

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH

---

IN THE MATTER OF THE LICENSES	:	<b>FINDINGS OF FACT</b>
OF <b>MICHAEL G. GOATES, MD</b>	:	<b>CONCLUSIONS OF LAW</b>
TO PRACTICE MEDICINE AND TO	:	<b>AND RECOMMENDED ORDER</b>
PRESCRIBE AND ADMINISTER	:	Case No.
CONTROLLED SUBSTANCES	:	DOPL-OSC-4-2005-129
IN THE STATE OF UTAH	:	

---

**APPEARANCES:**

K. Daniel Lau for the Division of Occupational and  
Professional Licensing

Michael G. Goates for Respondent

**BY THE BOARD:**

A March 10, 2010 hearing was conducted in the above-entitled proceeding before J. Steven Eklund, Administrative Law Judge for the Department of Commerce, and the Physicians Licensing Board. Board members present were John W. Bennion, George C. Pingree, Lori G. Buhler, James R. Fowler, Marc E. Babitz, Stephen E. Lamb, James H. Pingree, Kristen Ries, Daniel J. Parker and David D. Byrd.

The remaining Board member (Elizabeth F. Howell) was absent. Mark B. Steinagel, Director of the Division of Occupational and Professional Licensing, was also absent.

However, Mr. Steinagel had designated W. Ray Walker (Regulatory and Compliance Officer for the Division) as a substitute officer in this proceeding to thus act on behalf of the Division.

Prior to opening arguments by the parties and the evidentiary phase of the hearing, a separate voir dire examination was conducted of each Board member at Respondent's request. Specifically, Respondent had filed a December 30, 2009 response, wherein he alleged there was no chance of a fair hearing because the Board and this Court are hired by the State of Utah.

Respondent then filed a February 22, 2010 request that this Court "question the impartiality" of the Board and "address the strong potential for prejudice". The Court conducted a March 1, 2010 prehearing teleconference with the parties and informed both parties that Respondent had provided no substantial reasons to disqualify any Board member or this Court in this proceeding.

However, Respondent noted he has attended numerous meetings with the Board over many years in its efforts to monitor his compliance with various Orders governing his licenses. Respondent suggested that process has included comments by Board members which indicate they lack the necessary impartiality to now hear this case.

The Court informed both parties it would locate Board minutes for the dates when Respondent met with the Board and provide a copy of those minutes to the parties for their review. On an unrelated matter, the Court noted Respondent had filed a February 16, 2010 motion to continue the March 10, 2010 hearing. The Division filed its opposition to that motion on February 25, 2010.

Sparing extended detail, the Court denied Respondent's motion during the March 1, 2010 prehearing teleconference. The Court provided the above described Board minutes to both parties. Respondent then filed a March 6, 2010 motion, alleging this Court has become partial against Respondent based on prehearing rulings made by the Court in this case. Respondent thus made a peremptory challenge to this Court's impartiality.

Based on his review of the Board minutes in question, Respondent also questioned the "impartiality" and "conspiracy" of the Board. During a March 8, 2010 prehearing teleconference, the Court denied Respondent's motion to recuse the Court in this proceeding.

The Court scheduled two hours immediately prior to the March 10, 2010 hearing to conduct and complete a separate voir dire examination of each Board member. When that lengthy examination concluded, Respondent moved to recuse Dr. Marc E.

Babitz and Dr. George C. Pingree from participating in this proceeding. Based on their responses during the voir dire examination, the Court concluded a proper factual and legal basis existed to recuse both of those Board members from further participation in this proceeding.

Thereafter, evidence was offered and received. The hearing concluded on March 10, 2010. The Board then took the matter under advisement and conducted initial deliberations in this case with the expectation that the Court would prepare a draft of the Board's Findings of Fact, Conclusions of Law and Recommended Order and submit that draft to the Board for its review and action.

The Board reviewed the draft and resumed its deliberations in this proceeding. The Board now enters its Findings of Fact and Conclusions of Law, and submits the following Order to the Division for its review and action:

#### **FINDINGS OF FACT**

1. Respondent is, and at all time relevant to this proceeding has been, licensed to practice as a physician/surgeon and to administer and prescribe controlled substances in this state. Respondent was initially so licensed on July 14, 1992.

2. Pursuant to a March 8, 2001 Stipulation and Order (Case No. 2001-54), Respondent's controlled substance license was

I  
revoked. His license to practice medicine was revoked, but a stay of enforcement was entered as to that revocation. That license was thus indefinitely suspended until Respondent obtained various evaluations, completed all treatment programs and provided a practice plan to the Board for its review and approval.

3. The March 2001 Stipulation recites Respondent's admission that he has a substance abuse problem which currently places him at risk in serving the public. Respondent also admitted he obtained controlled substances for his consumption by issuing false prescriptions to pharmacies and by taking medication meant for use by his patients.

4. Pursuant to a May 16, 2005 Stipulation and Order (Case No. DOPL 2005-129), Respondent was fined \$1,000. His licenses were revoked, but a stay of enforcement was entered as to each revocation. Respondent's licenses were placed on probation for five (5) years, subject to various terms and conditions.

5. The May 2005 Stipulation recites Respondent provided professional services on a few occasions to a female client between June 2003 and November 2003. During that time, Respondent began attending Narcotics Anonymous meetings with the client, they exchanged personal e-mails and Respondent frequented the client's workplace on several occasions and

invited her to dinner. Respondent also hugged the client and tried to kiss her on one occasion during a treatment session with that client.

6. Respondent admitted the just described behavior is unprofessional conduct which justified disciplinary action as to his licenses. Respondent thus agreed the May 16, 2005 Stipulation and Order should be entered.

7. That Order required Respondent to obtain individual therapy with a Board approved clinical psychologist or psychiatrist to address patient boundaries, professional ethics, relationship issues and addiction issues. Respondent was to also complete a professional boundaries program and have a reviewing physician monitor Respondent's prescribing of controlled substances. Respondent was to also obtain a supervising physician to co-manage practice care issues.

8. Pursuant to an April 24, 2006 Stipulation and Order (Case No. DOPL-OSC-2005-129), the terms and conditions of the March 8, 2001 and May 16, 2005 Stipulations and Orders were incorporated by reference into the April 24, 2006 Stipulation and Order.

9. The April 2006 Stipulation was based on an admission by Respondent that he tested positive for ethyl glucuronide, a metabolite of alcohol, in violation of the March 8, 2001 Order.

1  
Respondent admitted such behavior is unprofessional conduct which justified the disciplinary action as to his license. Respondent thus agreed the April 24, 2006 Stipulation and Order should be entered.

10. Respondent was to abstain from the personal use or possession of alcohol in any form. He was to also abstain from the unauthorized use or possession of controlled substances or prescription drugs.

11. Respondent was to address any concerns regarding alcohol or substance abuse with his psychiatrist (Dr. Michael Brunson) and comply with any treatment recommended by Dr. Brunson. Respondent was to also attend Alcoholics Anonymous meetings on a weekly basis.

12. The Division filed a July 27, 2006 notice of agency action (Case No. DOPL-OSC-2-2005-129), whereby it was alleged Respondent had violated the April 24, 2006 Order due to drug testing which detected the presence of ethanol or ethyl glucuronide in Respondent on twelve (12) dates.

13. Based on subsequent drug testing of Respondent, the Division filed a July 25, 2007 motion to dismiss the pending case. Pursuant to a July 31, 2007 Order, the Division granted that motion.

14. Pursuant to an October 8, 2008 Stipulation and Order

I

(Case No. DOPL-OSC-3-2005-129), Respondent's license were suspended, effective November 6, 2008. That Order provides Respondent's licenses would be suspended for at least three (3) months. Respondent was to successfully complete the intensive in-patient treatment program for substance abuse at one of five treatment centers identified in the Order.

15. The suspension of Respondent's licenses was to remain in effect until the Division received a notarized written letter from the treating physician of the center in question that Respondent is safe and competent to resume his practice and to prescribe and administer controlled substances. Respondent's licenses were to remain on probation until May 16, 2010 or unless the Division and the Board deemed the probationary status and terms to be unnecessary.

16. The October 2008 Stipulation recites Respondent admitted he violated the prior governing Order when he consumed alcohol on fourteen (14) dates between May 6, 2008 and September 17, 2008. Pursuant to a March 19, 2009 Amended Order, Respondent's licenses were placed on probation. That Amended Order sets forth all of the various terms and conditions thus governing Respondent's probationary licenses.

17. Pursuant to a July 30, 2009 Amended Order, the probation on Respondent's licenses was extended until May 16,

!

2014 or sooner if deemed unnecessary. That Amended Order, which sets forth the various terms and conditions governing Respondent's licenses, was entered based on an agreement of the Division and Respondent.

18. This proceeding was initiated by the issuance of a December 10, 2009 notice of agency action. The December 9, 2009 Verified Motion for Order to Show Cause alleges Respondent violated the terms and conditions of the July 30, 2009 Order which governs his licenses because drug tests establish Respondent had ethyl glucuronide - which indicates alcohol consumption - in his body when those tests were performed on October 6, 2009; October 21, 2009; October 30, 2009; and October 31, 2009.

19. That Verified Motion also alleges Respondent violated the July 30, 2009 Order when: (1) he tested "dilute" for alcohol/ethyl glucuronide on September 11, 2009 and September 24, 2009; (2) he failed to pay for drug testing on October 31, 2009 and November 5, 2009; (3) he failed to participate in all of the therapy and aftercare required by the Division; and (4) he issued controlled substances to patients without the proper supervision from a supervising physician and without properly notifying the Division of a change in his job status.

1

20. Dr. Charles W. Walton offered expert testimony on behalf of the Division regarding the Division's use of EtG (ethyl glucuronide) testing to detect the presence of alcohol. Dr. Walton explained EtG testing is used to determine whether the subject of the testing has consumed alcoholic beverages.

21. Based on Dr. Walton's expert testimony, the Board finds and concludes EtG testing is very sensitive because an incidental exposure to alcohol in the environment can produce a metabolite of alcohol in the urine which would be detected by such testing. Accordingly, Dr. Walton explained the Division has substantially raised the cut-off point for a positive EtG test to render that test more reliable.

22. Respondent offered documentary evidence and his testimony to establish that EtG testing not reliable. He testified such tests produce an unacceptably high number of both false positives and false negatives. Respondent notes EtG testing was first recognized in the 1950's. Due to the ultra sensitivity of that process, the use of EtG testing has been criticized and subject to legal challenge.

23. Dr. Walton also explained it is not advisable to take any legal action based on only one (1) positive EtG test result. Based on Dr. Walton's education and experience, the Board finds the use of EtG testing, as described above, is an appropriate

method to detect whether a licensee who is subject to drug testing has consumed alcoholic beverages.

24. Respondent has previously misrepresented his use of alcohol to this Board. During a February 11, 2009 Board meeting, Respondent apologized to the Board for his deception regarding his prior alcohol use.

25. However, the minutes of that Board meeting do not identify the specific nature of that deception, when such deception occurred and the frequency of misrepresentations made by Respondent to the Board. Board minutes of the February 11, 2009 meeting also reflect comments by two Board members (Dr. Babitz and Dr. Howell) that Respondent has been deceitful or dishonest with the Board.

26. During that meeting, Respondent stated he has seen Dr. Brunson for approximately four (4) years. One of the Board members (Dr. Babitz) commented that Dr. Brunson has made specific recommendations as to Respondent. Another Board member (Dr. Howell) commented Dr. Brunson has noted Respondent has not been honest with him.

27. The Board minutes recite Respondent then clarified that Dr. Brunson's comments were in regard to his (Respondent's) dishonesty about his drinking. During the hearing in this

1  
proceeding, Respondent testified he was coached by Dr. Brunson to admit drinking.

28. Board minutes recite that, during a May 13, 2009 Board meeting, Respondent stated there has been no positive drug test since 2001. Upon further inquiry by the Board at that time, Respondent stated he has never used alcohol while his licenses were on probation.

29. During the May 13, 2009 Board meeting, the Division noted Respondent has had positive drug/alcohol tests from July 2004 until January 2009. Specifically, Respondent has been subject to drug testing in excess of 130 occasions from May 21, 2004 through November 5, 2009. Approximately forty-six (46) of those test results were positive.

30. Respondent tested positive on four (4) occasions (October 6, 2009); October 21, 2009; October 30, 2009; and October 31, 2009). Each of those EtG tests revealed a metabolite of alcohol in Respondent's urine. Respondent testified he has no knowledge or recollection of having consumed any alcohol on or about any of those dates.

31. Respondent had reported for drug testing on September 11, 2009 and September 24, 2009. Compass Vision, which is the Division's agent for authorized drug testing, reported to the Division that Respondent's urine samples provided on those two

1  
dates were diluted. Respondent admits he is aware the Division considers a diluted urine sample equates to a positive result.

32. Compass Vision notified the Division on or about November 5, 2009 that Respondent had failed to pay the cost for testing (\$75) regarding a drug test conducted on October 21, 2009. Based thereon, no drug test was conducted on November 5, 2009 and no drug testing of Respondent has occurred since that time.

33. Respondent issued two (2) refill prescriptions for Ativan to a patient on August 18, 2009. Respondent had no supervising physician at that time to co-manage practice care issues. Respondent admits he issued those prescriptions, but they were only refills of longstanding earlier prescriptions.

34. Respondent did not attend aftercare group meetings on August 5, 2009; August 19, 2009; and August 26, 2009. Respondent contacted the aftercare program and he was excused from attending those three (3) meetings. Respondent was similarly excused from attending a September 19, 2009 meeting.

35. Respondent did not attend aftercare group meetings on October 20, 2009; October 28, 2009; November 11, 2009; and November 18, 2009. Respondent contacted the aftercare program on each occasion and explained his absence in each case. Based

on aftercare progress notes, Respondent's lack of attendance at those four (4) meetings was not excused.

36. Respondent did not attend aftercare group meetings on November 25, 2009 and December 2, 2009. Aftercare progress notes recite Respondent contacted the program, but offered no explanation for those absences.

37. Respondent did not attend aftercare group meetings on December 9, 2009; December 16, 2009; December 23, 2009; and December 30, 2009. Aftercare progress notes only recite Respondent's absences. Respondent has not attended an aftercare group meeting since November 4, 2009.

#### **CONCLUSIONS OF LAW**

The Division concedes it does not claim Respondent has engaged in any unauthorized use of controlled substances or prescriptive medications. However, the Division forcefully asserts Respondent has repeatedly consumed alcohol in violation of the July 30, 2009 Amended Order. The Division claims Respondent is addicted to alcohol and he is not safe to practice medicine.

The Division further asserts multiple disciplinary actions have been taken as to Respondent's Utah licenses. Numerous terms and conditions have thus been entered to adequately protect the public and prompt Respondent's regular and continuous

rehabilitative efforts. Nevertheless, the Division contends Respondent's compliance with those Orders which have governed his licenses ranks among the worst that the Division has ever seen.

Accordingly, the Division argues Respondent's licenses should be revoked. Moreover, the Division asserts the revocation of those licenses should remain effective for five (5) years and Respondent should be required to demonstrate one (1) year of sobriety immediately prior to any request for relicensure.

Respondent contends no evidence exists to establish he has misused any illegal or prescriptive drug. He also asserts there is no evidence he has been impaired while engaged in the practice of medicine. Further, Respondent claims his conduct never caused harm to any patient.

Respondent next contends he has been unemployed since November 2008 with no income since that time. Respondent explained he has been relying on savings to meet his expenses, but those funds have been exhausted. Respondent asserts he lacked the ability to pay for drug testing in later 2009. However, Respondent states he has located a patron to provide the necessary funds for drug testing.

Respondent requests the opportunity to serve patients. He thus suggests the Board should consider other sanctions which would allow him to pursue his practice. Essentially, Respondent seeks the chance for what he has characterized as a fresh start governed by a stipulation with teeth that will allow him to succeed.

§58-1-401(2) provides the Division may "revoke, suspend, restrict, place on probation, issue a public or private reprimand to, or otherwise act upon the license of any licensee" who:

(a) . . . has engaged in unprofessional conduct, as defined by statute or rule under this title . . . .

§58-1-501(2) defines unprofessional conduct to include:

(a) violating . . . any statute, rule, or order regulating an occupation or profession under this title. . . .

The Board finds and concludes Respondent has failed to comply with the July 30, 2009 Order. He has thus engaged in unprofessional conduct violative of §58-1-501(2) (a) and a proper factual and legal basis exists to enter a further disciplinary sanction on Respondent's licenses.

Specifically, Respondent has consumed alcohol on multiple occasions. Based on the substantial evidence presented, and the reasonable inferences drawn therefrom, Respondent altered two of

his urine samples by diluting those samples as to avoid an adverse test result. He also failed to submit to a drug test, albeit lacking the funds to pay for such testing.

Respondent also failed to diligently attend all aftercare group meetings as required by the Order governing his licenses. Respondent also failed to practice medicine while duly subject to required supervision.

Respondent's noncompliance with various provisions of the Order in question runs the gamut as to the serious nature of such conduct. The most troubling aspects of Respondent's failure to comply with the July 30, 2009 Amended Order involves his alcohol consumption and diluted urine samples. If that Amended Order reflected the only prior disciplinary action taken as to Respondent's licenses, an extension of probation or a short term suspension might be warranted.

The Board acknowledges no sufficient evidence exists to find and conclude Respondent was impaired in his practice of medicine due to his alcohol consumption. Further, there is no evidence to find and conclude such consumption caused actual harm to any patient.

Nevertheless, the prohibition on any use of alcohol by Respondent is intended to preclude related issues of impairment and avoid exposure of any patient to actual or potential harm.

Simply put, the elemental focus should not be the possible consequences of Respondent's alcohol consumption. Rather, the first and predominant issue is that any alcohol consumption is prohibited.

There are various aggravating circumstances which must be duly considered in this case. Respondent has an extensive prior record of disciplinary actions. Further, those actions - taken as a whole- reflect a pattern of misconduct.

Specifically, Respondent acknowledges he had a substance abuse problem in 2001. He subsequently tested positive for alcohol use and he was to address concerns regarding alcohol or substance abuse with his psychiatrist. Respondent repeatedly consumed alcohol during approximately four (4) months in 2008. He again consumed alcohol on six (6) occasions during September 2009 and October 2009.

Respondent has engaged in unprofessional conduct on multiple occasions. Another aggravating circumstance is most disturbing. Respondent has provided false statements to the Board during its efforts to monitor Respondent's compliance with prior Orders. Respondent also engaged in a deceptive practice when he submitted diluted samples for drug testing. Efforts to monitor a licensee on probation are seriously compromised and

1  
may be rendered useless in the absence of good faith cooperation by the licensee.

Respondent also appears to basically minimize the nature and seriousness of his noncompliance with the Order under review. The Board duly notes that, during the extended time since entry of the initial Order, Respondent has realized some compliance for periods of time. Despite the numerous Orders which have been entered, Respondent has not demonstrated any meaningful long term recovery and rehabilitation. His most recent efforts are particularly deficient.

Based on the foregoing, the Board reiterates Respondent presents a serious threat of potential harm to any patient. There is no fresh start under these circumstances which would adequately protect the public health, safety and welfare. It would serve no measurable purpose to place Respondent's licenses on probation or to suspend those licenses followed by any probation.

The Recommended Order set forth below constitutes a reasoned attempt to protect the public, coupled with a lengthy period away from the practice of medicine and a demonstrated term of recovery and treatment before Respondent may properly seek relicensure.

**RECOMMENDED ORDER**

WHEREFORE, IT IS ORDERED Respondent's licenses to practice medicine and to administer and prescribe controlled substances in this state shall be revoked. Those revocations shall be effective on the date this Recommended Order is adopted.

It is further ordered Respondent shall not apply for any relicensure prior to five (5) years from the date this Recommended Order may become effective. Should Respondent seek such relicensure, he shall demonstrate one (1) continuous year of sobriety immediately prior to any relicensure application. Such sobriety, if any, shall be reflected by random drug testing for that year conducted by Compass Vision.

Respondent shall also demonstrate one (1) year of regular attendance in aftercare group meetings and one (1) year of regular attendance in Alcoholics Anonymous. Aftercare attendance shall occur once a week and Alcoholics Anonymous attendance shall occur twice a month.

On behalf of the Physician's Licensing Board, I hereby certify the foregoing Findings of Fact, Conclusions of Law and Recommended Order were submitted to W. Ray Walker, Regulatory and Compliance Officer of the Division of Occupational and Professional Licensing, on the 30<sup>th</sup> day of June 2010 for his review and action.

  
J. Steven Eklund  
Administrative Law Judge  
Department of Commerce