

Oregon Medical Board
BOARD ACTION REPORT
September 15, 2018

The information contained in this report summarizes new, interim, and final actions taken by the Oregon Medical Board between August 16, 2018, and September 15, 2018.

Scanned copies of Interim Stipulated Orders, Orders of Emergency Suspension, Stipulated Orders, Final Orders, Termination Orders, Modification Orders and Voluntary Limitations are included at the end of this report in the order that they appear in the report. These orders are marked with an * asterisk. **Scanned copies of Consent Agreements are not posted, as they are not disciplinary action and impose no practice limitations.** Complaint and Notices of Proposed Disciplinary Action are not listed in this report, as they are not final actions by the Board. Both Orders, however, are public and are available upon request.

Printed copies of the Board Orders not provided with this report are available to the public. To obtain a printed copy of a Board Order not provided in this report, please complete the License Verification and Malpractice Report Request (<http://www.oregon.gov/OMB/ombforms1/request-licensee-info-verification.pdf>) found under the Forms link on the Board's web site. Submit it with the \$10.00 fee *per licensee* and mail to:

Oregon Medical Board
1500 SW 1st Ave, Ste 620
Portland, OR 97201

Copies of the Orders listed below are mailed to Oregon hospitals where the Licensee had self-reported that he/she has privileges.

Diermayer, Marion, MD; MD20285; Springfield, OR

On September 16, 2018, the Board issued an Order Terminating Consent Agreement for Re-Entry to Practice. This Order terminates Licensee's July 20, 2016, Consent Agreement for Re-Entry to Practice.

Harris, Donna Jene, LAc; AC189495; Grants Pass, OR

On September 10, 2018, Applicant entered into a Consent Agreement for Re-Entry to Practice with the Board. In this Agreement, Applicant agreed to complete a 80-hour mentorship with a Board-approved clinical supervisor; and complete 30 hours of continuing education units.

***Kenny, Rose Jeannine, MD; MD23253; Redmond, OR**

On August 27, 2018, Licensee entered into an Interim Stipulated Order to voluntarily cease prescribing any medication for patients enrolled in hospice or requesting Death with Dignity, pending the completion of the Board's investigation.

***Murphy, James Michael, MD; MD23891; Portland, OR**

On August 16, 2018, the Board issued a Final Order Denying Petition for Stay. This Order denies Licensee's petition to stay the Final Order upon Consideration issued on June 28, 2018.

If you have any questions regarding this service, please call the Board at (971) 673-2700 or toll-free within Oregon at (877) 254-6263.

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BEFORE THE
OREGON MEDICAL BOARD
STATE OF OREGON

In the Matter of)
ROSE JEANNINE KENNY, MD) INTERIM STIPULATED ORDER
LICENSE NO. MD23253)
)

1.

The Oregon Medical Board (Board) is the state agency responsible for licensing, regulating and disciplining certain health care providers, including physicians, in the State of Oregon. Rose Jeannine Kenny, MD (Licensee) is a licensed physician in the State of Oregon and holds an active medical license.

2.

The Board received credible information regarding Licensee that resulted in the Board initiating an investigation. The results of the Board's investigation to date have raised concerns to the extent that the Board believes it necessary that Licensee agree to certain terms until the investigation is completed.

3.

In order to address the Board's concerns, Licensee and the Board agree to the entry of this Interim Stipulated Order, which is not an admission of any wrongdoing on the part of the Licensee, and will remain in effect while this matter is under investigation, and provides that Licensee shall comply with the following conditions:

3.1 Licensee must not prescribe or manage the prescriptions for any medication for any patient enrolled in hospice care.

3.2 Licensee must not prescribe or manage the prescriptions for any medication for any patient requesting Death with Dignity.

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1 3.3 Licensee understands that violating any term of this Order will be grounds for
2 disciplinary action under ORS 677.190(17).

3 3.4 Licensee understands this Order becomes effective the date she signs it.

4 4.

5 At the conclusion of the Board's investigation, the Board will decide whether to close the
6 case or to proceed to some form of disciplinary action. If the Board determines, following that
7 review, not to lift the requirements of this Order, Licensee may request a hearing to contest that
8 decision.

9 5.

10 This order is issued by the Board pursuant to ORS 677.410, which grants the Board the
11 authority to attach conditions to the license of Licensee to practice medicine. These conditions
12 will remain in effect while the Board conducts a complete investigation in order to fully inform
13 itself with respect to the conduct of Licensee. Pursuant to ORS 677.425, Board investigative
14 materials are confidential and shall not be subject to public disclosure, nor shall they be admissible
15 as evidence in any judicial proceeding. However, as a stipulation this Order is a public document
16 and is reportable to the National Databank and the Federation of State Medical Boards.

17 IT IS SO STIPULATED THIS 27 day of August, 2018.

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20 ROSE JEANNINE KENNY, MD

21 IT IS SO ORDERED THIS 27th day of August, 2018.

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23 OREGON MEDICAL BOARD
24 State of Oregon

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25 NICOLE KRISHNASWAMI, MD
26 INTERIM EXECUTIVE DIRECTOR

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**BEFORE THE
OREGON MEDICAL BOARD**

IN THE MATTER OF:

JAMES MICHAEL MURPHY, MD

Petitioner.

**FINAL ORDER DENYING
PETITION FOR STAY**

9 The Oregon Medical Board (Board), acting pursuant to ORS 183.482, having considered
10 this matter and the petition for stay of the Board’s Final Order upon Reconsideration revoking
11 the medical license of James Michael Murphy, MD (Petitioner) and assessing a civil penalty and
12 costs, case number 14-0672 (Final Order upon Reconsideration), received via electronic mail on
13 July 18, 2018, hereby makes the following Findings of Fact, Conclusions of Law, Opinion, and
14 Final Order¹.

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ISSUES

- (1) Has Petitioner demonstrated that, in the absence of a stay of the Final Order, irreparable injury to him would result?
- (2) Has Petitioner demonstrated a colorable claim of error in the contested case proceeding?

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PETITIONER’S PETITION FOR STAY

On July 18, 2018, Petitioner filed a petition for stay of the civil penalties and costs assessed against him by the Board in its Final Order upon Reconsideration in this case, as well as of the Board’s revocation of his Oregon license to practice medicine from the same Final Order upon Reconsideration. He claimed irreparable injury to him would result if the stay is not

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¹ Because civil penalties are not due and payable until 10 days after the order imposing the civil penalty becomes final by operation of law or on appeal (ORS 183.745(2)), we address only the issue of Petitioner’s license revocation and the Board’s assessment of costs here.

1 granted, and alleged a number of procedural errors were made throughout the contested case
2 proceedings.

4 **FINDINGS OF FACT AND ULTIMATE FACT**

5 Irreparable Injury

6 1) Petitioner had requested that his license be placed into inactive status in an email to the
7 Board dated November 23, 2016. That email, in part, read; “Please put me in inactive status, if
8 that has not already been done – I do not have an active practice address.” Then, Petitioner
9 allowed his license to lapse on January 1, 2018. Petitioner thereby rendered himself unable to
10 practice medicine as of November 23, 2016.

11 2) Petitioner’s petition for stay read, in pertinent part:

12 The OMB final order revokes a medical license currently lapsed and generates a report of
13 an adverse action against the petitioner that does permanent irreparable harm. The
14 petitioner has brought arguments against the OMB’s action and has requested judicial
15 review, therefore the case is not finalized and the revocation should be
16 stayed...Petitioner has been unable to practice medicine since April 2016, as the
17 consequence of the OMB’s defamation and the OMB’s propagation of a blatantly false
18 accusation of misconduct related to a sexual assault allegation...As a consequence of
19 being unable to work as a physician and the costs of legal defense, the petitioner has had
20 to file for Chapter 13 Bankruptcy in order to save his family and home. Finding
21 employment with a lapsed or expired license is much more feasible than with a revoked
22 medical license.

23 3) Petitioner therefore failed to demonstrate that irreparable harm to him will result from
24 imposition of the Final Order.

25 Colorable Claim of Error

26 4) Petitioner’s petition for stay alleged four errors:

27 **First:** The hearing ended in a mistrial and there was not a de novo hearing (the tribunal
28 who presided over the hearing: did not complete the proceeding, did not reconcile the
29 record and did not pass judgement). **Second:** OMB and ALJ Mann erred in failing to
30 adhere to (thereby violated) Oregon statutes regarding the recusal of an ALJ without
31 cause. **Third:** The self-assignment of ALJ John Mann to adjudicate a proposed order

1 created the appearance of extreme bias. **Fourth:** Blatant professional misconduct by
2 AAG Warren Foote occurred in representing the OMB; this included knowingly
3 providing misleading information to the tribunal, which included the false claim that a
document (the OCI report) was placed in a court ordered confidentiality.

4 5) Petitioner therefore failed to allege a colorable claim of error in the Board's Final
5 Order.

6 CONCLUSION OF LAW

7 Petitioner has not satisfied the criteria for a stay of the Final Order and, therefore, his
8 petition for stay may and must be denied.

9 OPINION

10 Under ORS 183.482 (3)(a), an agency may stay enforcement of a final order if the
11 Petitioner shows: "(A) Irreparable injury to the petitioner; and (B) A colorable claim of error in
12 the order."² Likewise, OAR 137-003-0690(3)(f) provides, in pertinent part, that Petitioner must,
13 in his petition for stay, include:

14 A statement of facts and reasons sufficient to show that:
15 (A) The petitioner will suffer irreparable injury if the order is not stayed; and,
16 (B) There is a colorable claim of error in the order.

17 1. Irreparable Injury

18 First, we examine whether Petitioner has shown he will suffer irreparable injury if
19 revocation of his license is not stayed. The Petitioner alleged that the revocation should be stayed
20 because he has an appeal pending, with arguments against the process followed at the contested
21 case level, and further alleged that it should be stayed because it will be easier to find new
22 employment with an expired medical license than with a revoked one.

23 On its face, Petitioner's claim fails because he was already unable to practice medicine
24 before the Board ever ordered revocation of his license. Petitioner allowed his own license to
25 lapse. Renewal of that license was entirely within his control, but he chose not to renew it. It
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² See also OAR 137-003-0700.

1 was, in fact, Petitioner who first rendered himself unable to practice medicine in Oregon, and not
2 the Board. Moreover, Petitioner has alleged a purely speculative injury, and mere conjecture
3 does not suffice to show irreparable harm. *Arlington Sch. Dist. No. 3 v. Arlington Ed.*
4 *Association*, 184 Or App 97 (2002). In *Arlington*, the court described the analysis applied to the
5 question of whether a petitioner has made a “showing” of irreparable injury:

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7 A “showing,” in its ordinary legal sense, is “proof or prima facie proof of a matter of fact
8 or law.” *Webster’s Third New Int’l Dictionary* 2106 (unabridged ed. 1993); *see Oregon*
9 *Health Care Assn. v. Health Div.*, 329 Or. 480, 492–93, 992 P.2d 434 (1999) (adopting
10 the dictionary definition as the meaning of “showing” in ORS 183.480(3)). “Proof,” in
11 turn, is evidence that satisfies a burden of production or persuasion placed upon the
12 proponent of a fact. *Marvin Wood Products v. Callow*, 171 Or.App. 175, 179, 14 P.3d
13 686 (2000). Proof must not leave the existence of the fact at issue to speculation. *See*
14 *Watzig v. Tobin*, 292 Or. 645, 652 n. 6, 642 P.2d 651 (1982). Therefore, as pertinent here,
15 a “showing” must at least demonstrate that irreparable injury *probably* would result if a
16 stay is denied.

13 * * *

14 We concluded that the petitioners had shown an irreparable injury and were entitled to a
15 stay. We explained:

16 “By affidavit accompanying their initial motion for a stay and their motion for a
17 continuance of a stay, petitioners claim that they ‘ * * * have existing and ongoing
18 contracts with wholesale distributors,’ and that unless the Commission’s
19 cancellation orders are stayed they will go bankrupt. The Commission does not
20 dispute these claims. *This, although in general terms, is, in the absence of any*
21 *refutation, a substantial showing of high probability of irreparable injury.*”

19 *Von Weidlein/N.W. Bottling*, 16 Or.App. at 88, 515 P.2d 936 (emphasis added). Although
20 our decision in *Von Weidlein/N.W. Bottling* did not turn on a construction of particular
21 statutory language, its focus on the existence of a “probability” that irreparable injury
22 would occur in the absence of a stay is consistent with the ordinary legal meaning of
23 “showing.”

23 Viewed in that light, the district’s evidence does not establish a sufficient showing of
24 irreparable injury to justify a stay pending judicial review of ERB’s arbitration
25 order * * *

25 As to the second asserted injury, that the district would be irreparably injured by the loss
26 of a possible legal victory in this court if the arbitrator were, in the meantime, to deny the
association’s grievance on its merits, the problem is compounded. First, the district’s

1 arguable entitlement to relief in this court does not show that it would suffer irreparable
2 injury if a stay is denied. That argument more properly relates to whether the district has
3 made a showing of a “colorable claim of error in the order.” ORS 183.482(3)(a)(B).
4 Second, the district’s *conjecture* that it might, before this court issues a decision on
5 review, obtain a victory on the merits in the arbitration proceeding does not constitute a
6 *showing* of irreparable injury.

7 We conclude that in both respects the district has not shown that it would suffer
8 irreparable injury if a stay is denied.

9 *Arlington Sch. Dist. No. 3 v. Arlington Educ. Ass’n*, 184 Or App 97, 101–04, 55 P3d 546,
10 548–49 (2002).

11 Thus, to make a showing of irreparable injury, the Plaintiff would have had to provide
12 proof or prima facie proof of a matter of fact or law that demonstrated irreparable injury in the
13 absence of a stay. In turn, such “proof” could not leave the existence of the fact at issue to
14 speculation. Here, and analogous to the district’s rejected argument in *Arlington*, the Petitioner in
15 this matter first argued an issue more properly related to what he alleges are colorable claims of
16 error (his pending appeal and its bases). Also analogous, he compounded his failure to show
17 irreparable injury because: he provided no proof (e.g., no compiled statistics, no affidavits from
18 experience, no acceptance letters acknowledging his lapsed license followed by rejection letters
19 citing his revocation, etc.) and because he left the fact he alleged to speculation. Specifically, he
20 simply made unfounded assertions that revocation of his expired license will make obtaining a
21 job more difficult than if his license were lapsed only. He did not describe any pending job
22 applications, did not explain *why* a revoked medical license would render a new position more
23 elusive than just a lapsed medical license, and did not even name potential jobs that are open to
24 candidates with lapsed medical licenses, but closed to those with revoked medical licenses. All
25 of these issues and the fact they would support are matters of pure conjecture.

26 Therefore, the Board concludes that Petitioner has not shown an irreparable injury as a
27 matter of law as a result of the revocation of his medical license, and that Petitioner has failed to
28 establish he will suffer irreparable injury if a stay is not granted.

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1 Colorable Claim of Error

2 Second, we examine whether Petitioner has established there is a colorable claim of error
3 in the Final Order. A “colorable” claim of error, as used in ORS 183.482(3), means a party must
4 show, among other things, that it is entitled to have the agency order set aside, modified,
5 reversed, or remanded on one or more of the grounds specified in ORS 183.482(8). *Bergerson v.*
6 *Salem-Keizer Sch. Dist.*, 185 Or App 649, 660, 60 P3d 1126, 1132 (2003). The grounds specified
7 in ORS 183.482(8) are: (1) the agency has erroneously interpreted a provision of law and a
8 correct interpretation compels a particular action; (2) the agency abused its discretion; and (3) the
9 order is not supported by substantial evidence in the record.

10 None of the errors Petitioner alleged, even if he were to prevail in his arguments, are
11 included in ORS 183.482(8). The first error alleged by Petitioner is that “the hearing ended in a
12 mistrial and there was not a de novo hearing (the tribunal who presided over the hearing: did not
13 complete the proceeding, did not reconcile the record and did not pass judgement).” There are no
14 such events in law such as mistrial or “de novo” hearing after an ALJ becomes unavailable
15 within the contested case process, so they do not fall under ORS 183.482(8). The second error
16 alleged by Petitioner is that OMB and ALJ Mann erred in failing to adhere to (thereby violated)
17 Oregon statutes regarding the recusal of an ALJ without cause. The Petitioner is incorrect in
18 ascribing decisions about ALJ recusals to the Board. The Board does not make determinations on
19 Respondent requests for changes of administrative law judge, and decisions of the Office of
20 Administrative Hearings and administrative law judges are not included in ORS 183.482(8).
21 Similarly, the third error alleged by the Petitioner is alleged against ALJ John Mann and not,
22 therefore, under ORS 183.482(8). Last, the Petitioner alleges professional misconduct by the
23 assistant attorney general representing the Board at hearing, alleging the assistant attorney
24 general made misleading or false arguments to the administrative law judge. The Board does not
25 find that AAG Foote attempted to mislead the forum. Further, misleading arguments of counsel
26 are not an agency’s misinterpretation of law in a final order, are not an agency’s abuse of

1 discretion, and are legal argument – not evidence and not a final order – so they are not a final
2 order that is unsupported by substantial evidence in the record. There is no attorney conduct or
3 alleged misconduct that falls under ORS 183.482(8). Because none of the errors Petitioner
4 alleges fall within ORS 183.482(8), they cannot be colorable claims of error within the meaning
5 or ORS 183.482(3), and Petitioner also fails to establish this requirement for the Board to grant a
6 stay.

7 CONCLUSION

8 Because Petitioner failed to show irreparable injury to himself from revocation of his
9 medical license if a stay is not granted, and because Petitioner also failed to allege a colorable
10 claim of error in the Board’s order, the Board must deny his petition for stay. ORS 183.482(3),
11 OAR 137-003-0700.

12 ORDER

13 For the above-stated reasons, Petitioner’s petition for a stay of the Final Order is
14 DENIED.

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16 IT IS SO ORDERED THIS 16th day of August, 2018.

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18 OREGON MEDICAL BOARD
State of Oregon

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21 PAUL A. CHAVIN, MD
22 BOARD VICE-CHAIR
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