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.
BEFORE THE
OREGON MEDICAL BOARD
STATE OF OREGON

In the Matter of

ROSE JEANNINE KENNY, MD
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.

///

Page 1 – INTERIM STIPULATED ORDER – Rose Jeannine Kenny, MD
3.3 Licensee understands that violating any term of this Order will be grounds for disciplinary action under ORS 677.190(17).

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

4.

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

5.

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

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

ROSE JEANNINE KENNY, MD

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

OREGON MEDICAL BOARD
State of Oregon

NICOLE KRISHNASWAMI, JD
INTERIM EXECUTIVE DIRECTOR
BEFORE THE
OREGON MEDICAL BOARD

IN THE MATTER OF:

JAMES MICHAEL MURPHY, MD

Petitioner.

FINAL ORDER DENYING
PETITION FOR STAY

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

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?

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

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

FINDINGS OF FACT AND ULTIMATE FACT

Irreparable Injury

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

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

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

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

Colorable Claim of Error

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

First: The hearing ended in a mistrial and there was not a de novo hearing (the tribunal who presided over the hearing: did not complete the proceeding, did not reconcile the record and did not pass judgement). Second: OMB and ALJ Mann erred in failing to adhere to (therby violated) Oregon statutes regarding the recusal of an ALJ without cause. Third: The self-assignment of ALJ John Mann to adjudicate a proposed order
created the appearance of extreme bias. Fourth: Blatant professional misconduct by AAG Warren Foote occurred in representing the OMB; this included knowingly providing misleading information to the tribunal, which included the false claim that a document (the OCI report) was placed in a court ordered confidentiality.

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

CONCLUSION OF LAW

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

OPINION

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

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

1. Irreparable Injury

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

On its face, Petitioner’s claim fails because he was already unable to practice medicine before the Board ever ordered revocation of his license. Petitioner allowed his own license to lapse. Renewal of that license was entirely within his control, but he chose not to renew it. It

2 See also OAR 137-003-0700.
was, in fact, Petitioner who first rendered himself unable to practice medicine in Oregon, and not
the Board. Moreover, Petitioner has alleged a purely speculative injury, and mere conjecture
does not suffice to show irreparable harm. Arlington Sch. Dist. No. 3 v. Arlington Ed.
Association, 184 Or App 97 (2002). In Arlington, the court described the analysis applied to the
question of whether a petitioner has made a “showing” of irreparable injury:

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

***

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

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

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

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

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

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


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

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

///
Colorable Claim of Error

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

None of the errors Petitioner alleged, even if he were to prevail in his arguments, are included in ORS 183.482(8). The first error alleged by Petitioner is that “the hearing ended in a mistrial and there was not a de novo hearing (the tribunal who presided over the hearing: did not complete the proceeding, did not reconcile the record and did not pass judgement).” There are no such events in law such as mistrial or “de novo” hearing after an ALJ becomes unavailable within the contested case process, so they do not fall under ORS 183.482(8). The second error alleged by Petitioner is that OMB and ALJ Mann erred in failing to adhere to (thereby violated) Oregon statutes regarding the recusal of an ALJ without cause. The Petitioner is incorrect in ascribing decisions about ALJ recusals to the Board. The Board does not make determinations on Respondent requests for changes of administrative law judge, and decisions of the Office of Administrative Hearings and administrative law judges are not included in ORS 183.482(8).

Similarly, the third error alleged by the Petitioner is alleged against ALJ John Mann and not, therefore, under ORS 183.482(8). Last, the Petitioner alleges professional misconduct by the assistant attorney general representing the Board at hearing, alleging the assistant attorney general made misleading or false arguments to the administrative law judge. The Board does not find that AAG Foote attempted to mislead the forum. Further, misleading arguments of counsel are not an agency’s misinterpretation of law in a final order, are not an agency’s abuse of
discretion, and are legal argument – not evidence and not a final order – so they are not a final order that is unsupported by substantial evidence in the record. There is no attorney conduct or alleged misconduct that falls under ORS 183.482(8). Because none of the errors Petitioner alleges fall within ORS 183.482(8), they cannot be colorable claims of error within the meaning or ORS 183.482(3), and Petitioner also fails to establish this requirement for the Board to grant a stay.

CONCLUSION

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

ORDER

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

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

OREGON MEDICAL BOARD
State of Oregon

PAUL A. CHAVIN, MD
BOARD VICE-CHAIR