1

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING

OF THE DEPARTMENT OF COMMERCE

OF THE STATE OF UTAH

IN THE MATTER OF THE DENIAL
OF THE RENEWAL OF THE LICENSES OF
JOHN EDWIN GAMBEE, MD
TO PRACTICE AS A PHYSICIAN/SURGEON
AND TO ADMISITER AND PRESCRIBE
CONTROLLED SUBSTANCES
IN THE STATE OF UTAH

ORDER

CASE NO: DOPL-2011-259

BY THE DIVISION:

The attached Findings of Fact, Conclusions of Law and Recommended Order is hereby adopted by the Director of the Division of Occupational and Professional Licensing of the State of Utah

Dated this 21 day of December 2011

Mark B Steinagel
Director
Division of Occupational and
Professional Licensing

Agency review of this Order may be obtained by filing a request for agency review with the Executive Director, Department of Commerce, within thirty (30) days after the date of this Order The laws and rules governing agency review are found in Section 63G-4-301 of the Utah Code, and Section R151-46b -12 of the Utah Administrative Code

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING

OF THE DEPARTMENT OF COMMERCE

OF THE STATE OF UTAH

IN THE MATTER OF THE DENIAL OF THE RENEWAL OF THE LICENSES OF **JOHN EDWIN GAMBEE, MD** TO PRACTICE AS A PHYSICIAN/SURGEON AND TO ADMINISTER AND PRESCRIBE CONTROLLED SUBSTANCES IN THE STATE OF UTAH	**FINDINGS OF FACT** **CONCLUSIONS OF LAW** **AND RECOMMENDED ORDER** **CASE NO:** DOPL-2011-259

APPEARANCES:

John Edwin Gambee for Applicant

Lenore Epstein for the Division of Occupational and Professional Licensing

BY THE BOARD:

Pursuant to a February 3, 2010 letter, the Division notified Applicant that his request to renew his Utah physician's license was granted on a conditional basis during the pendency of an administrative investigation involving Applicant's Oregon license to practice as a physician in that state Based on a September 8, 2010 Emergency Order, Applicant's Oregon medical license was suspended

A hearing, which was five (5) days in duration, was then conducted before the Oregon Medical Board in December 2010 Pursuant to a July 7, 2011 Order, Respondent's license to practice as a physician in Oregon was revoked Based on a July 27, 2011 letter, the Division notified Applicant that his request to renew his Utah medical license was denied

That letter recites Applicant engaged in unprofessional conduct as defined under Utah law and he has failed to meet the qualifications for licensure in this state

Pursuant to an August 3, 2011 letter, Applicant requested review of the denial of his request to renew his Utah licenses The Division thus issued an August 15, 2011 notice of hearing, which was scheduled to be conducted before the Physicians Licensing Board on October 12, 2011 The notice also recites a September 26, 2011 prehearing teleconference would be conducted to address various prehearing matters

The Court conducted the prehearing teleconference on that date with Applicant and Ms. Epstein on behalf of the Division That teleconference was thirty (30) minutes in duration The Court confirmed the Division's disclosure to Applicant of its witness and exhibit lists Specifically, the Division had made such disclosures to Applicant when it submitted those lists to him on or about August 11, 2011

The Court also reviewed Applicant's possible witnesses and potential exhibits Specifically, Applicant had submitted various documents to the Division on or about August 29, 2011 Those documents included a transcript of the December 2010 Oregon licensure hearing and numerous case records

The Court next inquired of Applicant as to the nature of his specific response to the Division's denial of his request to renew his Utah licenses Applicant stated the revocation of his Oregon licenses was entirely erroneous Applicant also claimed he has filed a judicial

appeal in Oregon to challenge that order and he is thus represented by counsel Applicant acknowledged there is no stay of enforcement of the Oregon revocation order and he is not practicing as a physician in that state

Applicant then informed the Court and the Division that he hopes to regain his Oregon physician's license following his appeal of the Oregon revocation order and then resume his Oregon practice It is uncertain when judicial review of the Oregon revocation order will be completed. Applicant has no present intent to relocate to Utah However, he informed the Court and the Division that he would personally attend the pending hearing before the Physician's Licensing Board and would seek an unrestricted license in this state

Given its' review of Applicant's witness list, the Division stated it opposes the relitigation before the Utah Board in this proceeding of any issues determined by the Oregon Board The Court informed the parties it is not for the Utah Board to now review the evidence, assess the facts entered by the Oregon Board and determine the validity of the Oregon revocation order The Court also stated it is not for the Utah Board to independently assess witness credibility in the Oregon proceeding or weigh the sufficiency of the evidence presented in support of the findings made by the Oregon Board

The Court thus informed Applicant and the Division that the Utah Board can essentially rely on the Oregon revocation order Based on Applicant's inquiry whether the documents he has submitted are worthless, the Court informed Applicant and the

Division that Applicant could use those documents to identify the challenges he presented to the Oregon Board However, the Court reiterated that the Oregon revocation order represents the final order in review proceedings before the Oregon Court and that such review properly rests with that Court

The October 12, 2011 hearing was conducted before J Steven Eklund, Administrative Law Judge, and the Physician's Licensing Board Members of the Board present were Elizabeth F Howell, Marc E Babitz, John W Bennion, Kristen Ries, Daniel J Parker, David D Byrd, Kenneth L Schaecher, Paul J Affleck and Lori Buhler Mark B Steinagel, Director of the Division of Occupational and Professional Licensing, was also present

The Court initially informed the Board as to the Division's proper application of the Oregon revocation order in this proceeding The Court also informed the Board that Applicant could identify the challenges he provided to the Oregon Board, but Applicant would be precluded from litigating those issues to this Board

Thereafter, evidence was offered and received Applicant asserted he has neither failed to comply with the Oregon revocation order nor has he been willfully noncompliant with that order Applicant contends he did not engage in any malpractice and that he created no risk to any patient Applicant also asserts he did not deviate from any governing standard of care in his medical practice in Oregon He thus contends the denial of his Utah license renewal application should not be upheld

The Division submitted orders entered by the Oregon Medical Board which reflect the various actions taken as to Applicant's licenses in that state The Division specifically noted the Oregon revocation order, which recites the number of patients affected and their complaints regarding standard of care issues, Applicant's lack of adequate assessment of those patients and the risks created as to those patients The Division further noted Applicant's unwarranted treatment of those patients and his breach of applicable standards of care

The Division contends that, had such conduct occurred in this state, it would prompt adverse action as to Applicant's Utah licensure The Division also asserts due process was fully accorded Applicant through the Oregon licensure proceeding

However, Applicant contends any deprivation of his Utah licenses requires adequate procedural safeguards and the Division's mere reliance on the Oregon revocation order is flawed because that order is factually erroneous Applicant also asserts that, given the severity of possible adverse action in this proceeding, he must be provided with a meaningful hearing and the restricted nature of the hearing before this Board is not fair

During the hearing, Applicant once more sought to challenge the factual basis for the Oregon revocation order The Division again objected to any such challenge, asserting it was beyond the proper scope of the hearing The Court reiterated its September 26, 2011 ruling that Applicant could not generally challenge the Oregon revocation order in this

forum, but he could only identify the issues which he raised in the Oregon case

The hearing in this proceeding concluded and the record was closed The Board conducted its initial deliberations after the conclusion of the hearing. However, Applicant then submitted various documents which were received by the Division and the Board on October 26, 2011

Those submissions included a one page October 21, 2011 letter to Noel Taxin (Division Bureau Manager) from Applicant setting forth comments as to the Oregon and Utah licensure proceedings, a five page October 21, 2011 submission from Applicant to the Board setting forth more detailed comments as to the Oregon and Utah licensure proceedings, and a six page October 23, 2011 letter from a Carden Gambee to Mr Steinagel, which sets forth additional comments as to the Oregon and Utah licensure proceedings

R151-4-801(3), which governs the issuance of an order in this proceeding, implicitly allows the presiding officer to permit the filing of post-hearing documents However, Applicant neither requested not obtained leave to make the just-described post hearing submission

Moreover, the Division had no opportunity to review and likely object to that post hearing submission before Applicant elected to provide it to the Board and Mr Steinagel Significantly, those documents include five pages of a detailed recital as to the action taken by Applicant concerning seven patients The six page submission by Carden Gambee sets

the various challenges to the validity of the Oregon revocation order

Given the Court's review of the submission made by Applicant and with due regard for the unwarranted manner whereby Applicant presented those documents to the Board and Mr Steinagel, the Court met with the Board on November 9, 2011 and instructed the Board to disregard the submission during their deliberation of this case

There is one procedural matter which should be addressed Applicant's October 21, 2011 letter to Ms Taxin and Carden Gambee's October 23, 2011 letter to Mr Steinagel both question why Applicant was required to submit documents regarding his claims and defenses to the Division prior to the hearing, yet he was not allowed to submit those same documents to the Board during the Utah hearing

Simply put, Applicant's prehearing disclosure to the Division was required as the means to duly notify the Division of the nature of Applicant's possible evidentiary submission to the Board Whether the Division may object to that evidence and it might be found to be inadmissible was to be subsequently addressed The required disclosure of those documents prior to this hearing does not necessarily establish their admissibility at this hearing

Consistent with the foregoing, the Board concluded its deliberations and now enters its Findings of Fact, Conclusions of Law and submits the following Recommended Order to the Division for its review and action·

FINDINGS OF FACT

1 Division records reflect Applicant became licensed to practice medicine and to administer and prescribe controlled substances in Utah in 1967 He relocated to Oregon in 1979 and thus commenced a medical practice in that state The Board received Applicant's request to renew his Utah licenses on February 1, 2010 The Division thus issued conditionally renewed licenses to Applicant given the pending Oregon investigation as to his licenses in that state

2. Pursuant to the July 7, 2011 Order, the Oregon Board revoked Applicant's medical license Based on the July 27, 2011 Order, the Division denied Applicant's request to renew his Utah licenses That letter sets forth the basis for the Division's action Applicant then filed an August 3, 2011 request for agency review of that order The Division then issued an August 15, 2011 notice of hearing and the conditional renewal of Applicant's licenses

3 The Division's denial of Applicant's request for license renewal was based on its review of the July 7, 2011 entered by the Oregon Board The Division noted Applicant willfilly disobeyed the Oregon order, he did not treat five patients according to the standard of care and the Oregon Board concluded Applicant engaged in unprofessional conduct reflecting gross and repeated negligence

4 The Division also noted Applicant repeatedly violated prior Oregon orders The Division further noted that the evidence supporting the most recent Oregon revocation

order reveals Applicant is not competent to safely practice medicine and he has failed to maintain the good moral character required for licensure in this state

5 The July 7, 2011 Oregon revocation order sets forth detailed findings of fact and conclusions of law Those conclusions include that Applicant repeatedly disregarded prior Oregon Board orders, he engaged in unprofessional or dishonorable conduct and also gross or repeated negligence The Oregon Board also concluded Applicant's conduct breached the standard of care and posed an immediate danger to the public and to his patients

CONCLUSIONS OF LAW

Applicant acknowledges the Oregon revocation order is based on allegations that he: repeatedly and willfully violated the Oregon Modified Stipulated Order and the Interim Stipulated Orders, put patients at risk because of those alleged violations, failed to have an objective basis for the use of testosterone or thyroid, and was grossly negligent and unprofessional Applicant also recognizes it is alleged he placed patients in immediate danger for allegedly failing to do two prostate exams, he practiced in a manner below the standard of care under Oregon law and he failed to practice in a manner consistent with Oregon law

Given the severity of the possible action as to his Utah licenses, Applicant adamantly contends a full and fair hearing should be conducted before this Board Applicant contends his Utah licensure has not been subject to prior disciplinary action and adequate safeguards

must exist before adverse action is entered is this proceeding

The Division contends Applicant's right to due process was amply satisfied through a lengthy hearing conducted with the assistance of legal counsel in the Oregon license proceeding Significantly, the Division emphasizes Utah law squarely allows disciplinary licensure action in this state based on action in another state which would constitute unprofessional conduct if it occurred here The Division asserts the general operative effect of the Utah law is to disallow relitigating issues previously determined in a licensure action of a sister state

U C A §58-1-401(2) provides the Division "may revoke or otherwise act upon the license of any licensee in any of the following cases"

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

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

> engaging in conduct that results in disciplinary action including revocation, by any other licensing or regulatory authority having jurisdiction over the licensee in the same occupation or profession if the conduct would, in this state, constitute grounds for disciplinary proceedings under Section 58-1-401

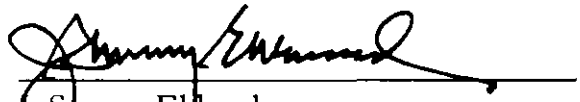
The Board readily finds and concludes the above quoted statutes apply in this case Specifically, the July 7, 2011 revocation order sets forth numerous findings which establish Applicant engaged in conduct that would be unprofessional if occurring in this state The

Board thus finds and concludes a clear factual and legal basis exists to deny Applicant's request for the renewal of his licenses to practice medicine and to administer and prescribe controlled substances in this state

RECOMMENDED ORDER

WHEREFORE, IT IS ORDERED Applicant's request to renew his licenses to practice medicine and to administer and prescribe controlled substances is denied

On behalf of the Physicians Licensing Board, I hereby certify the foregoing Findings of Fact, Conclusions of Law and Recommended Order was submitted to Mark B Steinagel, Director of the Division of Occupational and Professional Licensing, on the 21st day of December 2011 for his review and action



J Steven Eklund
Administrative Law Judge
Department of Commerce