

IN AND BEFORE THE OKLAHOMA STATE BOARD
OF MEDICAL LICENSURE AND SUPERVISION
STATE OF OKLAHOMA

STATE OF OKLAHOMA, *ex rel.*,)
THE OKLAHOMA STATE BOARD)
OF MEDICAL LICENSURE AND)
SUPERVISION,)

Plaintiff,)

vs.)

MEDHAT S.F. MICHAEL, M.D.)
LICENSE NO. MD 23746)

Defendant.)

FILED

JAN 05 2016

OKLAHOMA STATE BOARD OF
MEDICAL LICENSURE & SUPERVISION

Case No. 11-11-4441

**ORDER UPON DEFENDANT'S
MOTION FOR DECLARATORY RULING AND TO VACATE ORDER
ACCEPTING VOLUNTARY SURRENDER TO JURISDICTION**

This matter came on for hearing before the Oklahoma State Board of Medical Licensure and Supervision ("Board") on November 5, 2015 at the Board office, 101 N.E. 51st Street, Oklahoma City, Oklahoma 73105, pursuant to notice given as required by law and rules of the Board.

Medhat S.F. Michael, M.D. ("Defendant"), appeared in person and through counsel Eugene K. Bertman of Talley, Turner & Bertman.

Joseph L. Ashbaker and Jason T. Seay, Assistant Attorneys General, appeared on behalf of the State of Oklahoma, *ex rel.*, the Oklahoma State Board of Medical Licensure and Supervision.

The Board *en banc* heard testimony, reviewed the exhibits presented, reviewed the briefing of the parties and evidence attached thereto, and being fully apprised of the premises, makes the following Findings of Fact, Conclusions of Law, and Orders:

Findings of Fact

1. Defendant previously held Oklahoma medical license no. 23746.
2. In November 2011, Dr. Michael was charged with four counts of felony sexual battery in Oklahoma County District Court, Case No. CF-2011-6559.
3. A complaint was filed against Dr. Michael in June 2012 for significant allegations of predatory sexual behavior towards patients and staff, obstructing the Board's investigation of him, falsifying medical records, prescribing controlled dangerous substances (CDS) to his spouse, and fraudulent licensure renewal.

4. In January 2014, an attorney for Dr. Michael emailed Assistant Attorney General Matt Stangl to set up a meeting to discuss resolution of the criminal matter along with the disciplinary proceeding.

5. Dr. Michael's attorneys met with AAG Stangl and the Oklahoma County District Attorney David Prater, and Assistant District Attorney Suzanne Lavenue, regarding Dr. Michael's case on 6 February 2014.

6. In that meeting, it was expressed by the District Attorney the criminal charges would be dropped against Dr. Michael if Dr. Michael first agreed to relinquish his medical license and never reapply for licensure in Oklahoma.

7. Dr. Michael agreed to relinquish his medical license and never reapply for it in exchange for the dismissal of the felony criminal charges then pending against him.

8. On 19 February 2014, AAG Stangl sent a draft "Voluntary Surrender[sic][1] to Jurisdiction" ("VSJ") for Dr. Michael's attorneys' review. Between 20 February and 25 February 2014, counsel for Dr. Michael exchanged numerous emails with AAG Stangl regarding the terms of the proposed VSJ.

9. The parties reached an agreement as to the specific terms of the VSJ. Pertinent here, the terms of the VSJ negotiated by the parties show: (1) the VSJ was reportable to the National Practitioner Databank ("NPDB") by its own terms; (2) Dr. Michael did not admit to any of the allegations made against him; (3) Dr. Michael admitted that a hearing before the Board could result in some action upon his license; (4) Dr. Michael agreed to relinquish his medical license and to not reapply for it again; and (5) the parties did not intend the VSJ to be a surrender in lieu of prosecution under 59 O.S. 2011, § 509.1(E).

10. On 26 February 2014, counsel for Dr. Michael communicated to AAG Stangl that Dr. Michael would be signing the VSJ negotiated by counsel.

11. Sometime between 28 February and 5 March 2015, an attorney for Dr. Michael hand-delivered the VSJ, which was executed by Dr. Michael and one of his attorneys, to the Board.

12. AAG Stangl executed the VSJ he received from Attorney Krahl, and he presented the same document to the Board at the 6 March 2014 Board hearing and requested the Board accept it.

13. The Board Meeting Minutes from 6 March 2014 reflect the consideration and acceptance of the Board of the VSJ offered by AAG Stangl. The minutes reference "attachment # 13" to the minutes. Attachment 13 to the Meeting Minutes is a color copy of the VSJ presented to and accepted by the Board. The VSJ shows it was executed in blue ink by former Secretary Gerald Zumwalt, M.D., and AAG Stangl. This document was also transmitted to counsel for Dr. Michael

¹ The term of art for an agreed-to settlement of a disciplinary proceeding before the Board is "voluntary submittal to jurisdiction." See Okla. Admin. Code § 435:5-1-5.1. Although the title of the document is erroneous, it is still an agreed settlement of the disciplinary proceeding at issue.

via email. *Id.* The email transmitting to Dr. Michael's attorney contains the same color copy of the VSJ attached to the Meeting Minutes.

14. On 10 and 14 March respectively, counsel for Dr. Michael sent an email and letter to AAG Stangl, reiterating his client's position that Dr. Michael did not and has not ever surrendered his license. Counsel for Dr. Michael further stated that the VSJ, by its own terms, is not a surrender in lieu of prosecution.

15. On 17 March 2014, AAG Stangl alerted Attorney Krahl of the typographical error contained in the VSJ related to the misnaming of the defendant. AAG Stangl asked Attorney Krahl if he desired to have the typo fixed, but Krahl never responded to the inquiry.

16. The VSJ staff has on file in this matter is a true and accurate copy of the VSJ executed by Dr. Michael, presented to Board staff by Dr. Michael's attorney as the VSJ executed by Dr. Michael, presented to and approved of by the Board, and transmitted to Dr. Michael's attorney after it was accepted by the Board and file stamped.

17. The VSJ is not a surrender in lieu of prosecution under 59 O.S. 2011, § 509.1(E). It is a settlement agreement between the parties to the disciplinary proceeding to resolve the administrative action without the necessity of a hearing. It also accomplished Dr. Michael's goal of relinquishing his medical license, and to never reapply again, as part of his agreement with the Oklahoma County District Attorney to resolve the felony criminal charges filed against him without the need for a trial.

Conclusions of Law

1. This Board *en banc* has jurisdiction over the subject matter herein, and notice has been given in all respects as required by law and the rules of the Board.

2. This declaratory ruling is authorized 75 O.S. 2011, § 307, and Okla. Admin. Code § 435:1-1-9.

3. This Board is a duly authorized agency of the State of Oklahoma empowered to license and oversee the activities of physicians and surgeons in the State of Oklahoma pursuant to 59 O.S. § 480, *et seq.*

4. The Board is authorized to suspend, revoke or order any other appropriate sanctions against the license of any physician or surgeon holding a license to practice medicine in the state of Oklahoma for unprofessional conduct, which includes revocation without the right to reapply. 59 O.S. 2011, § 509.1(A)(1).

5. The Board is authorized to consider and accept proposed orders the parties to a disciplinary matter negotiate and agree to in order to resolve disciplinary proceedings without the need for a hearing – *i.e.* an agreed settlement, consent order or stipulation. 75 O.S. 2011, § 309(E); Okla. Admin. Code § 435:5-1-5.1(a). These proposed orders are referred to by this Board as "Voluntary Submittals to Jurisdiction" or "VSJ." Okla. Admin. Code § 435:5-1-5.1(a).

6. The order at issue in this matter constitutes a voluntary submittal to jurisdiction and is not a surrender in lieu of prosecution pursuant to 59 O.S. 2011, § 509.1(E).

7. The Board is authorized to consider and accept the VSJ Dr. Michael negotiated, executed, and had presented to this Board for consideration.

8. This Board accepted the VSJ Dr. Michael executed.

9. The VSJ staff has on file in this matter is a true and accurate copy of the VSJ executed by Dr. Michael, presented to Board staff by Dr. Michael's attorney as the VSJ executed by Dr. Michael, presented to and approved of by the Board, and transmitted to Dr. Michael's attorney after it was accepted by the Board and file stamped.

10. Dr. Michael is both judicially and equitably estopped from asserting the order at issue is not a VSJ.

11. Dr. Michael is both judicially and equitably estopped from asserting that he did not voluntarily relinquish his license and agreed to never reapply for licensure again.

Orders

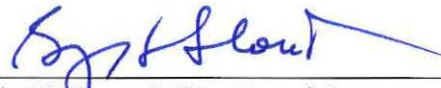
IT IS THEREFORE ORDERED by the Board of Medical Licensure and Supervision as follows:

1. The Motion for Declaratory Ruling and Motion to Vacate Order Accepting Voluntary Surrender to Jurisdiction of Defendant **MEDHAT S.F. MICHAEL, M.D.**, is hereby **DENIED** for the reasons stated herein.

2. A copy of this written order shall be sent to Defendant as soon as it is processed.

3. **This Order is subject to review and approval by the Oklahoma Attorney General, and this Order shall become final upon completion of the review by the Oklahoma Attorney General unless disapproved, in which case this Order shall be null and void.**

Dated this 5th day of January, 2016.



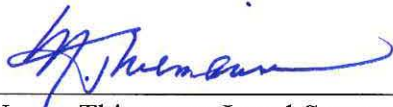
Billy H. Stout, M.D., Board Secretary
OKLAHOMA STATE BOARD OF MEDICAL
LICENSURE AND SUPERVISION

Certificate of Service

This is to certify that on the 6th day of January, 2016, a true and correct copy of this Order was sent by U.S. first-class mail, postage prepaid, to the following:

Samuel L. Talley
Eugene K. Bertman
Talley, Turner & Bertman
219 East Main Street
Norman, Oklahoma 73069
Telephone: (405) 364-8300
Facsimile: (405) 364-7059

*Attorneys for Defendant
Dr. Medhat S.F. Michael*



Nancy Thiemann, Legal Secretary



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

FILED
JAN 05 2016
OKLAHOMA STATE BOARD OF
MEDICAL LICENSURE & SUPERVISION

ATTORNEY GENERAL OPINION
2015-183A

Billy Stout, M.D., Board Secretary
State Board of Medical Licensure and
Supervision
101 NE 51st Street
Oklahoma City, Oklahoma 73105

December 9, 2015

Dear Board Secretary Stout:

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Medical Licensure and Supervision intends to take with regard to a motion filed by former medical doctor licensee 23746. The motion requests that the Board issue a declaratory ruling invalidating a prior Board order accepting licensee's voluntary submittal to jurisdiction. The Board rejected that motion.

A voluntary submittal to jurisdiction is, essentially, the label given to agreed disciplinary orders entered by the Board; the negotiation and entry of such agreed orders, while perhaps prone to some criticism, is a common practice across professional licensing boards in Oklahoma. Such consent orders, often not expressly authorized by statutes, save significant State—and professional—resources in exchange for milder discipline than might otherwise occur.

Licensee's voluntary submittal occurred in 2014 after serious allegations of flagrant and ongoing sexual misconduct were made both criminally and before the Board. Those allegations ranged from 2008 to 2011; affected at least seventeen people, including patients and employees; and included innuendo, sexually explicit comments, solicitations, and physical advances. Licensee has never admitted guilt as to any of the allegations.

The complaint initiating licensee's discipline also included other allegations, including allegations that licensee had interfered with the Board's investigation and had falsified records.

Licensee's voluntary submittal to jurisdiction according to the Board's records included no admission of guilt but did include a statement that the licensee understood a hearing could result in discipline. The voluntary submittal also required the revocation of the license and that the discipline be submitted to a national database that would be viewed by medical licensing authorities in other states.

In his motion to the Board, the licensee advanced two legal theories to support vacatur of his voluntary submittal to jurisdiction. First, he argued that the Board did not have authority to

approve the voluntary submittal to jurisdiction because the only possible statutory authority for accepting it did not have its requirements met.

In other words, rather than seeing his prior voluntary submittal as an agreed order, licensee views it as an attempt at a Surrender in Lieu of Prosecution. That process, peculiar to the Board and explicitly described in its statutes, requires an admission of guilt and the voluntary surrender of the license. *See* 59 O.S.2011, § 509.1(E). The advantage of such a surrender for a licensee is that it absolutely bars Board staff from engaging in any disciplinary proceedings, sparing a licensee from the expense and press of mounting a defense and also barring any discipline harsher than a revocation—including potentially significant fines. It is also a course that can be taken despite Board staff's reluctance to allow it. In other words, there is no negotiating a Surrender in Lieu of Prosecution; there is only a question of whether the licensee's attempt at one meets the statutory requirements. Here, there is no question that licensee's voluntary submittal does not meet the statutory requirements for a Surrender in Lieu of Prosecution because the submittal does not contain an admission of guilt.

The question decided by the Board in passing upon licensee's motion, then, is whether it has the legal authority to accept a voluntary submittal to jurisdiction—or, in other words, whether the Board can approve agreed orders negotiated by disciplinary respondents and Board staff. The Board's administrative rules specifically recognize voluntary submittals, OAC 435:5-1-5.1, and the Administrative Procedures Act, 75 O.S.2011 & Supp.2015, §§ 250–323, also authorizes the entry of consent orders and agreed settlements unless specifically barred, 75 O.S.Supp.2015, § 309(E). Based on these authorities, it is apparent that—so long as the obligations imposed by an agreed order fall within a statutory range of actions authorized for a board and the procedural requirements for instituting disciplinary proceedings are met—a board has the authority to impose discipline according to a consent order with a respondent who agrees to the terms of the discipline, voluntarily waiving a full hearing. Here, the Board has statutory authority to, among other things, revoke a medical license. *See* 59 O.S.2011, § 509.1(A). Acceptance of consent orders in the form of voluntary submittals to jurisdiction is intended to advance the Board's statutory mandate to “suspend, revoke or order any other appropriate sanctions against the license of any physician . . . for unprofessional conduct.” 59 O.S.Supp.2015, § 503; *see also* 59 O.S.2011, § 509.1(A). The Board may reasonably believe that accepting and enforcing such consent orders is legally appropriate and advances its statutory mission.

The licensee's second argument was that the Board had lost the original copy of its order, does not have a legally adequate copy, and that there is a dispute as to the contents of the order. Looking to licensee's own filings before the Board and evidence in the record before the Board, the Board could have concluded that these allegations are either false or irrelevant. There appears to be an order on file at the Board; it bears the signature of licensee; and it contains findings and terms that substantially mirror evidence as to the negotiation of the agreement. The order on file does not even substantially differ from licensee's current position on the true agreement's contents except that licensee alleges the true agreement “would not be considered discipline in any way by the Medical Licensure Board” or that his relinquishment of his license could not “be in any way as a result of the prosecution of [his] case.” Mot. Declaratory Ruling and Mot. Vacate Order at 8. No evidence presented to the Board bore out these irrelevant and borderline frivolous claims. The Board's rejection of this legal theory underlying the motion has some evidentiary

support, and the Board may reasonably believe that rejecting these contentions would advance its statutory mission to discipline physicians who engage in unprofessional conduct.

The Board denied licensee's motion, and it could have done so reasonably as to both legal theories underlying the motion. It is, therefore, the official opinion of the Attorney General that the State Board of Medical Licensure and Supervision has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect public health and ensure patient welfare.

A handwritten signature in blue ink, appearing to read "E. Scott Pruitt". The signature is stylized with a large, sweeping initial "E" and a long horizontal stroke extending to the right.

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA