

COPY

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BEFORE THE STATE BOARD OF MEDICINE

Commonwealth of Pennsylvania
Bureau of Professional and
Occupational Affairs

vs.

Scharazard Lee Gray, M.D.,
Respondent

Case No.¹

17-49-14208

PROHIBITORY
2018 NOV 26 AM 8:52
Department of State

FINAL ORDER

AND NOW, this 26th day of November 2018, noting that neither party filed an application for review and that the State Board of Medicine (Board) did not issue a Notice of Intent to Review, in accordance with 1 Pa. Code § 35.226(a)(3) and 49 Pa. Code § 16.57, the hearing examiner's Adjudication and Order dated October 9, 2018, appended to this order as **Attachment A**, is now the **FINAL ORDER** of the Board in this proceeding.

This Order shall take effect immediately.

BY ORDER:

BUREAU OF PROFESSIONAL AND
OCCUPATIONAL AFFAIRS

IAN J. HARLOW
COMMISSIONER

STATE BOARD OF MEDICINE

Keith E. Loisel

KEITH E. LOISELLE
CHAIR

Respondent's address:

Scharazard Lee Gray, M.D.
101 3rd Avenue
P.O. Box 44
Pettibone, ND 58475

¹ In June 2018, the Bureau of Professional and Occupational Affairs transitioned to a new case management system. As part of the transition, docket numbers are no longer utilized, and file numbers have been transitioned to a corresponding case number.

For the Commonwealth:

Jason T. Anderson, Esq.
Prosecuting Attorney
Department of State
P.O. Box 69521
Harrisburg, PA 17106-9521

Board Legal Counsel:

Peter D. Kovach, Esq.

Date of Mailing:

November 26, 2018

ATTACHMENT

A

COPY

RECEIVED

OCT 09 2018

Department of State
Prothonotary

**COMMONWEALTH OF PENNSYLVANIA
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BEFORE THE STATE BOARD OF MEDICINE**

**Commonwealth of Pennsylvania,
Bureau of Professional and
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v.

**Scharazard Lee Gray, M.D.,
Respondent**

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Case No. 17-49-14208

ADJUDICATION AND ORDER

**Thomas A. Blackburn
Hearing Examiner**

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL
DEPARTMENT OF STATE
OFFICE OF HEARING EXAMINERS
P.O. Box 2649
Harrisburg, PA 17105-2649**

Date Distributed 10/9/18
Prosecution _____
Counsel ✓ _____
BFO _____
Hearing Examiner _____
Other _____

HISTORY

This matter comes before a hearing examiner for the Department of State on a single-count order to show cause filed January 24, 2018, in which the Commonwealth alleged that Scharazard Lee Gray, M.D. ("Respondent"), is subject to disciplinary action by the State Board of Medicine ("Board") under the Medical Practice Act ("Act"), Act of December 20, 1985, P.L. 457, No. 112, *as amended*, 63 P.S. § 422.1 *et seq.*, at section 41(4), 63 P.S. § 422.41(4), as a result of having had a license or other authorization to practice the profession disciplined by the North Dakota Board of Medical Examiners ("North Dakota Board").

On February 23, 2018, Respondent filed an answer to the order to show cause, admitting that he had been disciplined by the North Dakota Board and asserting that he had completed it required remedial actions and provided a statement to the National Practitioner Data Bank. On May 30, 2018, Respondent requested that he be permitted to participate in the hearing via telephone, which request was granted by Order dated June 12, 2018. Hearing Examiner Christopher K. McNally conducted the hearing on June 26, 2018, at which Respondent appeared and participated via telephone. He was not represented by counsel. The Commonwealth was represented by Prosecuting Attorney Jason T. Anderson, Esquire. The parties did not elect to file post-hearing briefs, and the record was closed with the filing of the hearing transcript on July 13, 2018, and Respondent's additional exhibit from the North Dakota Board on August 2, 2018.

FINDINGS OF FACT

1. Respondent holds a license to practice medicine and surgery in the Commonwealth of Pennsylvania, license number MD427277. Official notice of Board records;¹ Exhibits C-1 and Exhibit C-3 at ¶ 1.²

2. Respondent's license was originally issued on August 8, 2005, is current through December 31, 2018, and absent further action by the Board, may be renewed, reactivated or reinstated upon the filing of the appropriate documentation and payment of the necessary fees. Board records; Exhibits C-1 and C-3 at ¶ 2.

3. At all times pertinent to the factual allegations, Respondent held a license to practice medicine and surgery in the Commonwealth of Pennsylvania. Board records; Exhibits C-1 and C-3 at ¶ 3.

4. Respondent's last known address on file with the Board is 101 3rd Avenue NW, Pettibone, ND 58475. Board records; Exhibits C-1 and C-3 at ¶ 4.

5. At all relevant and material times, Respondent was authorized to practice as a physician in the State of North Dakota, license number 12015. Exhibits C-1 and C-3 at ¶ 6.

¹At the hearing, the Commonwealth asked that official notice be taken of the Board's licensing records pertaining to Respondent, and that request was granted. Notes of Testimony at 14. All subsequent such references will be cited as "Board records."

²Under the General Rules of Administrative Practice and Procedure ("General Rules"), 1 Pa. Code § 31.1 *et seq.*, at 1 Pa. Code § 35.125(d)(2), the pleadings may not be considered as evidence of fact unless they are offered and received in evidence under the General Rules. The Commonwealth offered them into evidence at the hearing, offering Respondent's answer for the purpose of any admissions made in it, and the pleadings were admitted. NT at 15–19. Accordingly, Exhibits C-1 and C-2, collectively, may be utilized as evidence of the facts set forth in them which Respondent has admitted, and they are cited for that purpose.

6. On November 17, 2017, the North Dakota Board suspended Respondent's license to practice medicine in North Dakota for one year, but stayed that suspension for two years provided that Respondent successfully completes within six months the following courses: Probe Ethics & Boundaries Course through the Center for Personalized Education for Physicians, and Medical Records Keeping Course through the Center for Personalized Education for Physicians, and that Respondent pay investigation and prosecution costs not to exceed \$3500. Exhibit C-2 at Order; Exhibits C-1 and C-3 at ¶¶ 7-10 and attached exhibit A.

7. Respondent was subject to discipline under N.D.C.C. § 43-17-31 because he violated the North Dakota Medical Practices Act by engaging in unethical behavior and unprofessional conduct in handling the treatment of a patient in that he went to the patient's residence unannounced, disclosed information in front of the patient's family without a release, failed to renew prescriptions that had run out according to the duration and number of tablets prescribed, and failed to maintain complete records of treatment. Exhibit C-2 at Complaint and Stipulation; Exhibits C-1 and C-3 at ¶¶ 7-10 and attached exhibit A.

8. Respondent completed the courses required by the North Dakota Board's November 17, 2017 order; he currently holds an unconditioned license in the State of North Dakota. Notice filed August 2, 2018, at Certification of License Status dated July 24, 2018 by the executive secretary of the North Dakota Board.

9. Respondent is an independent physician, board certified in addiction medicine, and in his admittedly unconventional practice generally sees patients and families in their environment and not always in in office. Notes of Testimony ("NT") at 38-39.

10. Respondent was treating an opioid-dependent patient who lived with his parents; the patient's father called Respondent to say it was difficult to rouse his son, though not in a life-threatening condition. NT at 39-40.

11. Respondent went to the patient's home; the patient – who had always tested positive – refused a urine drug screen, was not taking the prescribed suboxone, and appeared to be using methamphetamine and heroin, and Respondent terminated him from further treatment. NT at 40-41.

12. Throughout the pendency of the North Dakota disciplinary action, Respondent's license in South Dakota remained fully unrestricted, unconditioned and unencumbered. NT at 30-31.

13. Respondent unconditionally passed the PROBE Program in April 2018; Respondent was active and thoroughly engaged, offered interesting comments and contributed helpfully, and fully acknowledged the behaviors that led to his disciplinary action. Exhibit C-3 at attached exhibits A-E, NT at 34-35.

14. By final order dated June 25, 2018, at case no. 14-49-03748, the Board adopted an adjudication and order of the hearing examiner levying a civil penalty of \$500 and reprimanding Respondent's license because in 2014 the North Dakota Board disciplined Respondent for failing to maintain appropriate documentation in medical records for diagnosis, testing and treatment of patients. Board records.

15. Respondent received the order to show cause and all subsequent notices, documents and pleadings filed in this matter; filed a response to the order to show cause, and was granted a

hearing, at which he appeared and participated telephonically, without counsel. Case No. 17-49-14208; NT at 7 and *passim*.

CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter. Findings of Fact 1 – 3.
2. Respondent has been afforded reasonable notice of the charges against him and an opportunity to be heard in this proceeding, in accordance with the Administrative Agency Law, 2 Pa. C.S. § 504. Finding of Fact 15.
3. Respondent is subject to discipline under section 41(4) of the Act, 63 P.S. § 422.41(4), in that the proper licensing authority of another state, North Dakota, disciplined Respondent's license to practice medicine in that state. Findings of Fact 1-3, 5-7.

DISCUSSION

Violations

This action is brought under subsection 41(4) of the Act, 63 P.S. § 422.41(4), which provides as follows:

§ 422.41. Reasons for refusal, revocation, or suspension of license

The board shall have authority to impose disciplinary or corrective measures on a board-regulated practitioner for any or all of the following reasons:

* * *

(4) Having a license or other authorization to practice the profession revoked or suspended or having other disciplinary action taken...by a proper licensing authority of another state, territory or country, or a branch of the Federal Government.

* * *

In a case of reciprocal disciplinary action such as this, it is the mere fact of disciplinary action against Respondent by the licensing authority of another state that authorizes the Board to impose a penalty. *Johnston v. Com., State Board of Medical Education and Licensure*, 410 A.2d 103, 106 (Pa. Cmwlth. 1980). The Commonwealth's evidence consisted of a certified copy of the North Dakota Board's Complaint, Stipulation and Order that comprise the North Dakota disciplinary action. Also, Respondent admitted that the North Dakota disciplinary action occurred.

The evidence proves that the North Dakota Board suspended Respondent's license for one year, with the suspension stayed for two years provided Respondent complied with the terms and conditions outlined in the Stipulation, including attending North Dakota Board-approved courses in boundaries and ethics and medical records keeping, documenting that attendance within six months of entry of the North Dakota Board's Order, and payment of the costs of prosecution not

to exceed \$3500. This evidence demonstrates conclusively that the North Dakota Board disciplined Respondent's license in North Dakota. Therefore, the Commonwealth has met its burden of proof³ as to the charge set forth in the order to show cause.

Sanction

For a violation of the Act, the Board is authorized to impose disciplinary or corrective measures or a civil penalty pursuant to § 42(a), 63 P.S. § 422.42(a), which provides as follows:

§ 422.42. Types of corrective action.

(a) **Authorized actions.**—When the board is empowered to take disciplinary or corrective action against a board-regulated practitioner under the provisions of this act or pursuant to other statutory authority, the board may:

- (1) Deny the application for a license, certificate or any other privilege granted by the board.
- (2) Administer a public reprimand with or without probation.
- (3) Revoke, suspend, limit or otherwise restrict a license or certificate.
- (4) Require the board-regulated practitioner to submit to the care, counseling or treatment of a physician or a psychologist designated by the board.
- (5) Require the board-regulated practitioner to take refresher educational courses.
- (6) Stay enforcement of any suspension, other than that imposed in accordance with section 40, and place a board-regulated practitioner on probation with the right to vacate the probationary order for noncompliance.

³The degree of proof required to establish a case before an administrative tribunal in an action of this nature is a preponderance of the evidence. *Lansberry v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). A preponderance of the evidence is generally understood to mean that the evidence demonstrates a fact is more likely to be true than not to be true, or if the burden were viewed as a balance scale, the evidence in support of the Commonwealth's case must weigh slightly more than the opposing evidence. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854, 856 (Pa. 1949).

(7) Impose a monetary penalty in accordance with this act.

The Board has a duty to protect the health and safety of the public. Under professional licensing statutes such as the Act, the Board is charged with the responsibility and authority to oversee the profession and to regulate and license professionals to protect the public health and safety. *Barran v. State Board of Medicine*, 670 A.2d 765, 767 (Pa. Cmwlth. 1996), *appeal denied* 679 A.2d 230 (Pa. 1996).

In determining an appropriate sanction, any evidence in mitigation or aggravation may be considered. Respondent did not dispute the North Dakota disciplinary action, but simply sought to explain what happened in order to demonstrate that it was not a matter warranting a severe sanction. By way of that explanation, he testified that the North Dakota disciplinary action arose out of the fact that, as he often did for addicted patients to treat them in their environments, Respondent went to the home of an opioid-addicted patient after the patient's father called him, and had been contacted by the patient's father. The patient refused a urine test, was not taking Suboxone as prescribed, and appeared to be using methamphetamines and heroin. Respondent subsequently discharged him from treatment. Respondent took full responsibility for his actions.

Respondent offered additional information by way of mitigation, indicating that he has satisfied and fully complied with the requirements of the North Dakota disciplinary action. Respondent appears to have fully embraced and benefited from the required remedial education.

At the conclusion of the hearing, the Commonwealth recommended that this Board impose upon Respondent a reprimand and a civil penalty of \$1,000, because this is now the second reciprocal disciplinary matter from North Dakota.

The sanction imposed by the North Dakota Board – in the jurisdiction where the underlying conduct occurred and Respondent practices – was comparatively light, and there are some mitigating factors, as discussed above. In view of all of the circumstances, the hearing examiner concludes that a reprimand and imposition of a civil penalty of \$500 is sufficient. The North Dakota Board never took Respondent out of practice nor even placed his license on probation, and there is no need to take additional steps to protect Pennsylvania patients from him. Respondent has fully complied with the obligations imposed on him by the North Dakota Board. The North Dakota Board is apparently satisfied that its action was adequate as a deterrent. In light of the significant investigation and prosecution costs imposed on Respondent by the North Dakota Board, the hearing examiner believes that greater civil penalty is not necessary to deter this type of misconduct. The recommended sanction will serve to remind Respondent, and other similarly situated licensees, of the responsibility to remain in good standing in all jurisdictions in which they are licensed. *C.f. Khan v. State Board of Auctioneer Examiners*, 842 A.2d 936, 944 (Pa. 2004). Moreover, those sanctions will protect the public by putting Pennsylvania's citizens on notice as to Respondent's disciplinary history.

Accordingly, based upon the foregoing, the following order shall issue:

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BEFORE THE STATE BOARD OF MEDICINE**

**Commonwealth of Pennsylvania,
Bureau of Professional and
Occupational Affairs**

v.

**Scharazard Lee Gray, M.D.,
Respondent**

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Case No. 17-49-14208

ORDER

AND NOW, this 9th day of **October, 2018**, upon consideration of the foregoing findings of fact, conclusions of law and discussion, it is **ORDERED** that Respondent, **Scharazard Lee Gray, M.D.**, license no. MD427277, is **REPRIMANDED** and shall pay a **CIVIL PENALTY** of **\$500** within 30 days of the date of the Final Order in this matter.

The civil penalty shall be paid by certified check, attorney's check or U.S. Postal Service money order, made payable to "Commonwealth of Pennsylvania," and shall be mailed to:


Board Counsel
State Board of Medicine
P.O. Box 69523
Harrisburg, PA 17106-9523

within 30 days of the date of the Final Order in this matter.

Should Respondent fail to pay the civil penalty of \$500 within 30 days of the date of the Final Order in this matter, his license to practice medicine and surgery in the Commonwealth, license no. MD427277, shall be **INDEFINITELY SUSPENDED** without the need for any further action by the Commonwealth and shall remain suspended until such time as Respondent pays the civil penalty in full.

This order shall take effect 20 days from the date of mailing unless otherwise ordered by the State Board of Medicine.

BY ORDER:


Thomas A. Blackburn
Hearing Examiner

For the Commonwealth: Jason T. Anderson, Esquire
GOVERNOR'S OFFICE OF GENERAL COUNSEL
DEPARTMENT OF STATE OFFICE OF CHIEF COUNSEL
PROSECUTION DIVISION
P.O. Box 69521
Harrisburg, PA 17106-9521

For Respondent: Scharazard Lee Gray, M.D.
101 3rd Avenue NW
P.O. Box 44
Pettibone, ND 58475

Date of mailing: October 9, 2018

NOTICE

(Medicine)

REHEARING AND/OR RECONSIDERATION

A party may file an application for rehearing or reconsideration **within 15 days of the mailing date** of this adjudication and order. The application must be captioned "*Application for Rehearing*", "*Application for Reconsideration*", or "*Application for Rehearing or Reconsideration*". It must state specifically and concisely, in numbered paragraphs, the grounds relied upon in seeking rehearing or reconsideration, including any alleged error in the adjudication. If the adjudication is sought to be vacated, reversed, or modified by reason of matters that have arisen since the hearing and decision, the matters relied upon by the petitioner must be set forth in the application.

APPEAL TO BOARD

An application to the State Board of Medicine for review of the hearing examiner's adjudication and order must be filed by a party **within 20 days of the date of mailing** of this adjudication and order. The application must be captioned "*Application for Review*". It must state specifically and concisely, in numbered paragraphs, the grounds relied upon in seeking the Board's review of the hearing examiner's decision, including any alleged error in the adjudication. Within an application for review a party may request that the Board hear additional argument and take additional evidence.

An application to the Board to review the hearing examiner's decision may be filed irrespective of whether an application for rehearing or reconsideration is filed. However, the filing of an application for rehearing and/or reconsideration does not extend, or in any other manner affect, the time period in which an application for review may be filed.

STAY OF HEARING EXAMINER'S ORDER

Neither the filing of an application for rehearing and/or reconsideration nor the filing of an application for review operates as a stay of the hearing examiner's order. To seek a stay of the hearing examiner's order, the party must file an application for stay directed to the Board.

FILING AND SERVICE

An original and three (3) copies of all applications shall be filed with:

Prothonotary
P.O. Box 2649
Harrisburg, PA 17105-2649

A copy of all applications must also be served on all parties.

Applications must be received for filing by the Prothonotary within the time limits specified. The date of receipt at the office of Prothonotary, and not the date of deposit in the mail, is determinative.

NOTICE

The attached Final Order represents the final agency decision in this matter. It may be appealed to the Commonwealth Court of Pennsylvania by the filing of a Petition for Review with that Court within 30 days after the entry of the order in accordance with the Pennsylvania Rules of Appellate Procedure. See Chapter 15 of the Pennsylvania Rules of Appellate Procedure entitled "Judicial Review of Governmental Determinations," Pa. R.A.P 1501 – 1561. Please note: An order is entered on the date it is mailed. If you take an appeal to the Commonwealth Court, you must serve the Board with a copy of your Petition for Review. The agency contact for receiving service of such an appeal is:

Board Counsel
P.O. Box 69523
Harrisburg, PA 17106-9523

The name of the individual Board Counsel is identified on the Final Order.