IN THE MATTER OF	*	**BEFORE THE MARYLAND**
ALI A. AL-ATTAR, M.D.	*	**STATE BOARD OF**
Respondent	*	**PHYSICIANS**
License No. D50098	*	**Case No. 2009-0822**

* *

FINAL DECISION AND ORDER

I. Procedural History

On November 8, 2010, the Maryland State Board of Physicians (the "Board") charged Ali A. Al-Attar, M.D., a physician licensed to practice medicine in the State of Maryland, with unprofessional conduct in the practice of medicine and failure to cooperate in a lawful investigation conducted by the Board in violation of sections 14-404(a)(3)(ii) and (33) of the Health Occupations Article of the Maryland Annotated Code. Those sections provide as follows:

> (a) Subject to the hearing provisions of § 14-405 of this subtitle, the Board, on the affirmative vote of a majority of the quorum may reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the licensee:
>
> * * * *
>
> (3) Is guilty of:
>
> * * * *
>
> (ii) Unprofessional conduct in the practice of medicine;
>
> * * * *

> (33) Fails to cooperate with a lawful investigation conducted by the Board[.]

Md. Code Ann., Health Occ. § 14-404(a)(3)(ii), (33) (Supp. 2011).

The hearing took place on July 7, 2011 before an Administrative Law Judge ("ALJ"). The Administrative Prosecutor submitted fourteen exhibits, all of which were admitted, and presented the testimony of Patricia Bramlet, Lead Compliance Analyst for the Board. Dr. Al-Attar did not appear, but was represented by Larry A. Ceppos, Esquire. The respondent offered no exhibits into evidence and did not call any witnesses.

The ALJ issued her proposed decision on September 27, 2011, a copy of which is attached to this Final Opinion and Order as Exhibit 1. The ALJ concluded that Dr. Al-Attar violated the Maryland Medical Practice Act, and recommended that Dr. Al-Attar's license to practice medicine in the State of Maryland be revoked.

The Respondent submitted exceptions to the Board, and the Administrative Prosecutor responded. The Board held a hearing on the exceptions on December 21, 2011. This Final Opinion and Order is the Board's final ruling on the case after considering the record, the written exceptions filed by the respondents, and the oral arguments at the Exceptions Hearing.

II. Findings of Fact

The Board adopts the Findings of Fact made by the ALJ at pages 4 through 10 of Exhibit 1 and incorporates them by reference into this Final Opinion and Order.

III. Conclusions of Law

The Board adopts the conclusions of law discussed by the ALJ on pages 16 through 33 of Exhibit 1 and incorporates them by reference into this Final Opinion and Order.

III. Exceptions

The Board has examined closely the arguments in Dr. Al-Attar's Exceptions. These exceptions, however, simply repeat the arguments made at the time of the evidentiary hearing before the ALJ. The ALJ considered these same arguments and rejected them. The Board will not reiterate here the ALJ's excellent and comprehensive discussion of these issues. The Board adopts the ALJ's discussion of these issues and overrules Dr. Al-Attar's exceptions for the reasons set out by the ALJ.

IV. Sanction

Dr. Al-Attar's failure to cooperate with the Board investigation was deliberate, longstanding and defiant. The Board's investigator gave him multiple opportunities to cooperate, in the process expending, over a period of months, time and resources that could otherwise have been used in the investigation of substantive matters. His attorney legitimately invoked every technical defense, but even these efforts failed to mask what amounted to a deliberate and continual flouting of the Board's investigative authority. The allegations being investigated were quite serious, and the Board may have lost forever its opportunity to investigate and possibly adjudicate these matters.

The Board is especially concerned with the willfulness of the offense, as well as the potential for public harm in the thwarting of the Board's investigation of these serious matters. Dr. Al-Attar had already been suspended for other serious violations of the Medical Practice Act when this investigation began. This is thus not his first offense. The Board agrees with the ALJ that Dr. Al-Attar's license should be revoked. Under the extreme circumstances of this case, the Board will also impose a fine as permitted by the Medical Practice Act at Md. Code Ann., Health Occ. § 14-405.1 and COMAR 10.32.03.06C(4)(c). And, under the circumstances, the Board will impose the maximum fine.

V. Order

Based on the above Findings of Fact and Conclusions of Law, it is hereby **ORDERED** as follows:

1. Dr. Al-Attar's license to practice medicine in the State of Maryland shall be, and hereby is, **REVOKED**;

2. Dr. AL-Attar shall pay a monetary fine of $50,000; and it is further

ORDERED that this Final Opinion and Order shall be considered a **PUBLIC DOCUMENT** pursuant to Md. State Gov't Code Ann. § 10-611 et seq. (2004).

SO ORDERED this 19th day of March 2012.

John T. Papavasiliou, Deputy Director
Maryland State Board of Physicians

NOTICE OF RIGHT TO APPEAL

Pursuant to Maryland Health Occ. Code Ann. § 14-408(b), Dr. Al-Attar has the right to seek judicial review of this decision. Any petition for judicial review shall be filed within 30 days from the date this Final Decision and Order is mailed. The procedure for filing a petition for judicial review are set out in the Maryland Administrative Procedure Act, § 10-222 of the State Government Article and Title 7, Chapter 200 of the Maryland Rules of Procedure. If Dr. Al-Attar files an appeal, the Board is a party and should be served with the court's process. In addition, Dr. Al-Attar should send a copy to the Board's counsel, Thomas W. Keech, Esq. at the Office of the Attorney General, 300 West Preston Street, Suite 302, Baltimore, Maryland 21201.

MARYLAND STATE BOARD OF	* **BEFORE EILEEN C. SWEENEY,**
PHYSICIANS	* **AN ADMINISTRATIVE LAW JUDGE**
V.	* **OF THE MARYLAND OFFICE**
ALI A. AL-ATTAR, M.D.,	* **OF ADMINISTRATIVE HEARINGS**
RESPONDENT	* **OAH NO.: DHMH-SBP-71-11-12424**
LICENSE No.: D50098	*

* * * * * * * * * * * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
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PROPOSED DISPOSITION

STATEMENT OF THE CASE

On November 8, 2010, the Maryland State Board of Physicians (Board) issued charges against Ali A. Al-Attar, M.D., (Respondent) for unprofessional conduct and failure to cooperate with a lawful investigation conducted by the Board, in violation of the Medical Practice Act. Md. Code Ann., Health Occ. § 14-404(a)(3)(ii) and (33) (Supp. 2011). The Board forwarded the charges to the Office of the Attorney General for prosecution.

I held a hearing on July 7, 2011, at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Health Occ. § 14-405(a) (2009). Robert J. Gilbert, Deputy Counsel, Health Occupations Prosecution and Litigation Division, Office of the Attorney General, represented the State of Maryland (State). Larry A. Ceppos, Esquire, represented the Respondent.

EXHIBIT 1

The Respondent did not appear at the hearing. Mr. Ceppos conceded that the Respondent did receive proper service of the Notice of Hearing. Accordingly, I proceeded to conduct the hearing in the Respondent's absence pursuant to section 14-405(d) of the Health Occupations Article and Code of Maryland Regulations (COMAR) 28.02.01.23A.[1]

The contested case provisions of the Administrative Procedure Act, the Rules of Procedure for the Board, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2011); COMAR 10.32.02; COMAR 28.02.01.

ISSUES

(1) Did the Respondent engage in unprofessional conduct and/or fail to cooperate with a lawful investigation conducted by the Board in violation of sections 14-404(a)(3)(ii) and (33) of the Health Occupations Article?

(2) If so, what is the appropriate sanction?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the State:

State Ex. 1 - October 8, 2010 Investigative Report

State Ex. 2 - March 23, 2009 article from wtop.com, entitled, "Health info., Soc. Security numbers accidentally released"

State Ex. 3 - June 1, 2009 letter from the U.S. Department of Justice, Federal Bureau of Investigation (FBI), to the Board

[1] The State did not raise any objection to Mr. Ceppos' representation of the Respondent at the hearing despite the Respondent's failure to appear.

State Ex. 4 - January 25, 2010 letter from the Board to the Respondent; Information Form; U.S. Postal Service certified mailing receipts indicating delivery on February 12, 2010; January 25, 2010 Subpoenas Duces Tecum

State Ex. 5 - February 16, 2009 letter from the Board to the Respondent; U.S. Postal Service certified mailing receipts indicating delivery on February 19, 2010; Information Form; and January 25, 2010 Reissued Subpoenas Duces Tecum

State Ex. 6 - February 17, 2010 mailing envelope from the Board to the Respondent and copy stamped, "Return to Sender," on February 27, 2010

State Ex. 7 - February 18, 2010 letter from Mr. Ceppos to the Board

State Ex. 8 - March 8, 2010 letter from the Board to Mr. Ceppos; U.S. Postal Service receipts indicating delivery on March 10, 2010

State Ex. 9 - May 5, 2010 letter from the Board to Mr. Ceppos; U.S. Postal Service certified mail receipts indicating deliveries on July 12, 2010 to Mr. Ceppos and August 30, 2010 to the Respondent; March 23, 2009 article from wtop.com, entitled, "Health info., Soc. Security numbers accidentally released;" Information Form; January 25, 2010 Subpoenas Duces Tecum; January 25, 2010 Reissued Subpoenas Duces Tecum; January 25, 2010 letter from the Board to the Respondent; February 16, 2010 letter from the Board to the Respondent; March 8, 2010 letter from the Board to Mr. Ceppos

State Ex. 10 - July 20, 2010 letter from the Board to Mr. Ceppos; July 21, 2010 Fax cover sheet from the Board to Mr. Ceppos

State Ex. 11 - U.S. Postal Service certified mailing receipts indicating delivery to Mr. Ceppos on February 21, 2010 and to the Respondent on August 30, 2010

State Ex. 12 - July 22, 2010 letter from Mr. Ceppos to the Board

State Ex. 13 - August 3, 2010 letter from the Board to Mr. Ceppos; U.S. Postal Service certified mail receipts

State Ex. 14 - November 8, 2010 letter from the Board to the Respondent; November 8, 2010 Charges Under the Maryland Medical Practice Act; November 8, 2010 Summons and Notice of Charges and Hearing

The Respondent did not submit any exhibits into evidence.

Testimony

The State presented the following witness: Patricia C. Bramlet, Lead Compliance Analyst.

The Respondent did not present any witnesses.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to this proceeding, the Respondent was licensed to practice medicine in the State of Maryland under license number D50098.
2. In 2005, the Respondent completed an Information Form, which he submitted to the Board relating to an investigation being conducted at that time involving the Respondent.[2]
3. On or about April 22, 2009, the Respondent entered into a Consent Order with the Board, pursuant to which he agreed to a three year suspension, effective April 22, 2009.[3]
4. In May 2009, the Board became aware of a March 23, 2009 article from wtop.com, entitled, "Health info., Soc. Security numbers accidentally released" (media report).
5. The media report stated, among other things, that federal authorities were actively investigating the Respondent and his professional partner, Abdul H. Fadul, M.D., for allegations of health care fraud, *i.e.*, allegations that the Respondent and Dr. Fadul charged insurance companies for services their patients did not receive.

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[2] That investigation involved a matter different from the investigation conducted by the Board to which the current charges are related.

[3] Neither party submitted a copy of the Consent Order into evidence. I note that in its Prehearing Conference Statement, the State confusingly indicated that the Respondent agreed to a three-year suspension, with all but one year stayed, effective April 22, 2009, and also that the Respondent was eligible to petition the Board to stay the suspension of his license on or about April 22, 2010. The State also indicated that as of the date of the current charges, the Respondent had not petitioned the Board to stay the suspension of his license. In addition, the Respondent's counsel indicated in his opening statement that the Respondent was approximately two years into the three-year suspension.

6. In May 2009, the Board began an investigation of the allegations contained in the media report.[4]

7. On January 25, 2010, the Board sent a certified letter to the Respondent at his address of record[5] advising him that the Board had opened an investigation regarding care provided by him to patients and questionable billing practices. Attached to the letter was an Information Form, which the Respondent was requested to complete, sign and return within five business days from receipt of the letter. The Information Form directed the Respondent to provide his full name, home address and telephone number, date of birth, specialty, licensing number, Board certification status, Drug Enforcement Agency (DEA) and Controlled Dangerous Substances (CDS) registrations, office addresses and telephone numbers, a list of any malpractice claims, lists of any and all facilities where the Respondent had privileges, and licensure information pertaining to licensure in other states.

8. The January 25, 2010 certified mailing also included two Subpoenas Duces Tecum of that same date issued by the Board to the Respondent, which directed that he provide the following within ten days of receipt of the subpoenas:

    a) a complete list of practice locations where he provides/provided care, consultations or had an ownership interest/partnership, including for each location, the complete address, the hours of operation, and the days and hours when the Respondent treated/consulted with patients from January 1, 2006 to the present, "**whether generated by [the Respondent] or this facility, which materials [were] in [his]**

[4] The Board subsequently received a June 1, 2009 letter from the FBI indicating that it was conducting an investigation of health care fraud by the Respondent and requesting that the Board provide its complete investigative file on the Respondent to assist the FBI with its investigation.

[5] The State's witness explained that Licensees are required to provide a non-public address of record and a public address of record to the Board. The Board sent this mailing to the Respondent's non-public address of record.

custody, possession, or control;" and

b) a current, signed and dated copy of his *curriculum vitae*, **"whether generated by [the Respondent] or this facility."**

(State Ex. 4.) (Emphasis supplied.)

9. The certified mailing was delivered to the Respondent's address of record on February 12, 2010.[6]

10. On February 16, 2010, the Board sent a second certified letter to the Respondent at his address of record, marked, "Second Notification," in which it again notified the Respondent of its investigation and requested that he return a completed, signed Information Form to the Board within five business days from receipt of the letter. Also included in the certified mailing were two reissued Subpoenas Duces Tecum, with instructions to respond within ten days from receipt.

11. On or about February 18, 2010, Larry A. Ceppos, Esquire, attorney for the Respondent, wrote to Patricia C. Bramlet, Lead Compliance Analyst for the Board, in response to the Board's January 25, 2010 letter. He indicated that the Information Form previously provided to the Board in connection with the previous investigation "should be updated" to reflect that the Respondent was under an order of suspension as of April 22, 2009, pursuant to the Consent Order, and that on June 2, 2009 the Respondent's Virginia license was suspended, based on that Maryland suspension.

12. The February 18, 2010 letter from Mr. Ceppos further advised that the Respondent could not respond to one of the Board's Subpoenas Duces Tecum because he did not have a current,

[6] The receipt was signed by another individual at the Respondent's non-public address (signature illegible).

signed and dated *curriculum vitae* in his custody, possession, or control. He could not comply with the other Subpoena Duces Tecum because he did not have a list of practice locations in his custody, possession, or control. In addition, Mr. Ceppos advised that he and the Respondent did not understand what the Board meant in its Subpoenas Duces Tecum by the term, "generated by. . . this facility," and asked, "What 'facility'?" (State Ex. 7.) Mr. Ceppos also offered to meet with Ms. Bramlet to discuss the purpose and direction of the investigation.

13. The February 18, 2010 letter from Mr. Ceppos did not include an Information Form, signed and completed by the Respondent.

14. The Board's February 16, 2010 certified mailing was delivered to the Respondent's address of record on February 19, 2010.[7]

15. The Board received Mr. Ceppos' February 18, 2010 letter on or about February 22, 2010.

16. On March 8, 2010, Ms. Bramlet sent a certified letter to Mr. Ceppos, with a copy to the Respondent[8] in response to his February 18, 2010 letter, stating, among other things, the following:

> The Board acknowledges the issues you raised with regard to the language contained in the two (2) subpoenas issued to your client on January 25, 2010. In lieu of responding to the subpoenas, the Board requests that your client clarify the following issues related to the current investigation:
>
> 1. **Provide a complete list of practice locations where:**
>
>   a. **Your client provides/provided care and/or consultations to include: the complete address, hours of operation, days and [the Respondent's] practice hours at each location beginning from March 2005 to present and/or**

[7] The certified mailing receipt was signed by another individual at the Respondent's non-public address (signature illegible). Mailings sent to the Respondent's public address of record were returned, marked, "return to sender/not deliverable as addressed/unable to forward/return to sender." (State Exs. 1 and 6.)

[8] It is not clear if the copy was sent by certified or regular mailing and if it was delivered.

b. Your client has/had ownership/partnership in a medical/physician practice to include: the complete address, hours of operation, days and [the Respondent's] practice hours at each location beginning from March 2005 to present.

2. A current, signed and dated curriculum vitae for [the Respondent].

3. Copies of 50 Continuing Medical Education (CME) credit hours obtained during your client's last renewal period.

(State Ex. 8.) (Emphasis by underlining supplied).[9]

17. The March 8, 2010 letter also contained another Information Form, and directed that the Respondent complete, sign, and return the form.

18. The March 8, 2010 letter directed the Respondent to send the requested information to Ms. Bramlet's attention within fourteen days of receipt of the letter. It further stated as follows:

> In furtherance of the Board's investigation of this matter, the Board requests a written response to the complaint from [the Respondent]. If your client elects to provide a written response, it must be submitted to the Board within 14 days of receipt of this notification and signed or cosigned by [the Respondent]. Should [the Respondent] elect not to respond, please be advised that the investigation shall proceed without his response.

(State Ex. 8.) (Emphasis supplied.)

19. The Board's March 8, 2010 letter was delivered by certified mail to the Respondent's attorney on March 10, 2010.

20. After the Board did not receive a response to the March 8, 2010 correspondence within fourteen days of receipt, Board staff contacted Mr. Ceppos' office on April 22, 2010, to inquire about the Respondent's intent to cooperate with the investigation, leaving a message with Nicole Sistrunk.[10]

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[9] The boldface language was contained in the letter.
[10] Neither party provided Ms. Sistrunk's title or position.

21. On or about July 20, 2010,[11] Ms. Bramlet sent a letter to Mr. Ceppos by certified mail, with a copy to the Respondent by certified mail at his address of record, "to inquire about [the Respondent's] intent to cooperate with an active Board investigation." (State Ex. 9.) She noted that the Respondent had failed to produce records and provide information as directed in the March 8, 2010 correspondence.

22. Ms. Bramlet also wrote, "[The Respondent] has failed to produce records and provide information to the Board as directed by subpoenas issued by the Board on January 25, 2010. . . ." (State Ex. 9.)

23. In her July 20, 2010 letter, Ms. Bramlet advised Mr. Ceppos that if his client failed to provide the requested information and records within five business days, the case would be considered for disciplinary action based on the Respondent's failure to cooperate.

24. The July 20, 2010 letter was delivered to Mr. Ceppos by certified mail on July 22, 2010, and to the Respondent on August 30, 2010.[12]

25. On July 22, 2010, Mr. Ceppos wrote to Ms. Bramlet, stating:

> Please know that [the Respondent] has not declined to cooperate with the Board. To the extent that you have premised your inquiry on the existence of a purported federal investigation, [the Respondent] will defer a response to your request, pending completion of that investigation. Thus, it is not a matter of if but rather a matter of when. Because [the Respondent's] license is currently in a suspended status, there does not appear to be any time imperative with regard to your inquiry. If it is made in good faith, there should be no reason why a response cannot be deferred to an appropriate future date.

(State Ex. 12.)

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[11] The letter was initially erroneously dated May 5, 2010; however, the error was discovered and a corrected letter was mailed to Mr. Ceppos on that same day and faxed to him the following day.

[12] Another individual at the Respondent's public address of record signed the receipt (signature illegible).

26. The Respondent never provided a completed Information Form to the Board. Nor did he provide the other information requested by the Board in the March 8, 2010 letter.

27. The Respondent elected not to provide a written response to the complaint.

28. On August 3, 3010, Ms. Bramlet sent a letter to Mr. Ceppos by certified mail, with a copy to the Respondent by certified mail at his address of record,[13] acknowledging Mr. Ceppos' letter indicating that the Respondent was deferring his written response to the Board's investigation pending completion of the federal investigation, and advising Mr. Ceppos that the Board would proceed with its investigation without a written response from the Respondent.

29. The Respondent did not renew his license by September 30, 2010, the deadline for filing a renewal application.

30. On November 8. 2010, the Board issued charges against the Respondent for unprofessional conduct and failure to cooperate with a lawful investigation conducted by the Board, in violation of sections 14-404(a)(3)(ii) and (33) of the Health Occupations Article.

DISCUSSION

The Board is the State agency charged with regulating the practice of medicine in Maryland, including the licensing and disciplining of physicians. Md. Code Ann., Health Occ. §§ 14-205 and 14-404 (Supp. 2010).

Section 14-404 provides in pertinent part as follows:

> § 14-404. Denials, reprimands, probations, suspensions, and revocations -- Grounds
>
> (a) *In general.* -- Subject to the hearing provisions of § 14-405 of this subtitle, the Board, on the affirmative vote of a majority of the quorum, may reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the

[13] The Board mailed the correspondence to the Respondent's public address of record. It did not include proof of delivery in its exhibits.

licensee:

. . .

(3) Is guilty of:

. . .

(ii) Unprofessional conduct in the practice of medicine;

. . .

(33) Fails to cooperate with a lawful investigation conducted by the Board[.]

Md. Code Ann., Health Occ. § 14-404(a)(3)(ii) and (33).

As part of the disciplinary process, the Board is empowered to conduct investigations and issue subpoenas. Section 14-401 provides in pertinent part:

§ 14-401. Investigations

(a) *Preliminary Board investigation.* -- The Board shall perform any necessary preliminary investigation before the Board refers to an investigatory body an allegation of grounds for disciplinary or other action brought to its attention.

. . .

(c) *Referral or other action to be taken by Board.* --

(1) Except as otherwise provided in this subsection, after performing any necessary preliminary investigation of an allegation of grounds for disciplinary or other action, the Board may:

(i) Refer the allegation for further investigation to the entity that has contracted with the Board under subsection (e) of this section;

(ii) Take any appropriate and immediate action as necessary; or

(iii) Come to an agreement for corrective action with a licensee pursuant to paragraph (4) of this subsection.

. . .

(i) *Subpoenas; oaths.* -- The Board may issue subpoenas and administer oaths in connection with any investigation under this section and any hearing or proceeding before it.

. . .

(k) *Time for disposition of complaint.* -- (1) It is the intent of this section that the

> disposition of every complaint against a licensee that sets forth allegations of grounds for disciplinary action filed with the Board shall be completed as expeditiously as possible and, in any event, within 18 months after the complaint was received by the Board.

Md. Code Ann., Health Occ. § 14-401(a), (c)(1), (i), and (k)(1) (2009). *See also* Md. Code Ann., Health Occ. § 14-206(a) (2009).

Before the Board takes any action under section 14-404(a), the individual against whom the action is contemplated is entitled to the opportunity for a hearing before an Administrative Law Judge (ALJ). "Factual findings [made by the ALJ] shall be supported by a preponderance of the evidence." Md. Code Ann., Health Occ. § 14-405(b)(2) (2009).

The State, as the moving party, has the burden of proof by a preponderance of the evidence to demonstrate that the Respondent violated the statutory and regulatory sections at issue. Md. Code Ann., State Gov't § 10-217 (2009); Md. Code Ann. Health Occ., § 14-405(b)(2) (2009); *Comm'r of Labor and Indus. v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996), citing *Bernstein v. Real Estate Comm'n*, 221 Md. 221, 231 (1959). *See also Schaffer v. Weast,* 546 U.S. 49, 56 - 57 (2005).

In this case, the Board charged the Respondent, a licensed physician in the State of Maryland, with violating sections 14-404(a)(3)(ii) and (33) of the Health Occupations Article by failing to provide information the Board sought during its conduct of a lawful investigation pursuant to its receipt of a media report indicating that the Respondent was being investigated by the FBI for health care fraud.

The State argued that if a physician is granted a license to practice medicine in the State of Maryland, he has a concomitant responsibility to cooperate with the Board when it conducts an investigation and that, in this case, the Respondent failed to do so.

The Respondent raised the following defenses to the charges, which I will discuss in greater detail below:

(1) the Respondent did cooperate with the Board by responding to its requests to the best of his ability. In the alternative, he was not required to provide the requested information to the Board because (a) the Board gave him the option of electing not to, and (b) based on his Fifth Amendment right against self-incrimination;

(2) the Respondent is not subject to sanction under section 14-404(a)(3)(ii) (unprofessional conduct in the practice of medicine) because he was not engaged "in the practice of medicine" at the time of his alleged offense, his license having been suspended on April 22, 2009;

(3) the term "unprofessional conduct" is void for vagueness and in violation of the Respondent's due process rights under the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights;

(4) even if the Respondent had been able to produce the requested information, any failure to do so did not have a significant impact on the Board's investigation;

(5) the Board was not conducting a legitimate investigation in furtherance of its licensing duties, but rather was acting as a "Trojan Horse" for the federal government with regard to a federal investigation of the Respondent;

(6) the sanction proposed by the State, *i.e.*, the revocation of the Respondent's license, is too severe under the circumstances.[14]

[14] The Respondent also complained that the Board improperly furnished its investigative file on the Respondent to the FBI; however, that is not an issue before me in this proceeding.

THE BOARD'S CASE

The State presented the testimony of Patricia Bramlet, Lead Compliance Analyst. Ms. Bramlet testified that the Respondent's license was suspended for three years relating to another disciplinary matter, beginning April 22, 2009. She further testified that in May 2009, the Board opened another investigation of the Respondent based upon the media report and she was assigned to conduct that investigation, which included a series of correspondence between Ms. Bramlet and the Respondent and/or his attorney, Mr. Ceppos.

Ms. Bramlet recounted in detail her efforts to obtain information from the Respondent as part of the investigative process, including the following:

(1) a January 25, 2010 letter from the Board to the Respondent enclosing:

(a) an Information Form, which the Respondent was requested to return within five business days from receipt of the letter.

(b) Subpoenas Duces Tecum issued that same date by the Board, which directed, that within ten days of receipt, the Respondent provide the following:

- a complete list of practice locations where he provides/provided care, consultations or had an ownership interest/partnership, including for each location, the complete address, the hours of operation, and the days and hours when the Respondent treated/consulted with patients from January 1, 2006 to the present, "whether generated by [the Respondent] or this facility, which materials [were] in [his] custody, possession, or control" (State Ex. 8.)
- a current, signed and dated copy of his *curriculum vitae*, "whether generated by [the Respondent] or this facility" (State Ex. 4.)

(2) a February 16, 2010 letter from the Board to the Respondent, enclosing the following:

(a) another Information Form, which the Board requested he complete and return within five business days from receipt of the letter; and

(b) reissued Subpoenas Duces Tecum;

(3) a March 8, 2010 letter from the Board to Mr. Ceppos, enclosing another Information Form, and directing that within fourteen days of receipt of the letter, the Respondent complete, sign, and return the Information Form and provide essentially the same information listed in the Subpoenas Duces Tecum but from March 2005 to present. (Ms. Bramlet did not include the qualifying language previously used in the Subpoenas Duces Tecum that the materials be in the Respondent's custody, possession or control or that they include materials generated by a facility). In addition, the Board requested copies of fifty CME credit hours obtained during the Respondent's last renewal period; [15]

(4) a July 20, 2010 letter from the Board to Mr. Ceppos inquiring about the Respondent's intent to cooperate with the Board's active investigation, noting the Respondent's failure to produce records and provide information as directed in the March 8, 2010 correspondence and by the Subpoenas Duces Tecum, and advising that if the Respondent failed to provide the requested information and records within five business days, the case would be considered for disciplinary action based on the Respondent's failure to cooperate.

Ms. Bramlet also testified about the following inadequate responses she received from the Respondent via Mr. Ceppos:

(1) a February 18, 2010 responding to the Board's January 25, 2010 letter, in which Mr. Ceppos indicated the following:

[15] It was not made clear why the Board requested the CME information. COMAR 10.32.01.09B(1) provides that "[a] physician **applying for renewal or reinstatement** shall earn at least 50 credit hours of Category I CME during the 2-year period immediately preceding the licensee's submission of the renewal or reinstatement application." (Emphasis supplied.) (COMAR 10.32.01.09D(1) and (2) imposes an obligation upon a licensee to obtain the requisite documentation of CME attendance and retain this documentation for the succeeding six years for possible inspection by the Board.)

(a) an Information Form previously provided to the Board in connection with a previous unrelated investigation "should be updated" to reflect suspensions of the Respondent's Maryland and Virginia licenses;

(b) the Respondent could not respond to one of the Board's Subpoenas Duces Tecum because he did not have a current, signed and dated *curriculum vitae* in his custody, possession, or control. He could not comply with the other subpoena duces tecum because he did not have a list of practice locations in his custody, possession, or control.

(2) A July 22, 2010 letter in which Mr. Ceppos advised Ms. Bramlet of the following:

(a) the Respondent would be deferring a response to the Board's request, pending completion of the federal investigation;

(b) because the Respondent's license was in a suspended status, there did not appear to be any time imperative with regard to the Board's inquiry; and

(c) if the Board's inquiry was made in good faith, there was no reason why response could not be deferred to an appropriate future date.

Ms. Bramlet testified that the Respondent never provided a completed Information Form or any of the other information requested in the Board's correspondence or Subpoenas Duces Tecum. She further testified that the Board has not been able to investigate the allegations in the media report because the Respondent has not provided the necessary information.

MOTION FOR JUDGMENT

At the close of the State's case, the Respondent made a Motion for Judgment raising most of the above defenses, pursuant to COMAR 28.02.01.12E, which provides in pertinent part as follows:

E. Motion for Judgment.

(1) A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party. The moving party shall state all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of any opposing party's case.

For the following reasons, I find that the Respondent is not entitled to judgment in his favor.

Failure to Cooperate with Lawful Investigation

Adequacy of Response

The Respondent argued that the State failed to present sufficient evidence to establish that he failed to cooperate with the Board during the course of its investigation. He argued that the correspondence between the parties showed that he did respond to the Board's letters and Subpoenas Duces Tecum to the best of his ability.

The Respondent referred to Mr. Ceppos' February 18, 2010 letter advising the Board that the information requested in the Subpoenas Duces Tecum, if it existed, was not in the Respondent's custody, possession or control. In that letter, Mr. Ceppos also indicated that he and the Respondent did not understand what the Board meant in its Subpoenas Duces Tecum by the term, "generated by. . . this facility," and asked, "What 'facility'?" (State Ex. 7.) The Respondent noted that this correspondence apparently crossed in the mail with the Board's February 16, 2010 letter.

The Respondent argued that in Ms. Bramlet's March 8, 2010 letter, Ms. Bramlet acknowledged the issues by raised by him with regard to the language contained in the Subpoenas Duces Tecum. He referred to the language in that letter stating that "[i]n lieu of responding to the subpoenas," the Respondent could provide certain information clarifying cited issues relating to the investigation, which the Respondent argued constituted a withdrawal of the Subpoenas Duces Tecum.

The Respondent also contended that he sufficiently responded to the Board's request to provide an Information Form by referring in his February 18, 2011 letter to updated information (relating to suspensions of his Maryland and Virginia licenses) to supplement an Information Form provided by him in 2005.

The Respondent argued that Ms. Bramlet never responded to the offer Mr. Ceppos made in his February 18, 2010 letter to meet with her to discuss the purpose and direction of the investigation.

In addition, the Respondent took the position that Ms. Bramlet indicated in her March 8, 2010 letter that the Respondent could elect whether or not to respond to the requests for information and that if the Respondent elected not to respond, the only potential consequence was that the investigation would proceed without his response, thereby rendering his response to the Board's requests wholly optional..

Furthermore, by letter dated July 22, 2010, Mr. Ceppos advised the Board that the Respondent would be pleased to cooperate with the Board's investigation following the conclusion of the federal investigation, ensuring the protection of his Fifth Amendment right against self incrimination.

For the following reasons, I did not find merit in the Respondent's contention that he adequately responded to the Board's requests for information.

Custody, Possession or Control; Withdrawal of Subpoenas Duces Tecum

I found the Respondent's contention that he could not provide a list of practice locations and a *curriculum vitae* in response to the Subpoena Duces Tecum because such documents did not exist or were not in his custody, possession or control, to be circuitous. I agree, however, that a

reasonable reading of the language contained in Ms. Bramlet's subsequent March 8, 2010 letter indicates that the Board withdrew the Subpoenas Duces Tecum. Nonetheless, the Medical Practice Act does not limit the Board's investigatory process to the collection of information by subpoena and Ms. Bramlet also stated in that letter that the Respondent was to provide within fourteen days of receipt of the letter, a complete list of practice locations and a current, signed, and dated *curriculum vitae*, as well as copies of fifty CME credit hours obtained during his last renewal period.

Information Form

A review of the Information Form(s) sent to the Respondent by the Board shows that the form requested basic information, *e.g.*, office addresses and telephone numbers, lists of facilities where the Respondent had privileges. Yet, except to advise the Board by letter dated February 18, 2010 that an Information Form provided approximately four years earlier with regard to another disciplinary matter needed to be updated to reflect the suspensions of his Maryland and Virginia licenses, the Respondent never provided any of the current information. This was despite the Board sending an Information Form to him again on February 16, 2010, with instructions to return it within five business days from receipt of the letter, and again on March 8, 2010, with instructions to return it within fourteen days of receipt of that letter. The evidence clearly showed that the Respondent never provided the information called for by the Information Form to the Board, despite another July 20, 2010 follow-up letter from Ms. Bramlet. As a licensing agency, the Board was certainly entitled to such current basic information, which may be relevant to its ongoing investigation rather than old, possibly outdated information.[16]

[16] I note that neither party submitted the 2005 Information Form into evidence. Nor did the Respondent's responses to the Board's communications specifically state that the information previously provided remained the same.

Meeting

With regard to the Respondent's complaint that Ms. Bramlet never met with his attorney, the Health Occupations Article and COMAR do not require the Board to meet with a licensee's attorney as part of the investigatory process and the Respondent presented no legal authority to that effect. Furthermore, such a meeting would not negate the Respondent's failure to provide requested documents.

Election to Respond

An examination of the March 8, 2010 letter also indicates that the Respondent's argument that he was given the option of electing to provide the requested information was somewhat disingenuous. The language in the letter relating to an election to provide a written response referred to "a written response to the **complaint**" not to the prior letters. (State Ex. 8.) (Emphasis supplied.) It was in that same context that Ms. Bramlet referred to proceeding with the investigation if the Respondent elected not to respond. Furthermore, in her subsequent July 20, 2010 correspondence, Ms. Bramlet advised the Respondent that if he failed to provide the requested information and records within five business days, the case would be considered for disciplinary action based on the Respondent's failure to cooperate.

Fifth Amendment

Finally, with regard to the Respondent's assertion that he had the right to invoke the Fifth Amendment, I fail to see how providing most, if not all, of the information requested could incriminate him criminally.

Thus, the Respondent's final response of July 22, 2010, indicating that he would be deferring a response to the Board's request pending completion of the federal investigation, was

inappropriate and contrary to the Respondent's legal obligation to cooperate with the Board in its investigation. Md. Code Ann., Health Occ. § 14-404(a)(33). It was not the Respondent's prerogative to decide how the Board was to conduct its investigation, the importance of the information requested, whether the Board's investigation could wait until the federal investigation was complete, or whether there was a time imperative in light of the suspension.

Accordingly, I find that the Board established a *prima facie* case that the Respondent failed to cooperate with a lawful investigation conducted by the Board in violation of section 14-404(a)(33).

For the reasons discussed below, I further find that the Board established a *prima facie* case that the Respondent violated section 14-404(a)(3)(ii).

Unprofessional Conduct in Practice of Medicine

In the Practice of Medicine

The Respondent contended that because his license had been suspended by the Board on April 22. 2009, he did not engage "in the practice of medicine" after that date. Thus, he was not subject to section 14-404(a)(3)(ii) (unprofessional conduct in the practice of medicine).

In support of his position, the Respondent referred to the definition of the practice of medicine set forth in section 14-101(n):

> (n) Practice medicine. --
>
> (1) "Practice medicine" means to engage, with or without compensation, in medical:
>
> (i) Diagnosis;
> (ii) Healing;
> (iii) Treatment; or
> (iv) Surgery.

(2) "Practice medicine" includes doing, undertaking, professing to do, and attempting any of the following:

(i) Diagnosing, healing, treating, preventing, prescribing for, or removing any physical, mental, or emotional ailment or supposed ailment of an individual:

1. By physical, mental, emotional, or other process that is exercised or invoked by the practitioner, the patient, or both; or

2. By appliance, test, drug, operation, or treatment;

(ii) Ending of a human pregnancy; and

(iii) Performing acupuncture as provided under § 14-504 of this title.

(3) "Practice medicine" does not include:

(i) Selling any nonprescription drug or medicine;

(ii) Practicing as an optician; or

(iii) Performing a massage or other manipulation by hand, but by no other means.

Md. Code Ann., Health Occ. § 14-101(n) (Supp. 2011).

The State emphasized that at the time of the alleged health care fraud and at the time the Board began its investigation, the Respondent still had a license subject to the Board's jurisdiction, although it was in a state of suspension.[17] The State contended that the Respondent

[17] Although both parties elicited testimony from Ms. Bramlet regarding the date the Board began its investigation (May 2009) and the date of the "expiration" of the Respondent's license after he failed to renew it by the September 30, 2010 renewal deadline, the Respondent did not appear to be asserting that the Board lacked jurisdiction in this matter based on an alleged lapse of his license. *Compare Salerian v. Md. State Bd. of Physicians*, 176 Md. App. 231, 246 (2007) (Appellant's investigation began when Board received complaint about Appellant, which was before license expired; license did not lapse pursuant to section 14-403(a)). Regardless, I agree with the Board that the Respondent was licensed at the time of the alleged acts under investigation and at the time of his alleged refusal to cooperate with the Board's investigation, which Ms. Bramlet testified began with a complaint in May 2009. *See* Md. Code Ann., Health Occ. § 14-101(g)-(i) (Supp. 2011). That was the case despite the Respondent's April 22, 2009 suspension as there was no evidence that he surrendered his license and the Board accepted that surrender, or that the license lapsed under section 14-403(a), which provides:

> § 14-403. Conditions for surrender of license, certification or registration
> (a) Agreement of Board required. -- Unless the Board agrees to accept the surrender of a license, certification, or registration of an individual the Board regulates, the individual may not surrender the license, certification, or registration nor may the license, certification, or registration lapse by operation of law while the individual is under investigation or while charges are pending.

Md. Code Ann., Health Occ. § 14-403(a) (2009).

was engaged "in the practice of medicine," as that term is defined in applicable statutory and case law, when he failed to cooperate in the Board's lawful investigation because the practice of medicine necessarily deals with licensure and regulation, including communication with the licensing entity regarding one's license. The Courts have defined the term to include aspects of physician behavior that go beyond the specific behavior set forth in section 14-101. Furthermore, in bringing these charges, the Board construed the practice of medicine to require a physician to respond to Board inquiry.

For the following reasons, I find that the State established a prima facie case that the Respondent's failure to cooperate in a lawful Board investigation occurred "in the practice of medicine."

Ms. Bramlet admitted on cross-examination that she did not know whether the Respondent engaged in any of the activities set forth in section 14-101(n) after he was suspended in April 2009. Nonetheless, as the State pointed out, the courts have not limited the "practice of medicine" to those activities. Based on my analysis of the following cases, I find that the Maryland appellate courts have expanded the meaning of the term "in the practice of medicine" sufficiently to include the failure of a licensee to cooperate in a lawful Board investigation.

In *Board of Physician Quality Assurance v. Banks*, the physician, Dr. Banks, engaged in sexually harassing conduct towards co-employees while he was on duty at a hospital. Dr. Banks argued that his behavior was not within the practice of medicine because, when it occurred, he was not "in the immediate process" of diagnosing, treating, or evaluating patients. *Board of Physician Quality Assurance v. Banks*, 354 Md. 59, 71-73 (1999). The Court of Appeals, however, noting that the "Board has a high degree of expertise in determining what constitutes

unprofessional conduct 'in the practice of medicine,'" rejected Dr. Banks's argument, and refused to more narrowly construe section 14-404(a)(3), as doing so "would lead to unreasonable results and render the statute inadequate to deal with many situations which may arise." *Id.* at 73, 76.

In *Finucan v. Maryland Board of Physician Quality Assurance*, the Board alleged that Dr. Finucan violated section 14-404(a)(3) by engaging in a series of sexual relationships with several female patients. The Court held that such conduct was "in the practice of medicine," stating, "[u]nethical conduct may indicate unfitness to practice medicine if it raises reasonable concerns that an individual abused, or may abuse, the status of being a physician in such a way as to harm patients or diminish the standing of the medical profession in the eyes of a reasonable member of the general public." *Finucan v. Maryland Board of Physician Quality Assurance*, 380 Md. 577, 595 and 601 (2004).

I found the recent cases of *Cornfeld v. State Board of Physicians* and *Kim v. Md. State Bd. of Physicians*,[18] to be particularly applicable to the case before me. In *Cornfeld*, the Court of Appeals considered whether making false statements to Board investigators,[19] constituted engaging in "professional misconduct in the practice of medicine" in violation of section 14-404(a)(3). *Cornfeld v. State Board of Physicians*, 174 Md. App. 456 (2007). The Court agreed with the Board that Dr. Cornfeld's dishonesty occurred "in the practice of medicine." *Id.* at 479. The Court stated:

> Misconduct reasonably may be considered to be in the practice of medicine when it "relates to the effective delivery of patient care." Such a relationship may be established by evidence that the physician abused his status as a physician in a manner that either harmed patients, created a substantial risk of harm to them, or diminished the standing of the medical profession as caregivers. The presence of

[18] The Court of Appeals granted certiorari in the *Kim* case but no decision had been rendered by the Court as of the time of the issuance of my decision.

[19] The Board also alleged that the physician made false statements to hospital peer reviewers.

> one or more of these effects sufficiently ties the physician's misconduct to the exercise of medical judgment and duties to warrant a finding that it occurred "in the practice of medicine."

Id. at 477-78 (quotations omitted).

The Court concluded that "unreasonable results" would occur if it were to hold that Dr. Cornfeld's false statement to the Board did not fall within the scope of practicing medicine." *Id.* at 481-82. It stressed that the "Board's mission [is] to regulate the use of physician's licenses in Maryland . . . in order to "protect and preserve the public health." *Id.* at 481. The Court also noted that "[t]he Board's conclusion that Dr. Cornfeld's false statements to the hospital and the Board constituted 'professional misconduct in the practice of medicine' has 'considerable weight' in this Court, because the Board's expertise in interpreting and applying. . . section 14-404(a) is entitled to judicial respect." *Id.* at 479 (citations omitted).

In *Kim*, the Court of Special Appeals held that a physician's failure to disclose malpractice suits on his license renewal application occurred "in the practice of medicine," as that term is used in section 14-404(a)(3). *Kim v. Md. State Bd. of Physicians*, 196 Md. App. 362 (2010), *cert. granted*, 418 Md. 397 (2011). The Court held:

> In this case, appellant argues-just as Dr. Cornfeld did-that his false statements to the Board did not logically occur "in the practice of medicine." We reject this argument for substantially the same reasons we rejected Dr. Cornfeld's argument. First, appellant's misconduct was sufficiently intertwined with the "effective delivery of patient care." As the ALJ in this case noted, a physician's failure to disclose the existence of a medical malpractice lawsuit on his license renewal application constitutes serious misconduct that (1) may involve substantial risk of harm to patients, and (2) may diminish the standing of the medical profession as caregivers. The failure to disclose such information, the ALJ explained, "interferes with the Board's obligation to investigate the proper delivery of patient care, and its obligation to protect the public health and adequately regulate the medical profession." Second, we recognize and pay deference to the Board's interpretation of §14-401--a statute it administers--as including statements made in applications to the Board. Indeed, this is not the first time the Board has set forth that interpretation.

> Even though Cornfeld concerned false *testimony* to the Board, not false *statements* on a Board application, the Board in Cornfeld cited its own precedents to support its position that "*making a false application*," in addition to "submitting false testimony for a Board proceeding" would "'clearly [fall] within the practice of medicine.'"
> . . .
>
> Beyond those reasons, we acknowledge and apply this Court and the Court of Appeals' consistent pattern of rejecting narrow interpretations of the phrase "in the practice of medicine." Ultimately, we agree with the administrative finding that appellant's failure to disclose the Wagner case in his license renewal application occurred "in the practice of medicine," as that term is used in § 14-404(a)(3) and § 14-404(a)(11).

Kim, 196 Md. App. at 377-78.

The Respondent argued that the facts in his case are distinguishable from the facts in the aforementioned cases because the physicians in those cases were actively practicing medicine, as defined in section 14-101(n), at the time of the activities which were the subjects of the Board's charges. The Respondent maintained that the failure to cooperate in a lawful investigation by the Board does not in and of itself constitute "the practice of medicine." I disagree. Similar to the conduct of the physicians in *Cornfeld* and *Kim*, the Respondent's conduct was intertwined with the effective delivery of patient care. The Respondent's cooperation with the Board in determining his level of competence or professionalism was integral to the Respondent's medical practice. The Respondent's failure to disclose and provide requested information to the Board in the course of its investigation constitutes serious misconduct that may involve substantial risk of harm to patients, may diminish the standing of the medical profession as caregivers, and "interferes with the Board's obligation to investigate the proper delivery of patient care, and its obligation to protect the public health and adequately regulate the medical profession." *Kim*, 196 Md. App. at 377.

I note also that this case does not involve an investigation by a governmental agency whose

purpose is unrelated to the profession of medicine, *e.g.*, the Internal Revenue Service. It involves an investigation by an agency charged with the licensing and disciplining of physicians.

I find that the reasons set forth above were sufficient in and of themselves to support my conclusion; however, I also note that weight must be given to the Board's conclusion, as evidenced by its issuance of charges against the Respondent, that the Respondent was engaging in the practice of medicine because of the Board's expertise in interpreting and applying section 14-404(a). *Cornfeld*, 174 Md. App. at 479.

Thus, I find that the Respondent's failure to provide and disclose the requested information to the Board in the course of its investigation occurred "in the practice of medicine," as that term is used in section 14-404(a)(3)(ii).

Unprofessional Conduct

Void for Vagueness

The Respondent argued that the term "unprofessional conduct" is undefined in the Health Occupations Article, is vague, permitting a broad range of subjective interpretation. Thus, section 14-404(a)(33) is void for vagueness and violates the Respondent's due process rights under the Fourteenth Amendment to the U.S. Constitution and Article 24 of the Maryland Declaration of Rights because it does not provide fair notice of what conduct is prohibited.

This issue was addressed by the Court of Appeals in *Finucan*. In that case, Dr. Finucan claimed that the prohibition of "immoral or unprofessional conduct" contained in section 14-404(a)(3) (1981, 2000 Repl. Vol., 2003 Supp.) was, on its face, unconstitutionally vague, because it did not explicitly prohibit a physician from engaging in sexual relations with patients, nor fairly warn the physician that such conduct falls within its proscription. The Court stated:

> The void for vagueness contention finds conceptual nourishment in the Fourteenth Amendment's guarantee of procedural due process. . . . Generally, courts employ two criteria in their analysis of whether a statute is void for vagueness. . . . First, a court determines whether the statute adheres to the "fair notice principle.". . . In discussing the fair notice principle, we have held that "due process commands that persons of ordinary intelligence and experience be afforded a reasonable opportunity to know what is prohibited, so that they may govern their behavior accordingly." . . . Thus, a statute will survive a challenge that it is unconstitutionally vague if it uses plain language that is understandable to a person of ordinary intelligence. . . .
>
> The next touchstone in the analysis counsels that a statute may be stricken for vagueness if it does not "provide legally fixed standards and adequate guidelines for police, judicial officers, triers of fact, and others whose obligation it is to enforce, apply and administer the penal laws." . . . The purpose behind this second factor is to avoid resolving matters in an arbitrary or discriminatory manner. . . . A statute, however, is not void for vagueness "merely because it allows for the exercise of some discretion.". . . A statute is unconstitutional only when it "is so broad as to be susceptible to irrational and selective patterns of enforcement . . . ."
>
> . . .
>
> A statute prohibiting "unprofessional conduct" or "immoral conduct," therefore, is not per se unconstitutionally vague; the term refers to "conduct which breaches the rules or ethical code of a profession, or conduct which is unbecoming a member in good standing of a profession." . . .[20]

Finucan, 380 Md. at 591-93 (citations omitted).

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[20] In support of his position, the Respondent cited *Greynad v. City of Rockford, 408 U.S. 104 (1972)* and *Cohen v. Cal.*, 403 U.S. 15 (1971). Those cases were not factually similar to this case, however. They involved a criminal ordinance and statute, which were not written specifically for a licensing context. Furthermore, in *Greynad*, the Court found the ordinance constitutional, holding:

> Although the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted. We do not have here a vague, general "breach of the peace" ordinance, but a statute written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of the school. Given this "particular context," the ordinance gives "fair notice to those to whom [it] is directed." . . . [T]he ordinance here clearly "delineates its reach in words of common understanding."

Id. at 112.

In this case, in bringing charges against the Respondent, the Board has made a determination that the common judgment of the profession is that the failure to cooperate with a lawful investigation by the Board constitutes unprofessional conduct. Indeed, one does not have to be a member of the medical profession to comprehend the very basic responsibility of cooperating with the authority that licenses and oversees that profession. Thus, I find that the statute does provide fair notice of what was prohibited.[21] I further find that such conduct is unbecoming a member in good standing in the profession.

Impact of Failure to Respond

The Respondent further contended that any failure to cooperate did not frustrate the Board's investigation since the Board never pursued the investigation beyond its initial requests for information. He noted that the Board never filed charges against the Respondent based on the initial reason for the investigation, *i.e.*, possible health care fraud.

Again, the Respondent's position lacks merit. First, he presented no legal authority for his assertion that the Board must show that it was prejudiced by a licensee's failure to respond in order to find him or her in violation of section 14-404(a)(3)(ii) or (33). Second, the information requested would have enabled the Board to pursue its investigation by, *e.g.*, issuing future subpoenas for records kept at various practice locations. The potential harm to the public in any such concealment is substantial.

[21] I also again note that in her July 20, 2010 correspondence, Ms. Bramlet put the Respondent on notice that if he failed to provide the requested information and records, the case would be considered for disciplinary action based on the Respondent's failure to cooperate.

MERITS OF THE CASE

Failure to Cooperate with Lawful Investigation

Lawful Investigation

In addition to the aforementioned issues raised by the Respondent in his Motion for Judgment, the Respondent argued he should not be found guilty of violating section 14-404(a)(33) because the Board was not conducting a lawful investigation. Rather, it was acting as a "Trojan Horse" for the FBI with regard to the federal investigation.

The Respondent emphasized that the media report which initiated the relevant investigation had more to do with the federal government allowing the disclosure of patients' personal identifying information, which was obtained during its investigation, than with health care fraud allegedly perpetrated by the Respondent. Thus, he questioned the legitimacy of the Board's investigation.

For the following reasons, I found no merit in that contention.

As discussed above, the Board has the legal authority to conduct investigations of allegations set forth in complaints. *See* Md. Code Ann., Health Occ. § 14-401(a), (c)(1), (i) and (k)(1). *See also* Md. Code Ann., Health Occ. § 14-206(a).

COMAR 10.32.02.02 defines a Complaint as follows:

> (10) Complaint.
>
> (a) "Complaint" means a written allegation that a health care provider has committed a prohibited act for which the Board can take disciplinary action or deny licensure.
>
> (b) "Complaint" includes, but is not limited to, the following:
>
> . . .
>
> (vi) A report from another federal or state agency or court in any country, state, or jurisdiction;

. . .

(x) News article;

. . .

(xii) Other information, from whatever source, which warrants investigation.

Thus, the Board was acting pursuant to its lawful authority. Furthermore, the Respondent, who was not present at the hearing, presented absolutely no evidence as part of the case in chief to support his position that the investigation was not lawful.

Adequacy of Response

For the same reasons set forth above with regard to the Respondent's Motion for Judgment, I find that a preponderance of the evidence established that the Appellant violated section 14-404(a)(33) and reject the Respondent's legal arguments to the contrary. The State's exhibits clearly showed that the Respondent never cooperated with the Board in its lawful investigation by providing requested information. The Respondent submitted no evidence outside of the documents submitted into evidence by the State and his cross-examination of Ms. Bramlet.

Ms. Bramlet presented as a confident and competent professional, with over six years experience as a lead compliance analyst, conducting investigations lodged against licensees in Maryland, as well as supervising a team of investigators. Except for her conclusion, which I have discussed above, that the Respondent was in violation of section 14-404 based on his failure to respond to the Board's Subpoenas Duces Tecum, I found her testimony regarding what took place to be straightforward and supported by the documents in evidence. Moreover, I note that it was not necessary for me to weigh Ms. Bramlet's testimony against the Respondent's testimony as he did not appear. Nor was it necessary to weigh the testimony of witnesses or Affidavits on behalf of the Respondent, as none were before me.

Unprofessional Conduct in the Practice of Medicine

For the same reasons set forth above with regard to the Respondent's Motion for Judgment, I find that a preponderance of the evidence established that the Appellant violated section 14-404(a)(3)(ii) and reject the Respondent's legal arguments to the contrary. I find that cooperation with a lawful investigation by the Board is encompassed in the "practice of medicine" and that such a failure to cooperate constitutes unprofessional conduct in the practice of medicine,

SANCTION

The State requested that I recommend the revocation of the Respondent's license.

The Respondent asked that if I impose a sanction, it be a continued suspension rather than the revocation recommended by the State.

I agree with the State's recommendation because the Respondent has yet to provide any of the requested information. In addition, he failed to even appear for the hearing. Thus, I find that he has continued to show a blatant disregard for the licensing and regulatory process. It is also important that the Board be able to rely upon the forthrightness and cooperation of physicians in conducting its investigations. The information requested would have enabled the Board to pursue its investigation and the potential harm to the public from the Respondent's failure to cooperate was substantial. Furthermore, revocation may act as a deterrent to the Respondent and other physicians from this type of conduct in the future.

CONCLUSIONS OF LAW

I conclude that the Respondent did engage in unprofessional conduct and failed to cooperate with a lawful investigation conducted by the Board in violation of sections 14-404(a)(3)(ii) and (33)

of the Health Occupations Article. I further conclude that, as a result, the Board may discipline the Respondent. Md. Code Ann., Health Occ. § 14-404(a) (Supp. 2010).

PROPOSED DISPOSITION

I **PROPOSE** that the charges filed by the Board on November 8, 2010 against the Respondent be **UPHELD;** and I further

PROPOSE that the Board revoke the Respondent's license to practice medicine in the State of Maryland.

September 27, 2011
Date Decision Mailed

Eileen C. Sweeney
Eileen C. Sweeney
Administrative Law Judge

ECS/ecs
#126011

NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party may file exceptions, in writing, to this Proposed Decision with the Board of Physicians within fifteen days of issuance of the decision. Md. Code Ann., State Gov't § 10-216 (2009) and COMAR 10.32.02.03F. The Office of Administrative Hearings is not a party to any review process.

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