

STATE BOARD OF PHYSICAL
THERAPY EXAMINERS

v.

DOUGLAS PALMER,
RESPONDENT
LICENSE NO. 16898

* BEFORE GERALDINE A. KLAUBER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: DHMH-BPTE-97-11-41118

*

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

On June 6, 2011, the State Board of Physical Therapy Examiners (Board) for the State of Maryland issued a Notice of Violation of Probation and Charges against Douglas Palmer (Respondent) for failing to comply with the Board's Order of March 29, 2007, and for being disciplined by the West Virginia Board of Physical Therapy (West Virginia Board) in violation of the Maryland Physical Therapy Act (the Act). Md. Code Ann., Health Occ. § 13-316 (1) and (10) (2009).

I held a hearing on February 1, 2012 at the Office of Administrative Hearings (OAH), Hunt Valley, Maryland. Md. Code Ann., Health Occ. § 13-317(a)(2009). The Respondent was present by telephone and represented himself.¹ Roberta Gill, Assistant Attorney General, presented the case on behalf of the State.

¹ Over the objection of the State, I allowed the Respondent to participate by telephone due to a documented medical condition.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the Rules of Procedure for Board Hearings, and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't, §§ 10-201 through 10-226 (2009 & Supp. 2011); Code of Maryland Regulations (COMAR) 10.38.05; and COMAR 28.02.01.

ISSUES

The issues are:

1. Whether the Respondent failed to comply with the Board's March 29, 2007 Order by failing to submit on a quarterly basis patient records for six patients.
2. Whether the Respondent is subject to disciplinary action under Md. Code Ann., Health Occ. § 13-316(1) for having his physical therapy license suspended by the West Virginia Board for failing to disclose on his reinstatement application that he had been disciplined in Maryland.

SUMMARY OF THE EVIDENCE

Exhibits

The State submitted the following exhibits, which were admitted into evidence:

- A. Respondent's licensing history
- B. March 29, 2007 Final Order of the Board; February 2, 2007 Proposed Decision of the Board
- C. December 1, 2010 letter from the Respondent to Ann E. Tyminski, Executive Director of the Board.
- D. December 15, 2010 letter from Ann E. Tyminski to the Respondent
- E. Eight pages of Therapy Notes sent by Respondent to the Board
- F. January 20, 2011 letter sent via certified mail from Ann E. Tyminski to the Respondent
- G. April 11, 2011 letter from the Respondent to the Board with attached March 24, 2011 Final Order of the West Virginia Board of Physical Therapy

- H. June 6, 2011 letter from the Board to the Respondent with attached Notice of Violation of Probation and Charges

The Respondent submitted the following exhibits, which were admitted into evidence:

1. May 3, 2011 cover letters from the Respondent to Delegate Kevin Kelly and Senator Edwards and copy of May 2, 2011 letter
2. May 12, 2011 letter from Delegate Kevin Kelly addressed to Governor O'Malley, the Secretary of Department of Health and Mental Hygiene (DHMH) Joshua Sharfstein, Attorney General Douglas F. Gansler and Ann E. Tyminski, Executive Director of the Board
3. May 31, 2011 letter from Delegate Kevin Kelly to Respondent with attached letters of May 23, 2011 from Joy Aaron, Deputy Director DHMH, and May 26, 2011 from Linda M. Bethman, Assistant Attorney General
4. July 7, 2011 letter from the Respondent to Delegate Kevin Kelly

The following additional documents, which were pre-marked and submitted with the Respondent's Prehearing Conference Statement, were admitted into evidence

- C. April 18, 2011 e-mail from Arnold Politzer, Esq., to the Respondent
- D May 2, 2011 letter from Janis Grissinger Cutchall To Whom It May Concern.
- D-1 Same letter as exhibit D with letterhead of Harbor Lights Enterprises visible.

Testimony

Ann E. Tyminski, former Executive Director of the Board, testified on behalf of the State.

The Respondent testified on his own behalf.

STIPULATED FACTS

The parties stipulated to the following facts:

1. At all times relevant to this matter, the Respondent was licensed to practice physical therapy in the State of Maryland.
2. The Respondent was originally issued a physical therapy license by the Board on December 10, 1990.
3. The Respondent's license expires on May 31, 2012.

4. The Board issued a final Order on March 20, 2007, which the Respondent failed to timely appeal.
5. By Order dated March 24, 2011, the West Virginia Board suspended the Respondent's license to practice physical therapy in West Virginia because he failed to advise the West Virginia Board on his reinstatement application that he had been disciplined in Maryland.
6. In its March 24, 2011 Order, the West Virginia Board imposed a \$1,000.00 fine against the Respondent.

FINDINGS OF FACT

I find these additional facts by a preponderance of the evidence:

1. On July 18, 2006, the Board issued formal charges against the Respondent alleging various acts of unprofessionalism and unethical conduct. A hearing on the merits was held on November 2, 2006 before a hearing Committee of the Board.² The Committee issued a Proposed Decision wherein it concluded that the charges against the Respondent were proved by a preponderance of the evidence. (Board B)
2. By Final Order dated March 29, 2007, the Board adopted the Committee's findings of fact and conclusions of law and imposed a sanction of one year suspension, with all but sixty days stayed. The Board deferred the sixty-day suspension until such time as the Board granted reinstatement of the Respondent's license to practice physical therapy. The Board further ordered that upon completion of the sixty-day suspension, the Respondent's license be placed on immediate probation for at least two years, during which time the Respondent is

² The Respondent's request for a continuance was denied by the Board. The Respondent failed to appear and the Hearing Panel proceeded to hold the hearing in the Respondent's absence.

- required to 1) successfully complete the Maryland Law and Ethics course within the first year of probation; 2) successfully complete a Board-approved documentation course within the first year of probation; and 3) submit to the Board six patient records for review on a quarterly basis for the first years of probation and then on a frequency determined by the Board thereafter. (Board B)
3. The Board further ordered that the Respondent pay a \$2,000.00 fine. (Board B)
 4. The Respondent successfully completed the Maryland Law and Ethics course and the Board approved documentation course within the first year of probation.
 5. The Respondent remitted the \$2,000.00 fine on May 17, 2010.
 6. On December 1, 2010, the Respondent forwarded to the Board eight pages of patient visit notes. The Respondent redacted the names or other identifying information on the documents making it impossible to decipher to how many patients the documents referred. (Board E)
 7. By letter dated December 1, 2010, the Respondent informed the Board that under the Health Insurance Portability and Accountability Act (HIPPA) he would not be able to send a patient chart. (Board C)
 8. On December 15, 2010, the Board returned the patient visit notes to the Respondent along with a letter which informed the Respondent that the Board was exempt from HIPPA laws and that he needed to submit complete patient records, including billing. (Board D)
 9. By letter dated January 20, 2011 and sent via certified mail, the Board informed the Respondent that they had not yet received the required patient records and that if the records were not received by February 15, 2011, the Board would request

- that the Office of the Attorney General prosecute the Respondent for violation of the terms of his probation. (Board F)
10. The Respondent did not submit any additional patient records to the Board by February 15, 2011.
 11. By letter dated April 11, 2011, the Respondent informed the Board that his license had been suspended in West Virginia for indicating on his reinstatement application that his license had never been suspended. (Board G)
 12. The Respondent is employed by Harbour Lights Enterprises, LLC. (Harbour Lights), which is owned and managed by the Respondent's fiancée, Janis Cutchall.
 13. Harbour Lights is a subcontractor that provides physical therapy services to other entities.
 14. On May 2, 2011, Ms. Cutchall wrote a letter to the Board stating that Harbour Lights refused to submit confidential patient records to the Board.
 15. Since December 1, 2010, Respondent has not submitted any additional patient records to the Board, nor has he submitted any documentation from any entities to which he provided physical therapy services.

DISCUSSION

Md. Code Ann., Health Occ. §13-316 (2000) provides, in pertinent part:

Subject to the hearing provisions of § 13-317 of this subtitle, the Board may deny a license, temporary license, or restricted license to any applicant, reprimand any licensee or holder of a temporary license or restricted license, place any licensee or holder of a temporary license or restricted license on probation, or suspend or revoke a license, temporary license, or restricted license if the applicant, licensee, or holder:

...

(10) Is disciplined by a licensing or disciplinary authority of any state or country or convicted or disciplined by a court of any state or country or disciplined by any branch of the United States uniformed services or Veterans Administration for an act that would be grounds for disciplinary action under the Board's disciplinary statutes;

The State contends that the West Virginia Board's discipline of the Respondent for failing to disclose the Maryland disciplinary action on his reinstatement application with the West Virginia Board subjects the Respondent to disciplinary action by the Board because the West Virginia Board's disciplinary action against the Respondent was for grounds that would be grounds for disciplinary action under the Board's disciplinary statute, specifically section 13-316(1), which states:

(1) Fraudulently or deceptively obtains or attempts to obtain a license, temporary license, or restricted license for the applicant, licensee, or holder for another.

It is not disputed that the Respondent was suspended by the West Virginia Board by Order dated March 24, 2011 because he falsely reported on his West Virginia reinstatement application that he not been disciplined in any State, when he had in fact been disciplined pursuant to the Board's March 29, 2007 Final Order.

The Respondent suggests that the Maryland Board should not impose any disciplinary action based on the West Virginia Board's disciplinary action because the disciplinary action imposed by the West Virginia Board was based on a clerical error. According to the Respondent, his fiancée, who is also his employer, filled out the West Virginia renewal application on his behalf. On the section of the application that asked "Has your license ever been revoked or suspended?" she marked "no." According to the Respondent, she thought the question read "Has your license ever been revoked or suspended in the State of West Virginia."

The Respondent's argument is without merit. The Respondent, as the licensee, is ultimately responsible for his license and the application to obtain that license. His signature on

the application was an affirmation that the information provided was accurate. The Respondent had the opportunity to present his case and this explanation to a West Virginia Hearing Examiner. The West Virginia Board by Final Order dated March 24, 2011, adopted the Hearing Examiner's Findings of Fact and Conclusions of Law that "the Respondent made a knowing and willful falsifications (sic) on his 'Application to Reactivate Physical Therapist License,' which violates West Virginia Code, section 30-20-10(b)(6)." (Board Exhibit G) As a result of the violation, the West Virginia Board suspended the Respondent's license for one year and imposed a \$1,000.00 fine. The West Virginia Board's disciplinary action was based on the Respondent's willfully falsifying his application for reactivation of his license, which would be grounds for disciplinary action by the Maryland Board under the provisions of section 13-316 (1) of the Act. Accordingly, the Board may impose disciplinary action pursuant to section 13-316 (10) of the Act. According to the Respondent, an appeal of the West Virginia action has been filed, but he presented no evidence to support the filing of an appeal.

The second basis for the State's proposed disciplinary action is the Respondent's alleged violation of certain provisions of the Board's Final Order of March 29, 2007. In the March Order, the Board adopted the Hearing Committee's Findings of Fact and Conclusion of Law and found that the Respondent had committed unprofessional and unethical acts that warranted sanctions. The sanctions included the imposition of a one-year suspension, with all but sixty days stayed. The Board deferred the sixty-day suspension until such time that the Board granted reinstatement of the Respondent's license to practice physical therapy. Upon completion of the sixty-day suspension, the Respondent's license was placed on immediate probation for at least two years, during which time the Respondent was required to 1) successfully complete the Maryland Law and Ethics course within the first year of probation; 2) successfully complete a Board-approved documentation course within the first year of probation; and 3) submit to the

Board six patient records for review on a quarterly basis for the first year of probation and thereafter on a frequency determined by the Board. The Board contends that the Respondent violated the third requirement of his probation by not submitting to the Board six patient records for review.

Along with a letter dated December 1, 2010 (Board Ex. C), the Respondent submitted to the Board what he stated were "six patient records" for the Board's review (Board's Exhibit E). The documents were physical therapy visit notes wherein the Respondent had redacted the patients' names. The Respondent informed the Board that under HIPPA laws he would not be able to send a patient chart (record). On December 15, 2010, the Executive Director of the Board, in accordance with the Board's instructions, returned the patient visit notes to the Respondent and informed him that the Board required the complete records for the patients, including billings. The letter further informed the Respondent that the Board is a peer review regulatory agency exempt from the HIPPA regulations. The Respondent failed to submit any additional patient records, and by letter dated January 20, 2011, the Board notified the Respondent that disclosure of patient information to the Board was permissible under HIPPA regulations. Subsequent to the letter of January 20, 2011, the Board did not receive any additional patient records from the Respondent. The Board did not modify or amend the Order of March 24, 2007 regarding the submission of the patient records.

The Respondent offered two arguments in response to the State's position that he failed to comply with the conditions of his probation in failing to submit patient records for review. The Respondent's first argument was that he was unable to supply the patient records requested by the Board because he does not have control or custody over the patient records. The Respondent testified that works for Harbour Lights, which is owned by his fiancée, Janis Cutchall. According to the Respondent, Harbour Lights is a subcontractor that provides physical

therapy services for different entities. He testified that he only deals with progress notes, discharge notes and initial evaluations of patients and does not have anything to do with billing. According to the Respondent, Harbour Lights asked the entities for the entire patient files, including billing, and they refused.

The Respondent's second argument was that even if he did have custody and control of the patient records, he is subject to the HIPPA laws that precluded him from providing the Board with the medical records.

Neither of the Respondent's arguments is persuasive. The Respondent attempts to use HIPPA, 42 U.S.C.S. § 1320d, as a shield from the requirement that he submit patient records to the Board. HIPPA governs the confidentiality of medical records and regulates how and under what circumstances "covered entities" may use or disclose "protected health information" about an individual. The term "covered entities" is defined to include health care plans, health care clearinghouses and health care providers. 45 C.F.R. §§ 160.102, 164.104. "Protected health information" includes all individually identifiable health information maintained or transmitted in any form, as well as any oral statement made about medical treatment or conditions. 45 C.F.R. §160.103. Generally, HIPPA prohibits the use and disclosure of an individual's protected health information unless the individual has authorized its use and disclosure. HIPPA provides, however, that a covered entity, such as the Respondent, may use or disclose protected health information without the written authorization of the individual or the opportunity for the individual to agree or object in certain limited circumstances. 45C.F.R. §164.512 (d). One of the exceptions permits a covered entity to disclose protected health information to a health oversight agency for oversight activities authorized by law, such as audits and licensure activities. See 45 C.F.R. 164.512(d). Such is the circumstance in this case.

The Respondent's assertion that he believes that he is constrained by HIPPA is not credible. When the Respondent submitted the patient notes to the Board under cover letter of December 1, 2010, the Respondent first cited his inability under HIPPA to send the Board patient charts. The Board immediately responded to the Respondent's concerns by letter dated December 15, 2010 and explained that the Board in its role as a peer review regulatory agency was exempt from HIPPA. The Board specifically informed the Respondent that if he was working for a company to provide them with a copy of the March Order so that they would know the records were being provided to the Board. Despite these instructions, the Respondent failed to provide any further documentation to the Board. On May 2, 2011, the Respondent wrote an eight page letter to Delegate Kevin Kelley (Respondent #1) regarding his perceived issues with the Board. In this letter, the Respondent again expresses his purported concern with violating HIPPA by providing the documents to the Board. The Respondent stated in that letter:

HIPPA laws do not permit me to give this information to anyone, even the board. I explained this in a letter to the board in which they responded that they are a governing body and HIPPA laws do not apply to them. Well, I as a clinician have to follow HIPPA rules and cannot just hand over confidential information to them. Ann Tyminski said that I needed to take the court order to the people that I work for and tell them I need entire patient records. I am not going to do this because all they are trying to do is further ruin my career as a physical therapist. (Respondent #1, page 5-6)

Thus, it is clear from the Respondent's own evidence that his true concern was not a HIPPA violation, but rather his perception of the Board's motive. The Respondent made it clear in his letter that the HIPPA exception aside, he had no intention of taking any steps toward providing the patient records as requested by the Board. On the very same day that the Respondent wrote to Mr. Kelley that he would not take the necessary steps to obtain patient records, the Board received a letter faxed by Harbour Lights Enterprises that states:

As the employer of [the Respondent] we are aware of his situation. When we received the final order, we assumed that patient records meant the patient visit notes, not entire patient files. We refuse to provide the Maryland Board of

Physical Therapy with confidential patient records. We will provide patient progress notes as this contains information that [Respondent] has directly been a part of. (Respondent D)

The letter is signed by Janis Grissinger Cutchall, the Respondent's employer and fiancée.

I have given no weight to this letter as evidence that the Respondent is unable to provide the Board with his patients' records. Just as in the case of the fraudulent West Virginia application, the Respondent attempts to use Ms. Cutchall as an excuse for his actions. It is clear from the evidence that Ms. Cutchall is not a disinterested party. The Respondent is engaged to her and resides with her and throughout the hearing, in reference to the actions taken to submit the patient files, the Respondent continuously referenced "we"- meaning he and Ms. Cutchall. The Respondent contends that he and Ms. Cutchall were not able to obtain the medical records from those entities for which they allegedly provided physical therapy services; yet, he did not produce documentation from any of those entities. Additionally, Ms. Cutchall's letter does not state that she does not have access to the patient files, but rather that she **refuses** to provide the Board with those files.

The Respondent further attempts to assert that he has not violated the terms of his probation because the Board had represented that if he obtained documentation from the entities to which he had provided services stating that they refused to provide the patient records, the requirement could be waived. The Respondent submitted a letter from his former attorney, Mr. Politzer, dated May 18, 2010, in support of his position. (Respondent Ex. C) According to the Respondent, Mr. Politzer, who was representing him, had communicated with Ms. Tyminski and the Attorney General and had come up with the arrangement documented in the May 18, 2010 letter.

The Respondent's assertion regarding this arrangement and his compliance with this arrangement is not convincing. The Respondent offered no documentation from the Board that

memorializes this purported agreement. Ms. Tyminski was clear in her testimony that it was not the practice of the Board to change conditions of probation without a written order of modification. The only documentation offered by the Respondent was the letter of May 18, 2010 from Mr. Politzer who, in his May 2, 2010 letter to Delegate Kelley, the Respondent described as “a wimp and worthless attorney.” (Respondent # 1)

Additionally, assuming arguendo that the Respondent believed that the letters from the entities were sufficient to meet the probation requirements, he failed to demonstrate that he complied with this requirement. He specifically testified that he had gone to the entities with which his employer subcontracts and asked them for entire patient files and they refused; yet outside of the correspondence from Ms. Cutchall, the Respondent failed to offer any documentation that corroborates his efforts.

In sum, the Board has met its burden and proved the Respondent’s violation of his probation and the charges set forth in its June 6, 2011 notice. The Board seeks a one-year suspension of the Respondent’s license for these violations. Given the Respondent’s disciplinary history and that the terms of the Respondent’s probation for previous violations, that he has since violated, was one year, with all but 60 days suspended, I find the Board’s recommended suspension of one year to be reasonable.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, the Respondent is subject to disciplinary action under Md. Code Ann., Health Occ. § 13-316(1) for having his physical therapy license suspended by the West Virginia Board of Physical Therapy for failing to disclose on his reinstatement application that he had been disciplined in Maryland.

I further conclude that the Respondent failed to comply with the Board's March 29, 2007 Order by failing to submit billing records of six patients. Accordingly, I conclude that the Board may discipline the Respondent. Md. Code Ann., Health Occ. § 13-316 (2009).

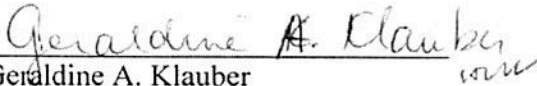
ORDER

I **PROPOSE** that the charges filed by the Board against the Respondent under sections 13-316 (1) and (10) be **UPHELD**; and

I further **PROPOSE** that the charges filed by the Board against the Respondent regarding the violation of his probation under the Board's Final Order dated March 29, 2007 be **UPHELD**; and

I further **PROPOSE** that the Respondent be **SUSPENDED** for one year.

April 18, 2012
Date Decision Mailed


Geraldine A. Klauber
Administrative Law Judge

GAK/fe
#130686

NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party adversely affected by this Proposed Decision may file exceptions with the Board of Physical Therapy Examiners within twenty-one (21) days of receipt of the decision. The Office of Administrative Hearings is not a party to the judicial review process. Md. Code Ann., State Gov't § 10-216 (2009).

Copies Mailed To:

Douglas Palmer
P.O. Box 299
McConnellsburg, PA 17233

Roberta Gill, Assistant Attorney General
Administrative Prosecutor
Health Occupations Prosecution and Litigation Division
Office of the Attorney General
300 West Preston Street, Room 201
Baltimore, MD 21201

Rosalind Spellman, Administrative Officer
Health Occupations Prosecution and Litigation Division
Office of the Attorney General
300 West Preston Street, Room 201
Baltimore, MD 21201

Carlton Curry, Executive Director
State Board of Physical Therapy Examiners
Metro Executive Plaza
4201 Patterson Avenue
Baltimore, MD 21215

John F. Baker, P.T., Chairman
State Board of Physical Therapy Examiners
Metro Executive Plaza
4201 Patterson Avenue
Baltimore, MD 21215

Linda Bethman, Board Counsel
State Board of Physical Therapy Examiners
Metro Executive Plaza
4201 Patterson Avenue
Baltimore, MD 21215

John Nugent, Principal Counsel
Health Occupations Prosecution and Litigation Division
Office of the Attorney General
300 West Preston Street, Room 201
Baltimore, Maryland 21201

STATE BOARD OF PHYSICAL
THERAPY EXAMINERS

v.

DOUGLAS PALMER,
RESPONDENT

LICENSE NO. 16898

* BEFORE GERALDINE A. KLAUBER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: DHMH-BPTE-97-11-41118

*

* * * * *

FILE EXHIBIT LIST

Exhibits

The State submitted the following exhibits, which were admitted into evidence:

- A. Respondent's licensing history
- B. March 29, 2007 Final Order of the Board; February 2, 2007 Proposed Decision of the Board
- C. December 1, 2010 letter from the Respondent to Ann E. Tyminski, Executive Director of the Board.
- D. December 15, 2010 letter from Ann E. Tyminski to the Respondent
- E. Eight pages of Therapy Notes sent by Respondent to the Board
- F. January 20, 2011 letter sent via certified mail from Ann E. Tyminski to the Respondent
- G. April 11, 2011 letter from the Respondent to the Board with attached March 24, 2011 Final Order of the West Virginia Board of Physical Therapy
- H. June 6, 2011 letter from the Board to the Respondent with attached Notice of Violation of Probation and Charges

The Respondent submitted the following exhibits, which were admitted into evidence:

- 1. May 3, 2011 cover letters from the Respondent to Delegate Kevin Kelly and Senator Edwards and copy of May 2, 2011 letter

2. May 12, 2011 letter from Delegate Kevin Kelly addressed to Governor O'Malley, the Secretary of Department of Health and Mental Hygiene (DHMH) Joshua Sharfstein, Attorney General Douglas F. Gansler and Ann E. Tyminski, Executive Director of the Board
3. May 31, 2011 letter from Delegate Kevin Kelly to Respondent with attached letters of May 23, 2011 from Joy Aaron, Deputy Director DHMH, and May 26, 2011 from Linda M. Bethman, Assistant Attorney General
4. July 7, 2011 letter from the Respondent to Delegate Kevin Kelly

The following additional documents, which were pre-marked and submitted with the Respondent's Prehearing Conference Statement, were admitted into evidence

- C. April 18, 2011 e-mail from Arnold Politzer, Esq., to the Respondent
- D. May 2, 2011 letter from Janis Grissinger Cutchall To Whom It May Concern.
- D-1 Same letter as exhibit D with letterhead of Harbor Lights Enterprises visible.