

**STATE OF NORTH DAKOTA
BOARD OF MEDICAL EXAMINERS
November 22, 2013**

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; and Cheryl Ulven, PA-C, representing the North Dakota Academy of Physician Assistants were also present.

Minutes:

Dr. Goven moved to approve the minutes of the July 26, 2013, board meeting, as distributed. Dr. Hoerauf seconded the motion, which passed unanimously.

Physician waivers:

Dr. Kavlie moved to approve the list of applicants for a license whose interview would be waived, specifically including William Bergen, M.D., who applied for an administrative license. Dr. Martin seconded the motion, which passed unanimously.

Special Licensees waiver:

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

Resident Licensees waiver:

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

Investigative Panel A report:

Dr. Kavlie, Chair of Investigative Panel A, reported that the panel met November 21, 2013, and reviewed 15 cases: three were referred for action, seven were dismissed, two were referred for further review, one letter of concern was issued, and two stipulations were approved.

Investigative Panel B report:

Dr. Hoerauf, Chair of Investigative Panel B, reported that the panel met November 21, 2013, and reviewed 14 cases: two were referred for action, eight were dismissed, two were referred for further review, one letter of concern was issued, and one stipulation was approved.

Investigative Panel A vs. Blair Nelson, MD:

Ms. Moldenhauer reviewed the case against Dr. Nelson, which included multiple violations of prescribing controlled substances for himself. Dr. Nelson entered into a stipulation under which he agreed his license would be suspended indefinitely.

Ms. Larson moved to approve the stipulation. Ms. Wardner seconded the motion, which passed unanimously.

Investigative Panel A vs. Walter Wynkoop, MD:

This complaint was issued because of comments made by Dr. Wynkoop while viewing a surveillance tape of a person believed to be his patient doing work deemed incompatible with a claimed WSI disability. The complaint alleged a breach of patient confidentiality and a lack of patient advocacy.

Dr. Wynkoop entered into a stipulation under which he agreed to attend an ethics course within six months of the board's order, to advise patients of his relationship with any third party payor, to obtain appropriate releases of information, to avoid putting himself in a situation where his ability to serve as a patient advocate is compromised, to avoid any violations of the medical practice act and to pay the costs of prosecution. Should he fail in any of these conditions, his license will be suspended in accordance with law.

Dr. Colón moved to approve the stipulation. Dr. Haug seconded the motion. During the discussion of the motion, it was directed that the stipulation should be modified to make clear that the ethics course must be approved by the board. With that modification, the motion passed unanimously.

Investigative Panel B vs. Elizabeth McBride, MD:

Stacy reviewed this case, which was based on an action taken by the Maine medical board against Dr. McBride, who practiced in the state of Maine. Dr. McBride did not appear at the scheduled hearing. The issues involved improper prescribing and a physical or mental impairment which prohibited Dr. McBride from practicing safely. Although Dr. McBride allowed her North Dakota license to lapse before this case was brought, she had a license at the time of the Maine board action, and so was subject to the jurisdiction of this board.

The recommended order of the administrative law judge was to revoke Dr. McBride's license in North Dakota.

Dr. Goven moved to revoke Dr. McBride's license. Mr. Riskedahl seconded the motion.

The motion passed unanimously, with members of panel A and Drs. Haug, Colón and Solberg, who were not members of Panel B at the time this case was authorized, voting.

Investigative Panel B vs. Marisa Albertson, MD:

This case was brought because Dr. Albertson violated patient confidentiality by accessing the medical records of her ex-husband's wife.

She entered into a stipulation under which her license would be suspended for a period of one year, with that suspension stayed provided she attends a board-approved ethics course within six months of the board's order, has no violations of the medical practice act and pays the costs of prosecution.

Dr. Kavlie moved to approve the stipulation. The motion was seconded by Dr. Goven and passed unanimously, with members of panel A and Drs. Haug, Solberg and Colón, who were not members of Panel B at the time this case was authorized, voting.

Matter of Michael Schmit, MD:

Dr. Schmit was a surgeon in Bismarck who the board dealt with beginning in 2010, when he joined the PHP. He had subsequent violations of the medical practice act involving a sexual relationship with a patient and a threat made to that patient. He stopped practicing pursuant to a stipulation with the board on December 6, 2012, and his license was indefinitely suspended on March 22, 2013.

He has now petitioned for reinstatement, following an evaluation at Acumen

Assessments, which reported to the board that if Dr. Schmit stays sober, he would be safe to practice medicine.

The board reviewed the petition for reinstatement and the Acumen assessment. Dr. Colón moved to deny the petition for reinstatement of license. Dr. Haug seconded the motion.

During the discussion, the board noted that Dr. Schmit has been sober since February of 2013, and is current with CME's. The board also noted Dr. Schmit has a reputation as an excellent surgeon.

It was noted by various board members that Dr. Schmit's plan to work at a small hospital could be problematic because that can be a stressful practice and there may not be the structure that could appropriately monitor his behavior.

Dr. Olson observed that Dr. Schmit has had instances of sexual misconduct that occurred when he was not drinking.

Mr. Riskedahl thought the petition for reinstatement was premature.

Dr. Kavlie stated that he would abstain from any vote in this case because he also serves as a surgeon for the hospital Dr. Schmit wants to go to, but that the board may want to consider establishing a subcommittee to work in the next interim to see if conditions could be established that would adequately address the concerns the board has about Dr. Schmit's control of his behavior.

Dr. Hoerauf stated a more in-depth psychological evaluation may be in order and counseling for sexual issues may be required.

The motion was amended to include the establishment of a subcommittee consisting of Drs. Hoerauf and Olson to review the case in the interim, obtain further evaluations as may be necessary and establish, if possible, a set of conditions that would adequately address the board's current concerns.

The motion passed unanimously, with Dr. Kavlie abstaining.

Jon Norberg, MD

Mr. Houdek reviewed the disciplinary history of Dr. Norberg. His license was suspended

January 5, 2012, for improperly administering propofol to his wife in a non-clinical setting, with inadequate monitoring.

Following evaluations and treatment, on August 8, 2013, the board granted Dr. Norberg a license to practice, which included a set of monitoring conditions that must be met.

Dr. Norberg has now entered into an employment agreement with Sanford–Fargo, and has entered into a practice agreement with the board. Separately, Sanford has entered into a memorandum of understanding with the board establishing certain monitoring requirements that are necessary to meet the conditions of Dr. Norberg’s license.

The board reviewed the practice agreement, which included the following requirements: Dr. Norberg will practice only at Sanford; he will cooperate fully with all monitoring requirements; he will continue monthly treatments with appropriate professionals; he will limit his hours of work to 50 hours per week, which will include hours spent in documentation; and he will not apply for privileges to administer sedation that would include the drug propofol.

The memorandum of understanding with Sanford provides that Sanford will provide practice oversight by named physicians and administrators, who will report to the board immediately any patient or staff complaints, any employment investigations, and any quality of care issue. Additionally, these reporters will provide quarterly reports to the board of Dr. Norberg’s practice.

Sanford will limit Dr. Norberg’s hours of surgery in such a manner to ensure that he will not exceed the practice limitations of this conditional license; no drugs are kept at the clinic at which Dr. Norberg will work, and Sanford has not granted him privileges to administer moderate sedation, which includes the drug propofol.

Dr. Goven moved to approve the practice agreement and the memorandum of understanding with Sanford. Dr. Kavlie seconded the motion. The motion passed unanimously, with Drs. Colón and Olson abstaining.

Richard Nybakken, MD:

Mr. Houdek reported to the board, for its information only, that Dr. Nybakken has approached the board to renew his license, which lapsed in 2011. Dr. Nybakken states he has been sober since January of 2013, although he has been known to have been intoxicated in June of 2013.

Dr. Nybakken understands the board will likely need more time of sobriety and treatment on his part to consider whether to allow him to practice, and is taking the appropriate steps to provide this assurance to the board.

Pharmacy collaborative agreement modification:

Family HealthCare:

Dr. Goven has agreed to review pharmacy collaborative agreements for the board and make recommendations regarding their appropriateness.

Dr. Hoerauf moved to approve this agreement. Dr. Martin seconded the motion. The motion passed unanimously.

Sanford – Fargo:

Dr. Hoerauf moved to approve this agreement. Dr. Martin seconded the motion. The motion passed unanimously.

Personal interview – Gloria Tong, MD:

Dr. Olson led the interview, which was lengthy.

The issues explored at the interview were first, why she refused to sign a release of information to the board from her former employer. Dr. Tong said she refused because it was called a “special release” and she never had to do that before. When it was made known that the board would require a statement directly from her employer, a letter was sent from a Dr. David Tomb, attesting to her good standing. Dr. Tong never told the board she and Dr. Tomb had a personal relationship and allegedly presented themselves as man and wife.

Mr. Houdek asked whether she didn't think it was unethical or at least misleading to have Dr. Tomb provide such a reference without telling the board of their relationship. Dr. Tong replied that the board approved it. Mr. Houdek stated there was no such approval given; that the board learned of their relationship only from others.

Dr. Olson asked about an allegation that Dr. Tong had asked the girlfriend of a patient of hers to serve as a surrogate mother for her. Dr. Tong said it was not her, the girlfriend must have confused her with another Gloria Tong from Hong Kong, who did such recruiting for surrogate mothers. Dr. Tong acknowledged she was investigated by the Minnesota medical board for this, although she did not disclose this investigation on her license application, as required.

When questioned about problems with medical documentation at a former employer, Dr. Tong stated it was not her, but a physician with a similar name to hers. This was contrary to information obtained from the former employer in question.

Ms. Wardner moved to grant Dr. Tomb a license. Dr. Kavlie seconded the motion.

The motion failed 7-5, with Mr. Riskedahl, and Drs. Olson, Johnson, Goven, Hoerauf, Martin, and Haug opposed.

The result of the failed motion was that the application for licensure was denied, and an informal notice of intent to deny a license would be sent to Dr. Tong, giving her the opportunity to have the matter addressed before an administrative law judge before the action became official.

D. Diamond, MD, license application:

Staff brought this license application to the board because Dr. Diamond failed component 1 of the COMLEX test 4 times, and had not practiced for ten years, as required by the exception rule the board had previously passed.

The board discussed the matter at length, noting the need for a physician in Watford City, her intended place of practice.

Dr. Hoerauf noted we have to protect citizens of North Dakota, but in this case it is difficult to not allow Dr. Diamond to practice.

Duane suggested that since Dr. Diamond may actually practice during her residency in September of 2004, the board could consider that as meeting the practice requirements.

Dr. Martin moved to grant Dr. Diamond a license, making a judgment that the circumstances of this application meet the requirements of our rules. This would be contingent on Dr. Diamond meeting all other requirements for licensure, since her application is not complete.

Dr. Kavlie seconded the motion, which passed unanimously.

Administrative license policy:

Staff presented the request for this policy. The board's policy has been to require some proof of competency for any physician who has not practice in two years. This has been met by competency evaluations or the use of the SPEX test.

We get applications for physicians in administrative positions who want a license for that purpose, but who do not practice clinically.

The proposed policy would allow the granting of an administrative license to an otherwise qualified applicant who has not practiced within the past two years, for administrative purposes only. The license would specifically exclude the clinical practice of medicine or any direct patient care.

The board discussed that this would be a worthwhile policy to have. There was extensive questioning about whether other qualifications would remain, or whether we were somehow lessening the standards required to get a license.

Mr. Houdek explained the intent of the policy is only to remove the requirement of proof of current competency for someone who meets all other licensing requirements, but who has not practiced in the past two years. In that case, a license could be granted that would not permit the practice of direct patient care, or clinical medicine.

The board approved the policy on a voice vote.

Special license rule:

Mr. Houdek started the discussion by noting that partly because of collaborations between North Dakota hospitals and either Mayo Clinic in Minnesota or Sanford in South Dakota, the board has been seeing applicants who are very well qualified to practice medicine, with excellent credentials and long, productive medical careers, but who may have done their postgraduate training abroad, or otherwise do not meet the specific eligibility requirements we have in North Dakota.

The board has addressed these applications and noted the applicants were worthy of licensure, and that we should not be prohibiting them from being involved in the care of North Dakota citizens. The board directed staff to propose a rule that would give it discretion to waive specific individual license requirements, if the applicant proves to be very well qualified.

The rule before the board does just that, and gives a list of considerations the board may consider in exercising its discretion. This list includes the nature and length of practice, nature and length of postgraduate training, licensure in other states, absence of adverse disciplinary or privileging actions, absence of significant malpractice cases, competency exams, possession of an O-1 visa for persons of extraordinary ability, or other indicators of quality.

Dr. Hoerauf moved to approve the rule for processing as an administrative rule, with the change of the word “shall” interview all such applicants to “may” interview such applicants. Dr. Olson seconded the motion. The motion passed on a voice vote without a negative vote.

Telemedicine:

Mr. Houdek explained the impetus behind requesting this rule is that we continue to get requests from telemedicine companies, some of which are legitimate, others less so, to be licensed in North Dakota. We use telemedicine both within and without the state every day, from radiologists to ICU monitors to psychiatric interviews.

The policy submitted for consideration is from North Carolina, which states, at its core, that practitioners practicing telemedicine would be held to the same standards with regard to care, and with regard to examinations and record keeping, as physicians seeing a patient in person. It would continue to require an in-person examination before prescribing, with some exceptions, and give the board discretion to decide these on a case-by-case basis.

Dr. Colón stated we should embrace telemedicine and just be careful in making sure, on a case-by-case basis, that good medical standards are being met.

Mr. Riskedahl moved to proceed with such a rule following North Carolina's policy. Dr. Goven seconded the motion. The motion passed unanimously.

Investment policy:

Mr. Houdek started the discussion by noting we have had a very conservative investment policy which has served us well, but in the current climate, we have reached the point where our returns will not meet inflation.

We have asked our largest broker to provide an investment plan with a higher rate of return, but still with the primary goal of protecting our assets. The cost of this plan is approximately 2.1 %.

In the course of this examination, we found we qualify to be represented by the State Investment Board. That has two distinct advantages: The fees are very small – 30 basis points, and, because we are a small part of very large investments, we can access cash without any transfer fees or having to maintain a cash account.

Darren Schulz, acting director of the SIB explained that asset allocation remains the prerogative of the board, we will be given monthly financial statements and annual investment updates.

Dr. Kavlie moved we move our investments to the State Investment Board. Dr. Martin seconded the motion. The motion passed unanimously.

2014 Budget.

Mr. Houdek presented the budget, explaining that he had previously discussed it with

the Treasurer, Ms. Larson. It projects income of approximately \$785,000 and expenditures of \$650,000.

It contains a 5% increase for staff, based on the facts that last year there was a net increase of 1%, given the restoration of full payroll taxes, plus there was much extra work done by staff in implementing the new software and data programs.

In addition to approval of the annual budget, Mr. Houdek asked that the board be authorized to expend up to \$350,000 to fund the new PHP program, as may be necessary, given the fact that hospital based funding has become more difficult to obtain, and funding through fund-raising could take some time to develop.

Dr. Kavlie moved to approve the 2014 budget, including the authorization to expend up to \$350,000 for the new PHP program. Dr. Martin seconded the motion. The motion passed unanimously.

Other matters:

Ms. Wardner moved that Dr. Kavlie be elected Vice-Chair of the board. Dr. Olson seconded them motion. The motion passed unanimously.

Adjournment:

Ms. Wardner moved to adjourn the meeting. Dr. Haug seconded the motion. The motion passed unanimously. Dr. Johnson adjourned the meeting at 12:31 o'clock, p.m.