

BEFORE THE MINNESOTA

BOARD OF MEDICAL PRACTICE

In the Matter of the Medical License of Nancy Ann Johnson Kermath¹, M.D. Year of Birth: 1950 License No. 27,457

FINDINGS OF FACT, CONCLUSIONS, AND FINAL ORDER

The above-entitled matter came on before the Administrative Law Judge ("ALJ") Barbara J. Case at the request of the Minnesota Board of Medical Practice ("Board") Complaint Review Committee ("Committee"). The matter was initiated pursuant to a Notice and Order for Prehearing Conference and Hearing ("Notice of Hearing") which was issued by the Committee on October 20, 2016. On April 25, 2018, the ALJ issued Findings of Fact, Conclusions of Law, and Recommendation ("ALJ's Report"), recommending the Board take appropriate disciplinary action against Respondent's medical license. (A true and accurate copy of the ALJ's Report is attached hereto and incorporated as Exhibit A.)

The Board convened to consider the matter on July 14, 2018, at University Park Plaza, 2829 University Avenue S.E., Minneapolis, Minnesota. Karen D. Olson, Deputy Attorney General, appeared and presented oral argument on behalf of the Committee. Michael J. Weber, Esq., appeared and presented oral argument on behalf of Nancy Ann Johnson Kermath ("Respondent"). The following Board members were present: Christopher Burkle, M.D., J.D., FCLM; Irshad H. Jafri, M.B., B.S., FACP; Kelli Johnson, Ph.D.; Gerald T. Kaplan, M.A., L.P.; Patricia J. Lindholm, M.D., FAAFP; Kathryn Lombardo, M.D.; William Parham, III, M.D., FACP, FCCP; Allen G. Rasmussen, M.A.; Kimberly W. Spaulding, M.D., MPH; Maria K.

The caption was modified to reflect the Licensee's full name.

Statton, M.D., Ph.D.; Patrick R. Townley, M.D., J.D; and Joseph Willett, D.O., FACOI. The following Board members did not participate in deliberations: Joseph Willett, D.O., FACOI and Kelli Johnson, Ph.D.² Board staff that assisted the Committee also did not participate in the deliberations. Nicholas Lienesch, Assistant Attorney General, was present as legal advisor to the Board.

FINDINGS OF FACT

I. Background.

- 1. Respondent is a Board Certified Doctor of Medicine in Psychiatry having earned her medical degree at the University of Minnesota. She is 68 years old and has been a practicing psychiatrist for 35 years.
- 2. She has been medicated for bipolar disorder since she was 28 years old. At that time, she was a resident. She had a manic episode while on the job and was sent to the hospital. Respondent testified that incident is the only time she has had manic symptoms while working and since that time she has managed her bipolar disorder through medication and regular consultations with her own psychiatrists. Respondent further testified that her bipolar disorder primarily manifests as depression and only occasionally manifests as mania.
- 3. Respondent <u>testified that her</u> manic episodes have historically been triggered by a major physical illness (for example a broken pelvis, a hysterectomy, and a coma) in part

² Board member William Parham, III, M.D., FACP, FCCP inadvertently identified himself at the hearing as a member of the Complaint Review Committee in this matter, when he in fact was not.

This sentence was modified to reflect that this fact was from Respondent's testimony and not independent evidence. The Board accepted the Committee's Exception #1.

⁴ This sentence was modified to reflect that this fact was from Respondent's testimony and not independent evidence.

because the medications given for the illness may trigger an episode.⁵

- 4. Respondent <u>testified that she</u> monitors her mental health, is aware of signs that she may be becoming manic, and therefore her mood has remained fairly stable.⁶
- 5. Respondent has a history of chemical dependency which involves both alcohol and prescription medications. ²

II. Prior Disciplinary Actions by the Board

- 6. Respondent's bipolar disorder and chemical dependency were the subject of several Board orders beginning in 1990.
- 7. On September 8, 2001, the Board issued Respondent an Order of Unconditional License.
- 8. By Stipulation and Order for Indefinite Suspension dated March 9, 2002, the Board indefinitely suspended Respondent's license to practice medicine due to illness and relapsed chemical use. By Stipulation and Order dated March 8, 2003, the Board reinstated Respondent's license with conditions and restrictions for monitoring her illness and recovery.
- 9. By Amended Stipulation and Order for Indefinite Suspension dated November 13, 2004, the Board indefinitely suspended Respondent's license to practice medicine based, in part, on Respondent's admission that she had consumed alcohol and had

⁵ A portion of the ALJ's Finding of Fact No. 3 was omitted as Respondent's actual testimony was that she did "not think" that she "ever practiced medicine while" she was having a manic episode. Tr. 161. Respondent further testified that she stopped working after her most recent episode where she was hospitalized for a coma but there was no evidence in the record that Respondent had stopped practicing prior to the episode. Tr. 162-163. In fact, she had been at work the prior day. Tr. 58-60.

⁶ This sentence was modified to reflect that this fact was from Respondent's testimony and not independent evidence.

⁷ The Board accepted the Committee's Exception #2. ALJ Finding of Fact No. 5 is omitted pursuant to Minnesota Statutes section 13.41, subdivisions 2 and 5, and due to the fact that it is not relevant to the Final Order.

altered a letter before submitting it to the Board so as to present herself in a more favorable light.

- 10. On January 13, 2007, Respondent entered into a Stipulation and Order with the Board which reinstated Respondent's license and required, in part, that she abstain from alcohol and nonprescription mood-altering chemicals, refrain from prescribing or administering prescription drugs or drug samples for her own use or her family members' use, attend self-help program meetings at least three times per week, attend depression and bipolar support group meetings at least twice per month, attend meetings of a professional support group on a monthly basis, engage in individual therapy, comply with medication management, practice in a group setting, limit her practice to no more than 25 hours per week, obtain a work quality assessor, meet with a designated Board member on a quarterly basis, pay a civil penalty of \$2,500, and submit to at least 18 unannounced biological fluid screens per quarter.
- 11. On May 11, 2013, the Board granted Respondent an Order of Unconditional License. This Order stated: "The Board has received periodic reports from Respondent's treating physician, treating psychiatrist, treating psychologist, work site monitor, self-help program sponsors, and designated Board member; and the results of her periodic fluid tests. The reports and test results support the conclusion that Respondent has successfully maintained sobriety and psychiatric stability for at least six years."

Ш. Events Leading to Board Action in the Present Case

A. COMA

- On January 29, 2015, Respondent was taken to the hospital after a family 12. member⁸ found her unconscious at home. Respondent was in a coma and was admitted to the intensive care unit.
- On February 6, 2015, Respondent was discharged from the intensive care 13. unit and admitted to the psychiatric unit. Respondent was discharged from the hospital on February 23, 2015. Respondent testified that prior to her hospital admission, she had been self-medicating her depression with high doses of Lexapro and Nuvigil.
- 14. Respondent testified that she stopped practicing medicine following this incident and did not begin practicing again until approximately October 2015 because she knew that her mental health was not stable. 2 10

В. DUI

On April 1, 2015. Respondent cleaned out her office because she was no 15. longer going to be working there. Respondent took a bottle of a patient's 12 lorazepam, an antianxiety medication, with her when she left. Respondent had prescribed the lorazepam to a

This finding was changed to limit identifying information. The Board accepted the Committee's Exception #6 and determined that potentially identifying information could be removed without compromising the ALJ's Findings.

This sentence was modified to reflect that this fact was from Respondent's testimony and not independent evidence.

¹⁰ The Board accepted the Committee's Exception #3. ALJ Findings of Fact Nos. 16 through 20 have been omitted as they related to an alleged violation of the Medical Practice Act that is not part of the final Order. See Doe v. State Board of Medical Examiners, 435 N.W.2d 45, 50-51 (Minn. 1989).

This Finding of Fact was changed to omit information that was not necessary and to limit identifying information.

This was changed to limit identifying information.

patient. 13 Respondent told the police that a patient 14 had given the prescription back to her.

- Later that night, between 11:00 p.m. and 12:00 a.m., Respondent left her house 16. to go to the grocery store. While driving to the store, Respondent got a flat tire. She pulled into the parking lot of a gas station to call a tow truck. She called several times, but a tow truck never came.
- 17. Respondent remained parked in the gas station parking lot for several hours before taking "some of [her] prescribed medications which [she] had on [her] person," Respondent had stopped taking a prescribed anti-depressant several days before because she was concerned about weight gain.
- 18. At approximately 6:00 a.m., Respondent was approached by several police officers. Following field sobriety tests, Respondent was arrested on suspicion of driving while impaired. Respondent was transported to the police station for booking and questioning and then to the hospital for a blood test. Respondent was ultimately admitted to the hospital, where she remained until April 14, 2015. 15
- At the time of her arrest, Respondent had a patient's 16 lorazepam prescription 19. bottle in her purse. The pill bottle contained 29 one milligram tablets and 9 one-half milligram tablets. Respondent testified that a typical prescription would be for 30 or 10 pills, rather than 29 and 9, so these quantities indicate that some pills had been taken. At that time of her arrest, Respondent did not have a prescription for lorazepam, and she denied having taken any

¹³ This was changed to limit identifying information.

¹⁴ This was changed to limit identifying information.

¹⁵ The Board accepted the Committee's Exception #5. This sentence was modified as Respondent was also questioned by the police. Tr. 60-65. In fact, a video was created of the questioning and entered into evidence. Tr. 63.

This was changed to limit identifying information.

lorazepam.

- 20. Respondent's blood test from the Bureau of Criminal Apprehension came back positive for the presence of lorazepam.
- 21. The Administrative Law Judge and the Board¹⁷ finds that Respondent took two lorazepam pills from a patient's 18 prescription.
- 22. Respondent denied taking these pills, instead testifying that she tested positive for lorazepam because she took two tablets from a 10-year-old prescription provided by her former psychiatrist. The original prescription had been for five pills, but she only had two remaining. Respondent stated that she had kept these pills in the coin pouch of her purse "for emergencies" and that she had kept them in this manner for "ten years, at least, maybe more." The Administrative Law Judge and the Board does not find this testimony credible.

C. HEALTH PROFESSIONALS SERVICES PROGRAM

- 23. Respondent first contacted the Health Professionals Services Program ("HPSP") in February 2015.
- 24. Respondent signed a HPSP Participation Agreement on April 27, 2015. The Participation Agreement stated that Respondent agreed to "[t]he terms and conditions established in [her] accompanying Monitoring Plan." The Agreement further indicated that Respondent could be discharged from the program for failing to comply with the conditions of the revised Monitoring Plan.

¹⁷ This was changed to reflect that the Board also made this Finding of Fact.

¹⁸ This was changed to limit identifying information.

¹⁹ This was changed to reflect that the Board also made this Finding of Fact.

- 25. Respondent's Monitoring Plan stated: "I will refrain from prescribing or dispending medications to myself, [sic]²⁰ any member of my family, household, or anyone with whom I do not have a formal patient relationship." Prior to signing the Agreement, Respondent's HPSP case manager advised Respondent that she should not be self-prescribing medication.
- 26. On April 28, 2015, Respondent self-prescribed estradiol. On May 2, 2015, Respondent self-prescribed estradiol and levothyroxine. On May 16, 2015, Respondent self-prescribed estradiol and levothyroxine. On June 7, 2015, Respondent self-prescribed betamethasone cream.
 - 27. On May 1, 2015, the Board received a report of Respondent's DUI arrest.²¹

D. EVIDENTIARY HEARING

- 28. At the evidentiary hearing, Respondent admitted that she had self-prescribed medications. The record indicates that Respondent self-prescribed 34 different times between January 14, 2013, and June 7, 2015.
- 29. Respondent further acknowledged that self-prescribing would be a violation of her HPSP Monitoring Plan and that, after signing the Participation Agreement, she had self-prescribed several medications.

CONCLUSIONS OF LAW

The Board accepts the ALJ's Recommendation and accordingly adopts and incorporates the Conclusions of Law contained therein:

This was changed because there was a typographical error, no comma, in the actual Monitoring Plan.

This was changed because the identity of a complainant is not public data under the Minnesota Government Data Practices Act.

- 1. The Administrative Law Judge and the Board have jurisdiction to consider this matter under Minn. Stat. §§ 14.50, 147.091 (2016). 22
- 2. The Committee gave Respondent proper and timely notice of the hearing and satisfied the relevant procedural requirements of statute and rule.
- 3. The Committee has the burden of proof in this proceeding and must establish the facts at issue by a preponderance of the evidence.
- 4. The Medical Practice Act provides that the Board may impose discipline against a medical license, including suspension and revocation, under certain enumerated circumstances.
- 5. Minn. Stat. § 147.091, subd. 1(g) prohibits a physician from engaging in unethical conduct, including but not limited to: conduct likely to deceive, defraud, or harm the public; conduct that demonstrates a willful or careless disregard for the health, welfare, or safety of a patient; medical practice which is professionally incompetent; or conduct that may create unnecessary danger to any patient's life, health, or safety.
- 6. The Committee proved by a preponderance of the evidence that Respondent violated Minn. Stat. § 147.091, subd. 1(g). 23
- 7. Minn. Stat. § 147.091, subd. 1(k) prohibits a physician from departing from or failing to conform to the minimal standards of acceptable and prevailing medical practice.
 - 8. The Committee proved by a preponderance of the evidence that Respondent

²² The Board accepted the Committee's Exception #7. This was changed to omit a statute that was cited despite the absence of allegations relating to that statute.

²³ The Board accepted the Committee's Exception #4, adding this Conclusion of Law.

violated Minn. Stat. § 147.091, subd. 1(k). 24

- 9. Minn. Stat. § 214.355 prohibits a physician from violating the terms of an HPSP participation agreement or leaving the program except upon fulfilling the terms for successful completion of the program as set forth in the participation agreement.
- 10. The Committee proved by a preponderance of the evidence that Respondent violated the terms of her HPSP participation agreement and Minn. Stat. § 214.355.25

ORDER

Based on the foregoing Findings of Fact and Conclusions, the Board issues the following Order:

- 1. NOW, THEREFORE, IT IS HEREBY ORDERED that Respondent is **REPRIMANDED**.
- 2. IT IS FURTHER ORDERED that the medical license of Respondent in the State of Minnesota shall be SUSPENDED for a period of 30 days.
- 3. IT IS FURTHER ORDERED that during the period of suspension Respondent shall not in any manner practice medicine in Minnesota.
- 4. IT IS FURTHER ORDERED that Respondent shall participate in the Health Professionals Services Program ("HPSP") and fully comply with all terms and conditions of her HPSP Participation Agreement and Monitoring Plan, including any modifications resulting from this Order. Failure to comply with a HPSP Monitoring Plan, including any modifications, shall constitute a violation of this Order.

with the prior paragraph.

The Board omitted ALJ Conclusions of Law Nos. 7 through 16, as all such Conclusions of Law relate to alleged violations of the Medical Practice Act that are not part of the final Order.
This sentence was modified to reflect the correct name of the agreement and to be consistent.

5. IT IS FURTHER ORDERED that Respondent shall sign all necessary releases allowing the Board access to all medical, mental health, and chemical dependency records from any treating professional, evaluator, facility, or other from whom Respondent has sought or obtained treatment, support, or assistance, including documentation of compliance with HPSP

monitoring.

6. IT IS FURTHER ORDERED that Respondent shall successfully complete a course in ethics, which has been approved in advance by the Complaint Review Committee or its designee, within six months of the date of this Order. Successful completion shall be determined by the Board or its designee.

7. IT IS FURTHER ORDERED that Respondent may petition for reinstatement of an unconditional license upon completion of the terms of this Order. Upon submission of such petition, Respondent may be required to meet with a Complaint Review Committee to discuss her petition. Upon hearing the petition, the Committee may recommend that the Board continue, modify, or remove the conditions set out herein.

Dated: July 30, 2018

MINNESOTA BOARD OF MEDICAL PRACTICE

Patricia J. Lindholm, M.D., FAAFP

Presiding Board Member

THIS DOCUMENT CONTAINS NOT PUBLIC DATA

STATE OF MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF MEDICAL PRACTICE

In the Matter of the Medical License of N.A.J.K., M.D.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

This matter came before Administrative Law Judge Barbara J. Case for a hearing on December 13 and 14, 2017. On January 29, 2018, the Committee filed its closing argument. On February 27, 2018, Respondent filed her closing argument. On March 26, 2018, the Committee replied to Respondent's closing argument. The record closed on that date.

Lucas Clayton, Assistant Attorney General, appeared on behalf of the Minnesota Board of Medical Practice Complaint Review Committee (Committee). Michael J. Weber, Weber & Nelson Law Office, PLLC, appeared on behalf of N.A.J.K. (Respondent).

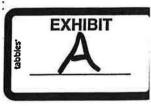
ISSUES

- 1. Does the Minnesota Board of Medical Practice (Board) have reasonable grounds to take disciplinary action against Respondent's medical license under Minn. Stat. § 147.091 (2016)?
- 2. Does the Board have reasonable grounds to take disciplinary action against Respondent's medical license under Minn. Stat. § 214.355 (2016)?

SUMMARY OF CONCLUSIONS

The Administrative Law Judge concludes that the Committee met its burden of proof with respect to some, but not all, of the violations alleged in the Notice and Order for Hearing. Specifically, the Administrative Law Judge concludes that the Committee met its burden of proving that Respondent violated Minn. Stat. §§ 147.091, subd. 1(k), 214.355. The Administrative Law Judge further concludes that the Committee failed to demonstrate that Respondent violated Minn. Stat. § 147.091, subd. 1(g),

Based on the record, the Administrative Law Judge makes the following:



FINDINGS OF FACT

I. Background

- 1. Respondent is a Board Certified Doctor of Medicine in Psychiatry having earned her medical degree at the University of Minnesota.¹ She is 68 years old and has been a practicing psychiatrist for 35 years.²
- 2. She has been medicated for bipolar disorder since she was 28 years old. At that time, she was a resident. She had a manic episode while on the job and was sent to the hospital. That incident is the only time she has had manic symptoms while working.³ Since that time she has managed her bipolar disorder through medication and regular consultations with her own psychiatrists.⁴ Her bipolar disorder primarily manifests as depression and only occasionally manifests as mania.⁵
- 3. Respondent's manic episodes have historically been triggered by a major physical illness (for example a broken pelvis, a hysterectomy, and a coma) in part because the medications given for the illness may trigger an episode.⁶ During these times, she does not practice psychiatry.⁷
- 4. Respondent monitors her mental health, is aware of signs that she may be becoming manic, and therefore her mood has remained fairly stable.⁸
- 6. Respondent has a history of chemical dependency which involves both alcohol and prescription medications.¹⁰

II. Prior Disciplinary Actions by the Board

7. Respondent's bipolar disorder and chemical dependency were the subject of several Board orders beginning in 1990.¹¹

¹ Exhibit (Ex.) 100.

² Transcript (Tr.) Volume (Vol.) 1 at 159.

³ Id. at 158.

⁴ Id. at 160.

⁵ Id.

⁶ Id. at 159.

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ See generally Exs. 1-16.

¹¹ Exs. 1-7.

- 8. On September 8, 2001, the Board issued Respondent an Order of Unconditional License. 12
- 9. By Stipulation and Order for Indefinite Suspension dated March 9, 2002, the Board indefinitely suspended Respondent's license to practice medicine due to illness and relapsed chemical use. ¹³ By Stipulation and Order dated March 8, 2003, the Board reinstated Respondent's license with conditions and restrictions for monitoring her illness and recovery. ¹⁴
- 10. By Amended Stipulation and Order for Indefinite Suspension dated November 13, 2004, the Board indefinitely suspended Respondent's license to practice medicine based, in part, on Respondent's admission that she had consumed alcohol and had altered a letter before submitting it to the Board so as to present herself in a more favorable light. 15
- 11. On January 13, 2007, Respondent entered into a Stipulation and Order with the Board which reinstated Respondent's license and required, in part, that she abstain from alcohol and nonprescription mood-altering chemicals, refrain from prescribing or administering prescription drugs or drug samples for her own use or her family members' use, attend self-help program meetings at least three times per week, attend depression and bipolar support group meetings at least twice per month, attend meetings of a professional support group on a monthly basis, engage in individual therapy, comply with medication management, practice in a group setting, limit her practice to no more than 25 hours per week, obtain a work quality assessor, meet with a designated Board member on a quarterly basis, pay a civil penalty of \$2,500, and submit to at least 18 unannounced biological fluid screens per quarter. ¹⁶
- 12. On May 11, 2013, the Board granted Respondent an Order of Unconditional License. This Order stated: The Board has received periodic reports from Respondent's treating physician, treating psychiatrist, treating psychologist, work site monitor, self-help program sponsors, and designated Board member; and the results of her periodic fluid tests. The reports and test results support the conclusion that Respondent has successfully maintained sobriety and psychiatric stability for at least six years." 18

¹² Ex. 8.

¹³ Ex. 9.

¹⁴ Ex. 10.

¹⁵ Ex. 11.

¹⁶ Ex. 12.

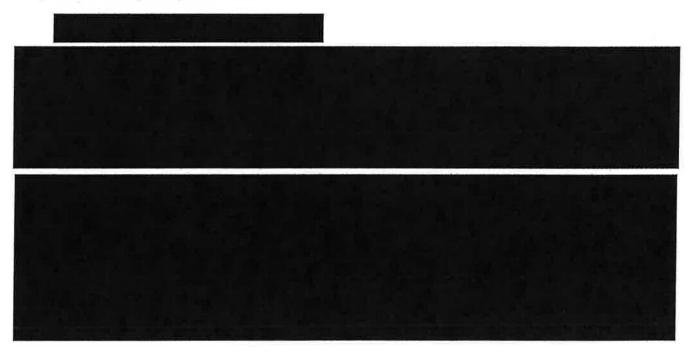
¹⁷ Ex. 16.

¹⁸ Id.

III. Events Leading to Board Action in the Present Case

A. Coma

- 13. On January 29, 2015, Respondent was taken to the hospital after found her unconscious at home. 19 Respondent was in a coma and was admitted to the intensive care unit. 20
- 14. On February 6, 2015, Respondent was discharged from the intensive care unit and admitted to the psychiatric unit.²¹ Respondent was discharged from the hospital on February 23, 2015.²² Respondent testified that prior to her hospital admission, she had been self-medicating her depression with high doses of Lexapro and Nuvigil.²³
- 15. Respondent stopped practicing medicine following this incident and did not begin practicing again until approximately October 2015.²⁴ Respondent did not practice during this period because she knew that her mental health was not stable.²⁵



¹⁹ Tr. Vol. 1 at 26.

²⁰ Id.

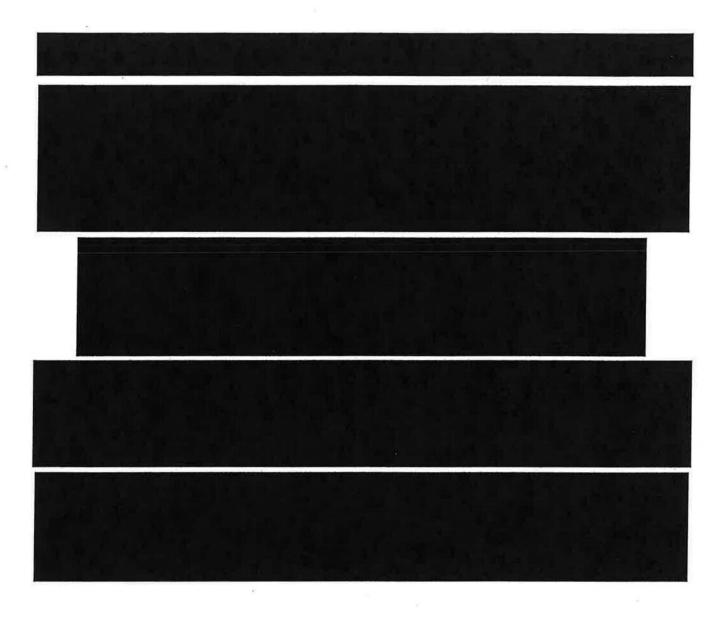
²¹ Id.

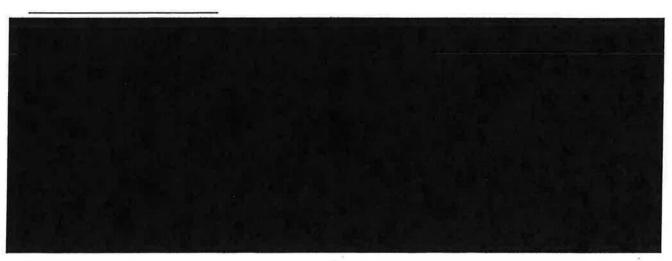
²² Id. at 27.

²³ Id. at 34.

²⁴ Id. at 163-64.

²⁵ Id. at 163.





C. DUI

- 21. On April 1, 2015, Respondent cleaned out her office at Lakes Consulting because she was no longer going to be working there.⁴³ Respondent took a bottle of her patient 's lorazepam, an anti-anxiety medication, with her when she left.⁴⁴ Respondent had prescribed the lorazepam to had given the prescription back to her.⁴⁶
- 22. Later that night, between 11:00 p.m. and 12:00 a.m., Respondent left her house to go to the grocery store.⁴⁷ While driving to the store, Respondent got a flat tire.⁴⁸ She pulled into the parking lot of a gas station to call a tow truck.⁴⁹ She called several times, but a tow truck never came.⁵⁰
- 23. Respondent remained parked in the gas station parking lot for several hours before taking "some of [her] prescribed medications which [she] had on [her] person." Respondent had stopped taking a prescribed anti-depressant several days before because she was concerned about weight gain. 52
- 24. At approximately 6:00 a.m., Respondent was approached by several police officers.⁵³ Following field sobriety tests, Respondent was arrested on suspicion of driving while impaired.⁵⁴ Respondent was transported to the police station for booking and then to the hospital for a blood test.⁵⁵ Respondent was ultimately admitted to the hospital, where she remained until April 14, 2015.⁵⁶
- 25. At the time of her arrest, Respondent had so 's lorazepam prescription bottle in her purse. The pill bottle contained 29 one milligram tablets and 9 one-half milligram tablets. Respondent testified that a typical prescription would be for 30 or 10 pills, rather than 29 and 9, so these quantities indicate that some pills had been taken. At that time of her arrest, Respondent did not have a prescription for lorazepam, and she denied having taken any lorazepam. So

⁴³ Id. at 68.

⁴⁴ Id. at 69.

⁴⁵ Id. at 60.

⁴⁶ Id

⁴⁷ Id. at 58.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ *Id.* at 59.

⁵² *Id.* at 89.

⁵³ *Id.* at 59.

⁵⁴ *ld.* at 60.

⁵⁵ *Id.*; Ex. 38 at 6.

⁵⁶ Tr. Vol. 1 at 95.

⁵⁷ Id. at 60.

⁵⁸ Id. at 92-93.

⁵⁹ *Id.*: Ex. 39.

- 26. Respondent's blood test from the Bureau of Criminal Apprehension came back positive for the presence of lorazepam.⁶⁰
- 27. The Administrative Law Judge finds that Respondent took two lorazepam pills from 's prescription.
- 28. Respondent denied taking these pills, instead testifying that she tested positive for lorazepam because she took two tablets from a 10-year-old prescription provided by her former psychiatrist.⁶¹ The original prescription had been for five pills, but she only had two remaining.⁶² Respondent stated that she had kept these pills in the coin pouch of her purse "for emergencies" and that she had kept them in this manner for "ten years, at least, maybe more."⁶³ The Administrative Law Judge does not find this testimony credible.

D. Health Professionals Services Program

- 29. Respondent first contacted the Health Professionals Services Program (HPSP) in February 2015.⁶⁴
- 30. Respondent signed a HPSP Participation Agreement on April 27, 2015.⁶⁵ The Participation Agreement stated that Respondent agreed to "[t]he terms and conditions established in [her] accompanying Monitoring Plan."⁶⁶ The Agreement further indicated that Respondent could be discharged from the program for failing to comply with the conditions of the revised Monitoring Plan.⁶⁷
- 31. Respondent's Monitoring Plan stated: "I will refrain from prescribing or dispending medications to myself, any member of my family, household, or anyone with whom I do not have a formal patient relationship." Prior to signing the Agreement, Respondent's HPSP case manager advised Respondent that she should not be self-prescribing medication. ⁶⁹
- 32. On April 28, 2015, Respondent self-prescribed estradiol.⁷⁰ On May 2, 2015, Respondent self-prescribed estradiol and levothyroxine.⁷¹ On May 16, 2015,

⁶⁰ Ex. 41.

⁶¹ Id. at 69, 74, 79.

⁶² Id. at 79, 82.

⁶³ Id. at 80.

⁶⁴ Ex. 26 at 97; Ex. 24 at 2.

⁶⁵ Ex. 23.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id. at 4.

⁶⁹ Tr. Vol. 1 at 57.

⁷⁰ Ex. 29 at 78.

⁷¹ Id. at 79-80.

Respondent self-prescribed estradiol and levothyroxine.⁷² On June 7, 2015, Respondent self-prescribed behamethasone cream.⁷³

33. On May 1, 2015, reported Respondent's DUI arrest to the Board.⁷⁴

E. Evidentiary Hearing

- 34. At the evidentiary hearing, Respondent admitted that she had self-prescribed medications.⁷⁵ The record indicates that Respondent self-prescribed 34 different times between January 14, 2013, and June 7, 2015.⁷⁶
- 35. Respondent further acknowledged that self-prescribing would be a violation of her HPSP Monitoring Plan and that, after signing the Participation Agreement, she had self-prescribed several medications.⁷⁷

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

- 1. The Administrative Law Judge and the Board have jurisdiction to consider this matter under Minn. Stat. §§ 14.50, 147.091, .092 (2016).
- 2. The Committee gave Respondent proper and timely notice of the hearing and satisfied the relevant procedural requirements of statute and rule.
- 3. The Committee has the burden of proof in this proceeding and must establish the facts at issue by a preponderance of the evidence.⁷⁸
- 4. The Medical Practice Act provides that the Board may impose discipline against a medical license, including suspension and revocation, under certain enumerated circumstances.⁷⁹
- 5. Minn. Stat. § 147.091, subd. 1(g) prohibits a physician from engaging in unethical conduct, including but not limited to: conduct likely to deceive, defraud, or harm the public; conduct that demonstrates a willful or careless disregard for the health,

⁷² Id. at 81-82.

⁷³ Id. at 83.

⁷⁴ Ex. 24.

⁷⁵ Tr. Vol. 1 at 42-47.

⁷⁶ See Ex. 29.

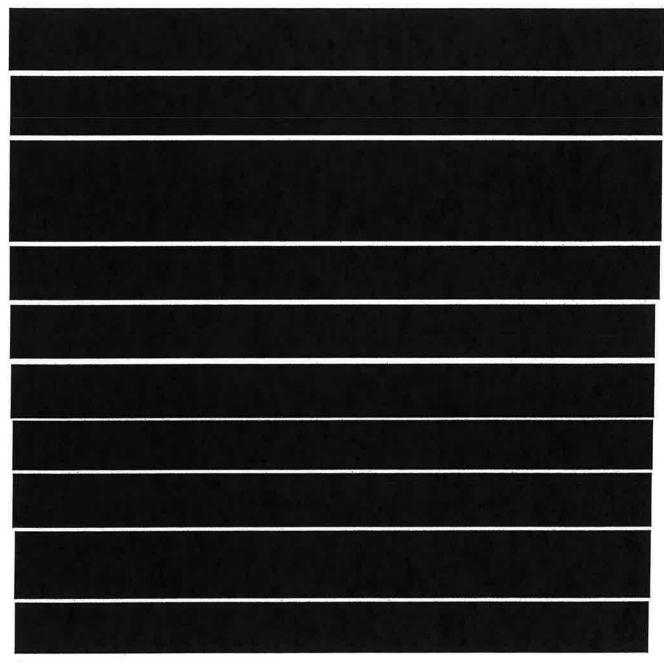
⁷⁷ Tr. Vol 1 at 42.

⁷⁸ Minn. R. 1400.7300, subp. 5 (2017); see also In re Wang, 441 N.W.2d. 488, 492 (Minn. 1989); In re Medical License of Friedenson, 574 N.W.2d 463, 466 (Minn. Ct. App. 1998), review denied (Minn. 1998).

⁷⁹ See Minn. Stat. § 147.141 (2016).

welfare, or safety of a patient; medical practice which is professionally incompetent; or conduct that may create unnecessary danger to any patient's life, health, or safety.

6. The Committee has failed to prove by a preponderance of the evidence that Respondent violated Minn. Stat. § 147.091, subd. 1(g).



17. Minn. Stat. § 214.355 prohibits a physician from violating the terms of an HPSP participation agreement or leaving the program except upon fulfilling the terms for successful completion of the program as set forth in the participation agreement.

18. The Committee proved by a preponderance of the evidence that Respondent violated the terms of her HPSP agreement and Minn. Stat. § 214.355.

Based on these Findings of Fact and Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

Based on the proven violations, the Administrative Law Judge recommends the Board take appropriate disciplinary action against Respondent's medical license.

Dated: April 25, 2018

BARBARA J. CASE Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Board will make the final decision after a review of the record. The Board may adopt, reject, or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61 (2016), the Board shall not make a final decision until this Report has been made available to the parties to the proceeding for at least ten calendar days. The parties may file exceptions to this Report and the Board must consider the exceptions in making a final decision. Parties should contact Ruth Martinez, Executive Director of the Minnesota Board of Medical Practice, Suite 400, 2829 University Avenue SE, Minneapolis, Minnesota 55414, (612) 548-2149, to ascertain the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Board, or upon the expiration of the deadline for doing so. The Board must notify the parties and the Administrative Law Judge of the date the record closes. If the Board fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2016). In order to comply with this statute, the Board must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1 (2016), the Board is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law.

MEMORANDUM

The Committee alleges that Respondent committed numerous violations of Minn. Stat. § 147.091 and Minn. Stat. § 214.355. Respondent argues that "the Committee failed to present a prima facie case or otherwise meet its burden of proof for each of its specific categories of allegations and the related alleged statutory violations." The violations alleged by the Committee will be considered in turn.

The Administrative Law Judge first notes that "proceedings brought on behalf of the state, attacking a person's professional and personal reputation and character and seeking to impose disciplinary sanctions, are no ordinary proceedings." The Minnesota Supreme Court has requested the finder of fact in all professional disciplinary matters to keep "in mind the gravity of the decision to be made" and only "be persuaded by evidence with heft" because "the reputation of a professional as well as the public's trust are at stake." 82

I. Health Professionals Services Program

Respondent signed a HPSP Participation Agreement on April 27, 2015.⁸³ The Participation Agreement stated that Respondent agreed to "[t]he terms and conditions established in [her] accompanying Monitoring Plan." The Agreement further indicated that Respondent could be discharged from the program for failing to comply with the conditions of the revised Monitoring Plan. Respondent's Monitoring Plan stated: "I will refrain from prescribing or dispending medications to myself, any member of my family, household, or anyone with whom I do not have a formal patient relationship." Before signing the Agreement, Respondent's case manager advised Respondent that she should not be self-prescribing medication.

On April 28, 2015, Respondent self-prescribed estradiol. On May 2, 2015, Respondent self-prescribed estradiol and levothyroxine. On May 16, 2015, Respondent self-prescribed estradiol and levothyroxine. On June 7, 2015, Respondent self-prescribed behamethasone cream. At the evidentiary hearing in this matter, Respondent admitted that self-prescribing would be a violation of her Monitoring Plan and that, after signing the Participation Agreement, she had self-prescribed several medications.

⁸⁰ Resp't N.A.J.K.'s Closing Legal and Factual Analysis at 6 (Feb. 26, 2018) (Resp't Mem.).

⁸¹ Wang, 441 N.W.2d. at 492.

⁸² Id.

⁸³ Ex. 23.

⁸⁴ Id

⁸⁵ Id.

⁸⁶ Id. at 4.

⁸⁷ Tr. Vol. 1 at 57.

⁸⁸ Ex. 29 at 78.

⁸⁹ *Id.* at 79-80.

⁹⁰ *Id.* at 81-82.

⁹¹ Id. at 83.

⁹² Tr. Vol 1 at 42.

Minn. Stat. § 214.355 provides:

Each health-related licensing board, including the Emergency Medical Services Regulatory Board under chapter 144E, shall consider it grounds for disciplinary action if a regulated person violates the terms of the health professionals services program participation agreement or leaves the program except upon fulfilling the terms for successful completion of the program as set forth in the participation agreement.

Based on the application of this statute to the undisputed facts of this case, the Administrative Law Judge concludes that discipline against Respondent's medical license is appropriate.

However, Respondent maintains that "HPSP arguably lacks legal authority to monitor" her. According to Respondent, "[t]o even be eligible for HPSP, HPSP's statutory authority indicates the substance and/or mental health diagnosis must affect the physician so that she is otherwise unable to practice with reasonable skill and safety," and thus, because Respondent's "diagnoses are not actually impairing her practice," section 214.355 should not apply to her. This argument ignores the fact that Respondent "agree[d] to monitoring by the [HPSP], consistent with Minnesota Statutes 214.31 – 214.37" and "agree[d] to abide by the conditions, limitations, and terms, as stated in the accompanying Monitoring Plan and any revisions of the document." The Administrative Law Judge concludes that Respondent's willingness to participate in the program precludes her current argument that the program does not apply to her.

Respondent further argues that "the committee failed to present a prima facie case that HPSP somehow has regulatory authority over [her] prescriptions of routine and non-addictive medication." The Administrative Law Judge refuses to distinguish between addictive medication and "routine and non-addictive medication." Presumably, because this medication is available only by prescription, the medical field views these medications as needing regulation. While acknowledging that Respondent's self-prescribing did not lead the HPSP to terminate her from the program, the Administrative Law Judge, as a nonmedical professional, will not opine that, because these medications are somehow less dangerous than others, Respondent's self-prescribing of these medications does not violate the HPSP.

Respondent states, without any supporting legal authority, that "it is unlikely that Section 214.355 is intended to encompass any potential compliance issues, no matter how minor. The language and the related grounds for disciplinary action require a meaningful or substantive violation of the participation agreement, one that prevents the physician from successfully completing the program." In order to accept Respondent's

⁹³ Ex. 23 at 2.

interpretation, the Administrative Law Judge would need to read language into the statute. The Administrative Law Judge is precluded from doing so.⁹⁴

In sum, because Respondent's HPSP Participation Agreement and Monitoring Plan prohibited her from self-prescribing medication, and the facts indisputably demonstrate that Respondent violated that condition, the Board is within its discretion to impose discipline against Respondent's medical license.

II. Respondent's Patient's Prescription

The Committee alleges that Respondent should be disciplined for taking pills from her patient's prescription. Respondent denies having done so.

It is grounds for discipline if a physician engages in "[c]onduct that departs from or fails to conform to the minimal standards of acceptable and prevailing medical practice in which case proof of actual injury need not be established." Facts supporting a legal conclusion under this statutory provision may be "proved either by direct evidence or circumstantial or both. The law does not prefer one form of evidence over the other." A fact is proved by circumstantial evidence when its existence can be reasonably inferred from other facts proved in this case."

On April 1, 2015, Respondent cleaned out her office at Lakes Consulting because she was no longer going to be working there. Respondent took a bottle of her patient Is lorazepam with her when she left. Respondent was arrested for driving while impaired in the early morning hours of April 2, 2015. Respondent had Is lorazepam in her purse when she was arrested. The pill bottle contained 29 one milligram tablets and 9 one-half milligram tablets. Respondent testified that a typical prescription would be for 30 or 10 pills, rather than 29 and 9, so these quantities indicate that some pills had been taken. At the time of her arrest, Respondent did not have a prescription for lorazepam, and she denied having taken any lorazepam. But her toxicology screen from the Bureau of Criminal Apprehension tested positive for lorazepam.

At the hearing, Respondent testified that she tested positive for lorazepam because she took two tablets from a 10-year-old prescription provided by her former

⁹⁴ See State v. Noggle, 881 N.W.2d 545, 550-51 (Minn. 2016) (stating that the Court "cannot read . . . additional language" into a statute, "but rather must apply the plain language of the statute as written").

⁹⁵ Minn. Stat. § 141.09, subd. 1(k) (2016).

^{96 4} Minnesota Practice, CIVJIG 12.10 (2014).

⁹⁷ Id.

⁹⁸ Tr. Vol. 1 at 68.

⁹⁹ Id. at 69.

¹⁰⁰ Id. at 60.

¹⁰¹ Id.

¹⁰² Id. at 92-93.

¹⁰³ *Id.*; Ex. 39.

¹⁰⁴ Ex. 41; Tr. Vol. 1 at 65.

psychiatrist. 105 The original prescription had been for five pills, but she only had two remaining. 106 Respondent stated that she had kept these pills in the coin pouch of her purse "for emergencies" and that she had kept them in this manner for "ten years, at least, maybe more." 107 Respondent denied taking any pills from the purse of the

The Administrative Law Judge does not find this testimony credible. According to Respondent, she took three pills over the course of ten years, and then, coincidentally on the date that she was arrested in possession of her patient's lorazepam, she took the remaining two, the same number missing from 's prescription bottle, which she claims she had kept intact in her purse for over a decade. It simply strains all credulity to think that Respondent took two 10-year-old pills from her coin purse, rather than those from a prescription bottle. Therefore, the Administrative Law Judge concludes that the Committee has met its burden of proving that Respondent took pills from prescription. And contrary to Respondent's implicit assertion, the Committee was not required to present direct evidence in order to prove this fact. 109

Respondent testified that it would be unprofessional, unethical, and fall below the minimal standards of acceptable practice for a physician to take a patient's prescription. The Administrative Law Judge agrees with Respondent's assessment and concludes that by taking her patient's lorazepam, Respondent violated Minn. Stat. § 141.09, subd. 1(k). The Board may therefore appropriately impose discipline against Respondent's medical license.

III. Self-Prescribing

The Committee argues that Respondent violated several statutory provisions, namely Minn. Stat. §147.091, subd. 1 (k), by self-prescribing medications. It is undisputed that Respondent self-prescribed a number of medications over the course of several years. Respondent, however, "explained that her prescriptions were intended to be isolated, short term, and routine, in compliance with the [American Medical Association's (AMA)] ethical guidelines effective at the time of her conduct." 111

The AMA ethical guidelines state:

It would not always be inappropriate to undertake self-treatment or treatment of immediate family members. In emergency settings or isolated settings where there is no other qualified physician available,

¹⁰⁵ Tr. Vol. 1 at 69, 74, 79.

¹⁰⁶ Id. at 79, 82.

¹⁰⁷ Id. at 80.

¹⁰⁸ Id. at 69-70.

¹⁰⁹ See Black's Law Dictionary (10th ed. 2014) (defining "direct evidence" as "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption and "circumstantial evidence" as "[e]vidence based on inference and not on personal knowledge or observation").

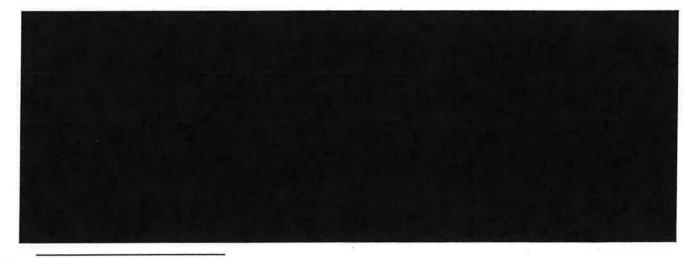
¹¹⁰ Tr. Vol. 1 at 70.

¹¹¹ Resp't Mem. at 16.

physicians should not hesitate to treat themselves or family members until another physician becomes available. In addition, while physicians should not serve as a primary or regular care provider for immediate family members, there are situations in which routine care is acceptable for short-term, minor problems. Except in emergencies, it is not appropriate for physicians to write prescriptions for controlled substances for themselves or immediate family members.¹¹²

In addition, Respondent's psychiatrist, Dr. Ronald D. Groat, testified that "it's relatively commonplace for some physicians to prescribe – I'm on vacation and I forgot my meds. at home or I left them somewhere or I have a sinus infection, to treat themselves." ¹¹³

Respondent insists that these were routine medications prescribed in "isolated, short-term" situations. The record belies this assertion. Respondent self-prescribed medications 34 different times between January 14, 2013, and June 7, 2015. 114 This amounts to approximately one prescription per month for about two and one-half years. Moreover, according to the AMA, self-prescription should be limited to "emergency settings or isolated settings where there is no other qualified physician available." Respondent contends that her self-prescription "could be considered somewhat of an emergency situation" because she "had no insurance and . . . was just writing scripts to cover [herself] for chronic conditions that were not controlled substances." 115 The Administrative Law Judge sympathizes with Respondent's situation, but does not believe that lack of insurance constitutes an emergency, considering the length of time that Respondent continued to self-prescribe. Therefore, the Administrative Law Judge concludes that the Committee has met its burden of proof that Respondent's self-prescribing failed to "conform to the minimal standards of acceptable and prevailing medical practice" in violation of Minn. Stat. § 147.091, subd. 1(k).

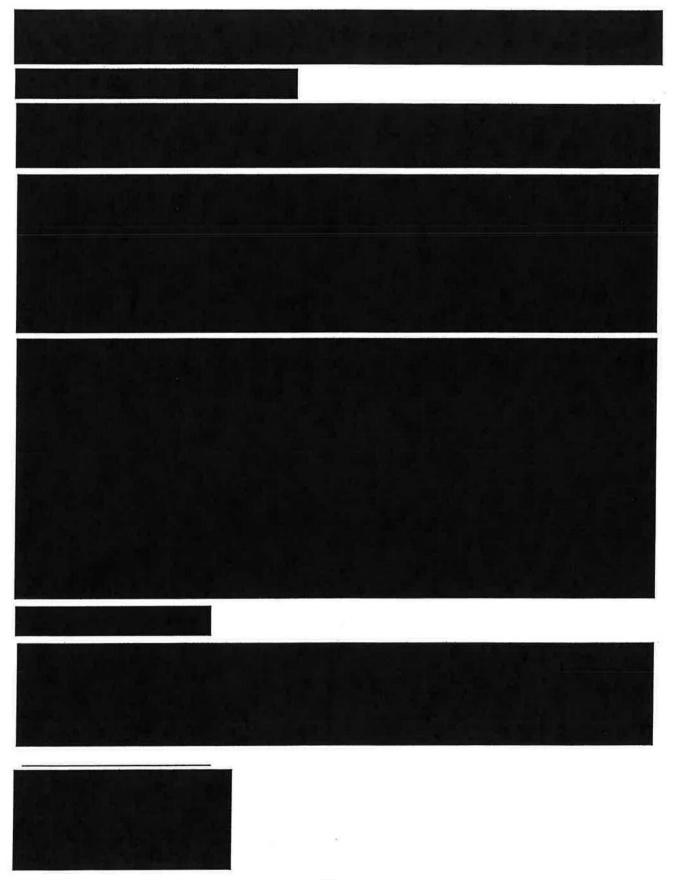


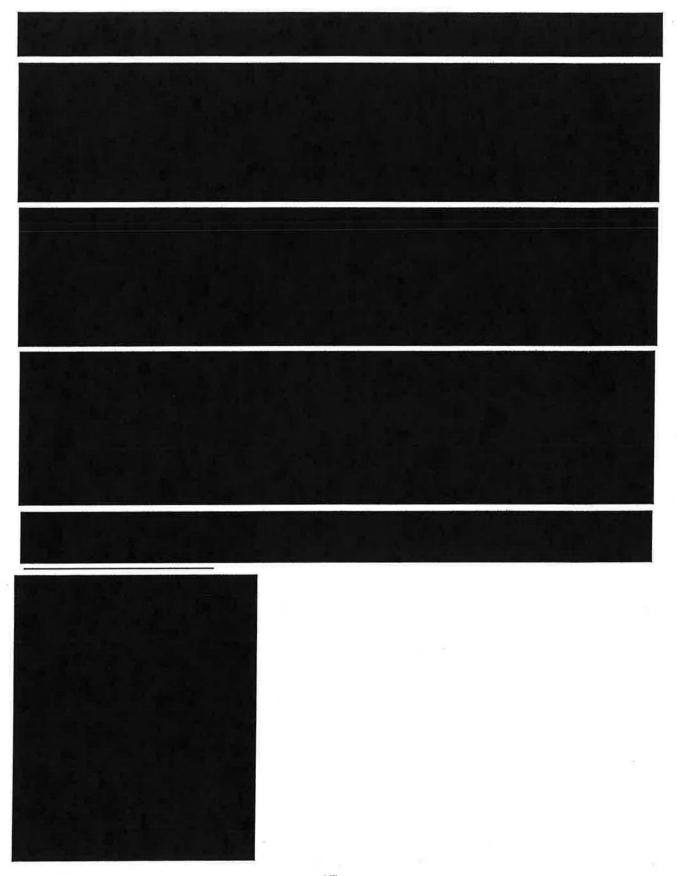
¹¹² Ex. 113.

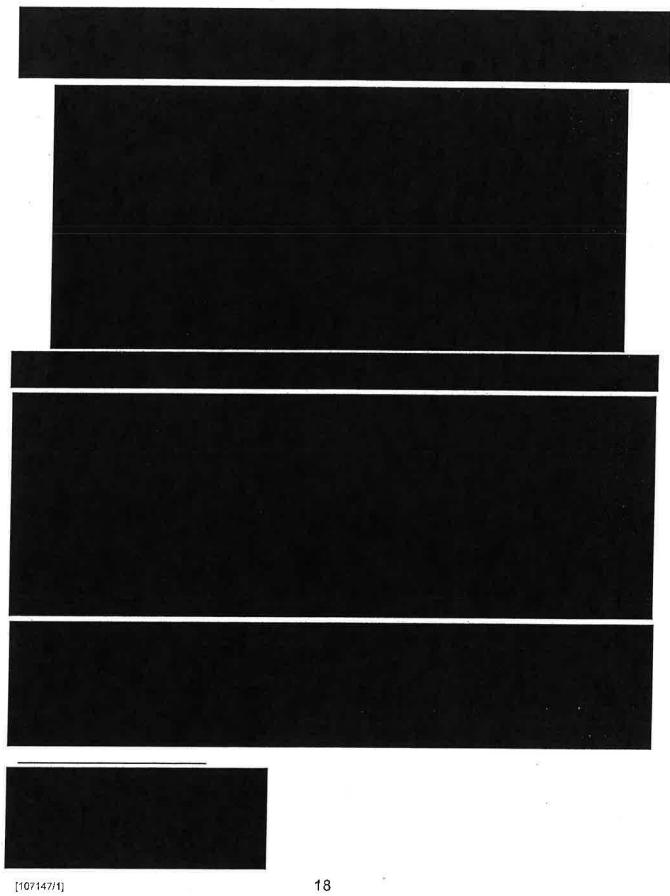
¹¹³ Tr. Vol. 2 at 237.

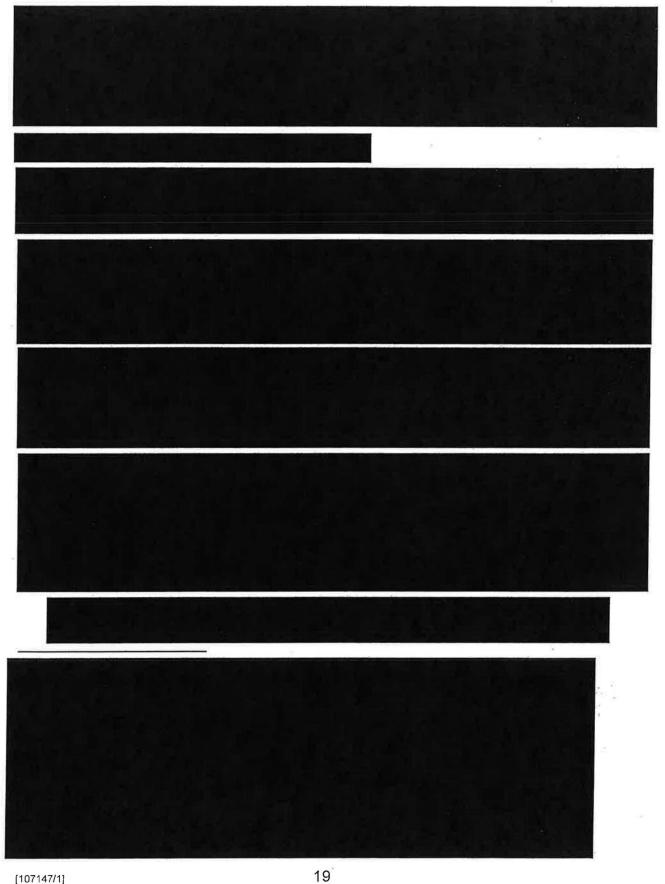
¹¹⁴ See Ex. 29.

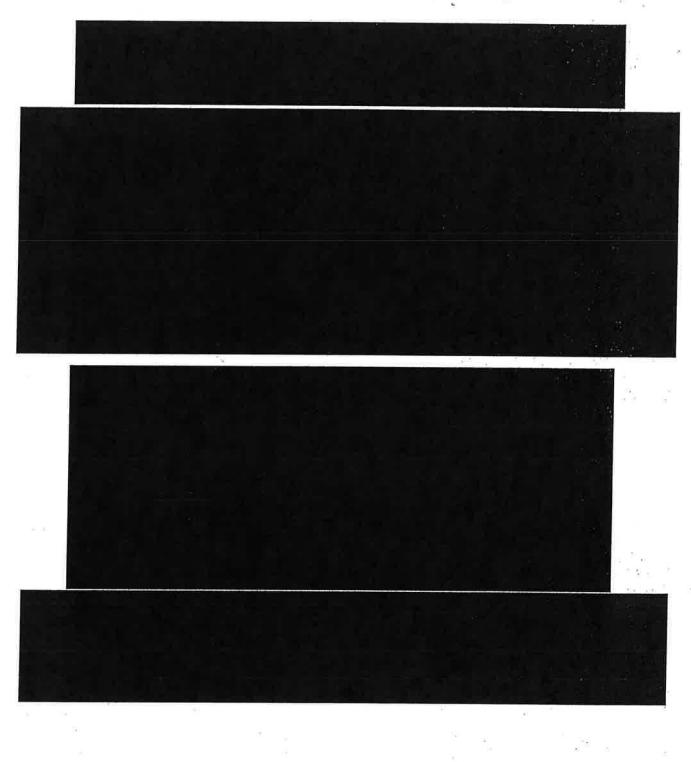
¹¹⁵ Tr. Vol. 1 at 47.



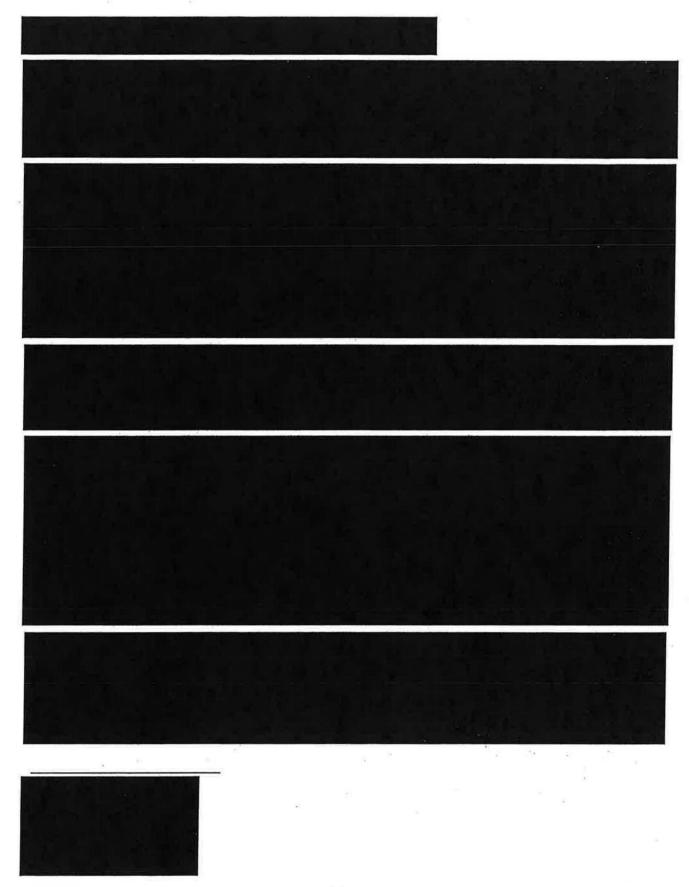


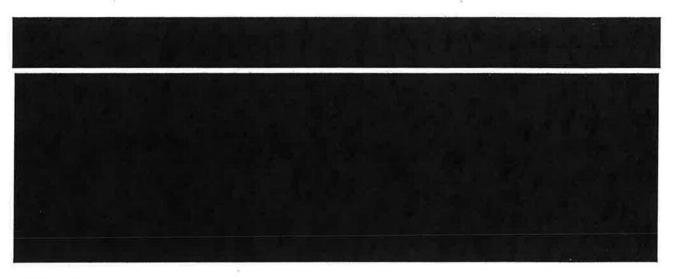












VIII. Conclusion

In sum, the Committee has presented sufficient evidence to impose discipline against Respondent's medical license under Minn. Stat. § 147.091, subd. 1(k) and Minn. Stat. § 214.355.

B. J. C.

AFFIDAVIT OF SERVICE

Re: In the Matter of the Medical License of N.A.J.K., M.D. License No. 27,457; OAH Docket No. 82-0903-33896

STATE OF MINNESOTA) ss.

COUNTY OF RAMSEY)

ELIZABETH ROOD, being first duly sworn, deposes and says:

That at the City of St. Paul, County of Ramsey and State of Minnesota, on August 1, 2018, she caused to be served the FULLY EXECUTED FINDINGS OF FACT, CONCLUSIONS, AND FINAL ORDER (WITH EXHIBIT A ATTACHED), by personally delivering to and/or depositing the same in the United States mail at said city and state, true and correct copy(ies) thereof, properly enveloped with prepaid first-class postage, and addressed to:

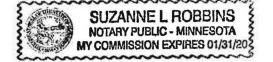
BY U.S. MAIL

Michael J. Weber, Esq.
Weber & Nelson Law Office, PLLC
150 – 3rd Avenue South, Suite 100
Minneapolis, MN 55401
BY U.S. MAIL

The Honorable Barbara J. Case Administrative Law Judge Office of Administrative Hearings P.O. Box 64620 St. Paul, MN 55164-0620

Subscribed and sworn to before me on August 1, 2018.

NOTARY PUBLIC



HAND-DELIVERED

Karen Olson Deputy Attorney General 445 Minnesota Street, Suite 900 St. Paul, MN 55101-2131