



FILED

CAD

NOV 17 2014

BEFORE THE BOARD OF HEALING ARTS
FOR THE STATE OF KANSAS

KS State Board of Healing Arts

IN THE MATTER OF

) Docket No.: 10-HA00129

)

ANN K. NEUHAUS, M.D.

) OAH No.: 10HA0014

Kansas License No. 04-21596

)

) Shawnee County Dist. Court Case 12 C 873

RESPONDENT'S MEMORANDUM ON REMAND ISSUE REGARDING RECORD
KEEPING VIOLATION

Respondent Ann K. Neuhaus, through counsel, hereby submits the following memorandum concerning the record keeping sanction issue remanded by the Shawnee County District Court to the Board of Healing Arts.

Procedural History Relevant to the Issue on Remand

On April 16, 2010, a petition was filed against Ann K. Neuhaus, M.D. by the Board of Healing Arts (Board or BOHA) seeking disciplinary action against Dr. Neuhaus's license to practice medicine and surgery in Kansas.

On September 12, 2011, through September 16, 2011, and November 4, 2011, the Board's petition was tried before Presiding Officer Edward J. Gaschler of the Kansas Office of Administrative Hearings.

An initial order was issued February 17, 2012, by Presiding Officer Gaschler. The initial order found that Dr. Neuhaus had violated K.S.A. 65-2836(b) and K.S.A. 65-2837(a) by not meeting the standard of care related to administration of mental health evaluations. (Initial Order, paras. 30, 43, 54, 62, 70, 79, 89, 97, 105, 117, 128, 129). The

initial order also found that there was inadequate documentation in patient records and such was a violation of K.A.R. 100-24-1. (See eg. Initial Order, para. 130). The initial order also directed revocation of Dr. Neuhaus' license and for her to pay costs of the action. (Initial Order, p. 27).

On June 22, 2012, a hearing was held before the Board to review the Presiding Officer's Initial Order.

The Board adopted the Initial Order without modification and its Final Order was issued July 5, 2012.

The Board's Final Order was served on Dr. Neuhaus July 6, 2012.

A Petition for Review under the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq., was filed on behalf of Dr. Neuhaus in the Shawnee County District Court on August 6, 2012.

On March 7, 2014, the Shawnee County District Court entered judgment on the Petition for Review. The decision reversed the hearing officer on the standard of care issues related to administration of mental health evaluations and affirmed on the issue of record keeping deficiencies. The decision also vacated the Board's order revoking Dr. Neuhaus' license and the order for costs entered against her. The District Court remanded to the Board the question of what, if any sanctions should be applied for the record keeping deficiencies. (District Court Memorandum and Order, pp. 81-84).

The Board filed a notice of appeal on April 3, 2014, seeking reversal by the Court of Appeals of the State of Kansas the District Court's decision on the standard of care issues related to administration of mental health evaluations.

On May 1, 2014, the Court of Appeals ordered the parties to show cause why the appeal should not be dismissed on the ground that there was no appealable final order because the Board had not disposed of the issue remanded to it by the District Court. Dr. Neuhaus' response argued that because there was no final order that triggered jurisdiction of the Court of Appeals the Board's appeal should be dismissed. The Board argued that the appeal should not be dismissed.

On June 6, 2014, the Court of Appeals determined there was not a final order subject to appeal and entered an order dismissing the Board's appeal without prejudice. Accordingly, the Board now has the remand issue before it.

Subsequent to the Court of Appeals Order of July 6, 2014, the parties conferred and agreed to set the remand issue for the Board's December 11-12, 2014, meeting. The parties also agreed to submit briefs on the remand issue to the Board on November 17, 2014.

The District Court's Decision on the Records Issue

The District Court affirmed the Hearing Officer's Initial Decision as to the alleged violation of the record keeping requirements specified at K.A.R. 100-24-1 and that such constituted unprofessional conduct under K.S.A. 65-2837(k). (District Court Memorandum and Order, pp. 77-78)

The District Court discussed the underlying purpose of the requirements of K.A.R. 100-24-1 and that the regulation protects both patients and practitioners. (District Court Memorandum and Order, pp. 79-80)

The District Court observed that, considering the record as a whole, the record omissions were not "nefarious". The omissions were a function of "inadequate and short-sighted" record

keeping. (District Court Memorandum and Order, p. 80). This finding is consistent with Dr. Neuhaus' testimony that she attempted to meet the standard of care related to record keeping while also protecting patient privacy interests. (See eg. Tr. Vol. 4, p. 870, line. 24-p. 873, line 9; Vol. 5, p. 1056, line 11-p. 1058, line 5)

Legal Standards Applicable to the Issue on Remand

Any Board decision made on the remanded record keeping issue must be consistent with the requirements of K.S.A. 77-526(c): "A final order or initial order shall include, separately stated, findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness." *Blue Cross of Kansas, Inc. v. Bell*, 227 Kan. 426, 433-34 (1980).

The findings of fact required by K.S.A. 77-526(c) must be supported by evidence in the record or matters officially noticed. K.S.A. 77-526(d). *Water District No. 1 of Johnson County v. Kansas Water Authority*, 19 Kan. App. 2d 236, 241 (1994). The evidence relied upon must be substantial and competent when viewed in light of the entire record. K.S.A. 77-617(c)(7) and (d). *Herrera-Gallegos v. H & H Delivery Service, Inc.*, 42 Kan. App. 2d 360, 363 (2009).

Discussion

At the outset it is important to note what this remand issue is not about. It is not about abortion. In fact, the presiding officer specified that the case is about meeting the applicable record keeping standard of care (K.A.R. 100-24-1) and not whether the requirements related to abortions have been met. (Tr. Vol. I, p. 22, line 25-p. 23, line 7). Nevertheless, the context of Dr. Neuhaus' practice involved in this case was abortion care.

Accordingly, members of BOHA who have personal objections against abortion providers on religious or philosophical grounds must set such aside and make decisions only based on relevant evidence that bears on the applicable standard of care. "The morality of abortion is not a legal or constitutional issue; it is a matter of philosophy, of ethics, and of theology. It is a subject upon which reasonable people can, and do, adhere to vastly divergent convictions and principles." *American Academy of Pediatrics v. Lungren*, 940 P.2d 797, 16 Cal. 4th 307, 313 (1997) citing *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 284 (1981). Accordingly, the focus in this matter is not the fact that Dr. Neuhaus' practice included abortion care; rather, the focus is on the applicable standard related to record keeping.

Moreover, given the procedural posture of this case, the Board may not consider the facts that were relied upon by the Board to support its prior decision that the standard of care related to administration of mental health evaluations has been violated. That part of the Board's decision has been vacated by the District Court's decision. (District Court Memorandum and Order, pp. 81-84). This means that the Board's prior decision that Dr. Neuhaus committed unprofessional conduct in the administration of mental health examinations presently has no legal effect. *Becker v. Rooth*, 184 Kan. 830, 835 (1959)(subsequent to a vacated decision issues must be considered "in the same manner as though no judgment had ever been rendered in the case"). Application of the rule in *Becker* in this case means there should be no reference to, nor reliance on the prior decisions of the presiding officer and this Board related to Dr. Neuhaus' administration of mental health evaluations.

In light of the above, the Board is to determine what, if any, sanction should be applied to the record keeping violations attributable to Dr. Neuhaus. On June 5, 2012, the Board revoked Dr. Neuhaus' license after review and adoption of the presiding officer's Initial Order. (District

Court Memorandum and Order, p. 1). The revocation has been effective for nearly two and one-half years. In comparison with other cases that involved record keeping violations, this is a severe and disproportionate sanction. For example, in BOHA Docket No. 07-HA00045, *In the Matter of Gilbert Parks, M.D.* the Board imposed a fine and public censure after concluding that Dr. Parks failed to document material patient related information. (BOHA Docket No. 07-HA00045, Consent Order, p. 4)

Another example of a record keeping violation sanction is in BOHA Docket 14-HA00043, *In the Matter of Kimberly Darlene West, M.D.*. In this case Dr. West was accused of violating, *inter alia*, the record keeping required under K.S.A. 65-2837(b)(25). Dr. West was suspended for sixty days, subjected to monitoring and probation and required to attend remedial training on medical records. (BOHA Docket 14-HA00043, Consent Order, pp. 8-11).

In the Board case of *In the Matter of Vernon L. Kliewer, M.D.*, Docket No. 07-HA-61 the licensee was sanctioned for, *inter alia*, failing to adequately document care and treatment for six patients. Dr. Kliewer was placed on probation, ordered to pay a fine and have his practice monitored. (BOHA Docket No. 07-HA-61, Consent Order, pp. 3-7).

In the BOHA case *In the Matter of K. Dean Reeves*, Docket No.12-HA00072, the licensee was cited under the record keeping regulation (K.A.R. 100-24-1) and a number of other statutes and regulations. (Consent Order, pp. 2-5). The licensee was placed on probation with conditions. (Consent Order, pp. 5-12).

In the case of *In the Matter of Stewart Grote, D.O.*, BOHA Docket No. 14-HA000 14, the licensee was cited for violations of the record keeping requirements and numerous other violations. (Consent Order pp.52-54). Dr. Grote was subject to suspension, limitations, additional education, fine and costs. (Consent Order, pp. 58-62).

In BOHA case *In the Matter of Robert T. Tenny, M.D.*, Docket No. 10-HA00147, the licensee was cited for record keeping violations under K.S.A. 65-2837(b)(25) and numerous other violations. (Consent Order, pp. 8-9). Dr. Tenny was suspended, ordered to pay costs and had special conditions ordered related to records. (Consent Order, pp. 13-16)

Additionally, in BOHA Docket 14-HA00016, *In the Matter of Stephen G. Grillot, D.O.*, the licensee was accused of failing to maintain adequate records under K.S.A. 65-2837(b)(25). Dr. Grillot was required by the Board to attend remedial education on patient records. (BOHA Docket 14-HA00016, Consent Order, pp. 6-10).¹

In light of the dispositions in the above seven cases, none of which resulted in revocation, the revocation of Dr. Neuhaus' license for the past two and one-half years is comparatively severe. As such, Dr. Neuhaus respectfully requests the Board recognize and decide that the license revocation ordered June 5, 2012, is adequate punishment to serve the purpose of K.S.A. 65-2801 and to protect the public interest and permit Dr. Neuhaus to pursue license reinstatement.

Moreover, because K.A.R. 100-24-1 specifies neither the severity nor duration of sanctions for record keeping violations, the Board has an obligation to administer unwritten standards in a uniform and consistent way. Failure to do so that causes disparate outcomes may render the decision constitutionally suspect. In *Hallmark Cards, Inc. v. Kansas Dept. of Commerce and Housing*, 32 Kan. App. 2d 715 (2004), rev. den. 278 Kan. 844 (2004), the court addressed whether the agency had consistently and uniformly applied unwritten standards:

In the absence of rules, however, due process requires the agency to demonstrate that its internal and written standards of eligibility for statutory benefits are objective and ascertainable and that they are applied consistently and uniformly. See *White v. Roughton*, 530 F.2d 750, 753-54

¹ Dr. Neuhaus requests that the Board take official notice of these seven cases pursuant to K.S.A. 77-524(f)(2).

(7th Cir. 1976); *Holmes v. New York City Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968); *Baker-Chaput v. Cammett*, 406 F. Supp. 1134, 1139-40 (D.N.H. 1976). Where disparity in outcome among applicants for administrative certification or licensing is the result of intentional systematic unequal treatment by the agency, the Equal Protection Clauses of the federal and state constitutions are implicated. *In re Tax Appeal of City of Wichita*, 274 Kan. 915, 920-22, 59 P.3d 336 (2002). Accordingly, we believe that both due process and equal protection concerns require that an administrative agency charged with administering a statutory certification program must demonstrate that any unwritten standards which have not been made explicit in the statute or regulations are applied consistently and uniformly.

32 Kan. App.2d at 725-26.

In the instant case *Hallmark* has applicability. Because neither K.S.A. 65-2837(b)(25) nor K.A.R. 100-24-1 inform the public as to what the nature or extent of sanctions for records violations may be, the Board “must demonstrate that any unwritten standards which have not been made explicit in the statute or regulations are applied consistently and uniformly.” *Id.* A revocation sanction against Dr. Neuhaus for record keeping violations, particularly when there is no nefarious intent, is not a consistent or uniform application of sanctions in light of the four BOHA disciplinary cases cited above.

Alternatively, Dr. Neuhaus would agree to reasonable monitoring of her practice for a reasonable duration and to attend remedial education on patient records in the event her license is reinstated.

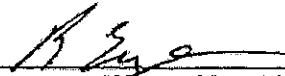
Conclusion

Dr. Neuhaus’ license revocation represents a disproportionately severe sanction compared to similarly situated peers who have run afoul of the record keeping requirements. Her record keeping problems were not occasioned by a “nefarious” intent. Rather, Dr. Neuhaus made good

faith attempts to both protect patients' interests and meet the applicable standard of care for record keeping. (Tr. Vol 4, p. 873, lines 6-9). There is no record evidence that contradicts this.

Accordingly, the Board should order that the license revocation ordered June 5, 2012, is sufficient discipline to meet the purposes of the K.S.A. 65-2801 and allow her to pursue license reinstatement. Alternatively, the Board should order that Dr. Neuhaus be allowed to reinstate her license and be subject to reasonable monitoring and that she attend coursework on patient records.

Respectfully submitted,



Robert V. Eye, K8 S.C. No. 10689
Law Office of Robert V. Eye, LLC
Suite 200
123 SE 6th Ave
Topeka, Kansas 66603
Ph. 785-234-4040
Fax 785-234-4260
bob@kauffmaneye.com

CERTIFICATE OF SERVICE

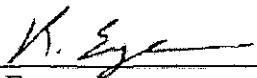
The undersigned hereby certifies that a true and correct copy of the above and foregoing was emailed on November 17, 2014, to the following:

Kathleen Selzer Lippert, klippert@ksbha.ks.gov

Mr. Mark Ferguson, MarkFerguson@gflegal.com

Ms. Jessica Bryson, jbryson@ksbha.ks.gov

Mr. Reese Hays, rhays@ksbha.ks.gov



Robert V. Eye