.

Dr. Donovan stated he knows in his career that he has not always dealt with people in the best manner. He has addressed the matter of anger management and has done so successfully.

Dr. Goven moved to grant Dr. Donovan a license. Dr. Colón seconded the motion. The motion passed unanimously.

Michael Schmit, MD

An investigative panel of the board filed a complaint against Dr. Schmit on November 28, 2012, based upon alcohol abuse issues and having a sexual relationship with a patient.

Dr. Schmit signed an agreement on December 7, 2012, that indefinitely suspended his license to practice medicine. On March 22, 2013, the board

entered on order indefinitely suspending Dr. Schmit's license, which incorporated the 2012 agreement.

On November 18, 2013, Dr. Schmit petitioned for reinstatement of his license. By order of December 23, 2013, the board denied his petition and directed a subcommittee of the board to develop the terms, to include further treatment and practice requirements, under which Dr. Schmit's license might be considered for reinstatement.

The Board reviewed the treatment and practice assessments that had been performed by Acumen Institute since the November meeting, and the proposed conditions of licensure, which included random substance testing at the place of employment and by the board's PHP program, the presence of chaperones for female patients, a physician workplace monitor, with obligations to report relevant matters to the board, polygraph testing, required participation in the PHP, and restrictions of hours of work.

Dr. Hoerauf moved to grant a conditional license. Dr. Olson seconded the motion. It was noted that any violation of the conditions would be grounds for revocation of the license. The motion passed with Drs. Hoerauf, Olson, Colón and Goven, Mr. Riskedahl and Ms. Wardner voting in favor; Drs. Haug and Solberg and PA-C Larson opposed; and Drs. Kavlie, Johnson and Martin abstaining.

Proposed administrative rules

Special License

The board discussed the rule authorized at the November, 2013, meeting, which would permit waiving specific licensing requirements if the applicant would provide a unique benefit to the citizens of North Dakota and consideration of listed factors demonstrated exceptional ability and accomplishments. It was recommended that the proposed personal interviews of such applicants be made discretionary rather than mandatory.

With that change, Dr. Kavlie moved approval of the rule. Dr. Martin seconded the motion, which passed unanimously.

PHP surcharge

Mr. Houdek explained that certain facilities in the state and the board members of the newly formed North Dakota Professional Assistance Program suggested that a license surcharge be used, as opposed to contributions by health related industries, to fund the NDPAP.

With the amount already pledged by the board of \$75,000 per year and an authorization of up to \$350,000 to fund the program until a funding source is established, the estimated amount of a surcharge on all licensed physicians would be \$75.00 per year.

Dr. Kavlie noted that it should be capped at the amount actually needed to run the program for physicians and physician assistants, not accruing a surplus, nor paying for other disciplines. It was discussed that it would be made clear, contractually, that the funding is for board licensees only, and other professions that may be served will need to provide their own funding.

Dr. Colón asked how the total fee of \$275.00 per year compared to other states.

Mr. Houdek noted that the average license fee, without regard to funding given to physician health programs, is approximately \$225.00.

Dr. Kavlie moved to approve the rule. Mr. Riskedahl seconded the motion. The motion passed unanimously.

Telemedicine policy

The board reviewed the policy presented at the last meeting, which was based on the North Carolina telemedicine policy. It provides, basically, that telemedicine providers must be licensed in the state, and will be held to the same standard of care, regardless of the technology utilized. It also requires a personal examination before prescribing can occur, with listed exceptions.

Dr. Goven moved to approve the policy. Dr. Hoerauf seconded the motion. The motion passed unanimously.

Medical spas

Mr. Houdek noted that the issue of regulating medical spas has been a concern of the board for a long time. It is a concern shared by the Board of Nursing, who have issues with scope of practice and proper supervision. He noted that our board can regulate only our licensees, not nurses, nor estheticians, nor facilities, and what is needed is comprehensive regulation of all aspects of a medical spa. He informed the board that he would begin efforts to see if the respective boards wanted to join in a process to reach a set of regulations all could approve and would update the board as this progressed.

Financial audit

The final audit report was submitted by Brady Martz. There were no material findings of any concern.

Office matters

Mr. Houdek briefly outlined issues the office staff has encountered since the last meeting.

PA supervision

The first is the disparity in licensing allowances for physicians and physician assistants. Physicians can be located anywhere in the world and practice in North Dakota if they are licensed to do so. Our rules require a PA to have a supervising physician who practices in North Dakota. The original thought behind the rule was that we did not want to create a situation where a PA would be in North Dakota, but the licensed North Dakota physician who supervises would be out of state.

But that wording did not contemplate situations in which a physician, licensed in North Dakota, but living elsewhere, has a telemedicine practice and employs a PA. An example was recently encountered with a physician practicing in western Minnesota with many North Dakota patients. He can follow them when they are physically in North Dakota, but his PA cannot because he does not physically practice in the state.

The second is when a PA leaves the state for a time with a supervising physician. The physician may maintain his North Dakota license, but the PA cannot.

Mr. Houdek suggested a change in interpretation of our rule and its wording, if necessary, to make clear that if supervision is direct, that is, the physician and the physician assistant are in the same location, and both are licensed in North Dakota, the physician assistant may maintain a North Dakota license.

DO board candidate

Mr. Houdek reported that Dr. Thomas Carver, a pediatrician/neonatologist from Minot has expressed an interest in serving on the board in the DO capacity.

Investments

Mr. Houdek reported that, now that the North Dakota State Investment Board has been approved to manage our investments, the accounts would be moved over to them as it is prudent to do so.

WSI article

Mr. Houdek reported that he had a draft article reviewed by WSI and certain facilities to make sure it didn't inadvertently describe conduct that is, in fact, prevalent and acceptable, with regard to physicians voicing opinions about WSI claimants' fitness for duties.

Dr. Johnson reminded board members to think about officers for the board, as the board will be replacing officers at the July meeting.

Adjournment

Dr. Olson moved the meeting be adjourned. Dr. Hoerauf seconded the motion, which passed unanimously. Dr. Johnson adjourned the meeting at 12:16 o'clock, p.m.