

BEFORE THE WEST VIRGINIA BOARD OF MEDICINE

WEST VIRGINIA BOARD OF MEDICINE,

Petitioner,

V.

Complaint No. 21-96-W

DAVID NATHANIEL SMITH, M.D.,

Respondent.

WEST VIRGINIA BOARD OF MEDICINE'S
FINAL DECISION AND ORDER

On December 11, 2023, the West Virginia Board of Medicine met and considered the “Hearing Examiner’s Recommended Findings of Fact, Conclusions of Law, and Recommended Decision” issued by Hearing Examiner Janis I. Reynolds, Esquire, on November 13, 2023, in this matter. After considering the recommended decision, and the underlying record adduced in this matter, the Board of Medicine voted to adopt and accept the recommended decision.

Wherefore, having adopted and accepted the recommended decision, its contents are hereby incorporated in their entirety by reference in this Final Decision and Order. A copy of the same is attached to this Final Decision and Order. It is hereby **ORDERED** that the “Hearing Examiner’s Recommended Findings of Fact, Conclusions of Law and Recommended Decision” is hereby accepted and adopted.

Accordingly, Respondent’s license to practice medicine and surgery in this State is hereby **REVOKED** as permitted by West Virginia Code § 30-3-14(j)(4). The revocation is effective upon entry of this Order.

It is further **ORDERED** that Respondent shall pay the costs and expenses of this proceeding, as permitted by 11 C.S.R. 1A § 12.3.g. The costs and expenses assessed to

Respondent shall be paid to the Board within thirty (30) days of the issuance of an invoice by the Board.

Respondent has the right to appeal this Final Decision and Order to the Intermediate Court of Appeals of West Virginia. Notice of Appeal must be filed with the Intermediate Court of Appeals of West Virginia within thirty (30) days of issuance of this Final Decision and Order, with a copy served on the Board of Medicine.

ENTERED THIS 14th DAY OF December, 2023.



ASHISH P. SHETH, MD
PRESIDENT



MATTHEW Q. CHRISTIANSEN, MD, MPH
SECRETARY

BEFORE THE WEST VIRGINIA BOARD OF MEDICINE

**WEST VIRGINIA BOARD OF MEDICINE,
Petitioner,**

v.

Complaint No. 21-96-W

**DAVID NATHANIEL SMITH, M.D.,
Respondent.**

**HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDED DECISION**

PROCEDURAL HISTORY

The hearing in this matter convened before the Hearing Examiner at 9:30 a.m. on May 23, 2023, in the Hearing Room of the West Virginia Board of Medicine ("Board") at 101 Dee Drive in Charleston, West Virginia pursuant to the Board's Complaint and Notice of Hearing ("CNOH") dated March 13, 2023. The Board's was present by its counsel, Greg S. Foster. The Board also appeared through its Executive Director, Mark A. Spangler. The Board's Paralegal, Joseph A. Lewis, was also present throughout the proceeding. Dr. Smith failed to appear at the hearing.

The Board presented the testimony of three witnesses: Leslie A. Thornton, Chief Board Investigator and Supervisor of Investigation, Complaints and Division, Mr. Spangler, and Ernie Kirchin, an Investigator employed by the North Carolina Medical Board.

The Board offered forty-one (41) Exhibits in support of its complaint against Dr. Smith. Each of the Board's Exhibits (Exhibits 1-41) were admitted into evidence and made part of the record. Some of the Board's Exhibits were placed under seal at hearing in accordance with the CNOH's protective order and W. VA. CODE § 30-3-14(p) to maintain

the confidentiality of records and protect personally identifiable and/or medical information of Dr. Smith.

At the conclusion of the hearing, the Undersigned set a briefing schedule for the parties to submit proposed findings of fact and conclusions of law on or before June 30, 2023. Despite his failure to appear at the hearing, Dr. Smith was offered the opportunity to obtain a copy of the hearing transcript, at his own expense, and to provide a written submission for the Hearing Examiner's consideration. (See Findings of Fact 100 - 110 regarding the subsequent changes to this briefing schedule.)

This matter became mature for decision on August 28, 2023, after the events listed in Findings of Fact 100 - 110 and a subsequent time period was allowed for Dr. Smith to respond. The Board's Respondent's Proposed Findings of Fact and Conclusions of Law were submitted in a timely manner pursuant to W. Va. Code R. § 11-3-13.

EXHIBITS¹

1. Initiated Complaint - BOM
2. Disciplinary Alert From FSMB
3. NC Consent Order
4. BOM Current Report of License, 8/18/21
5. BOM Current Report of License, 2/28/23
6. Letter, BOM to Smith, with initiated complaint, 10/12/21
7. Letter, BOM to Smith, with initiated complaint, 12/2/21
8. Letter, BOM to Smith, with initiated complaint, 12/29/21
9. Email, BOM to Smith, Final Notice, 12/29/21
10. Letter, BOM to Smith, with initiated complaint, 3/8/22
11. Letter, BOM to Smith, with Subpoena, 3/31/22
12. Letter, BOM to Smith, with Subpoena, 3/31/22
13. Email, BOM to Smith, with documents, 4/14/22
14. Email, Smith to BOM, with documents, 5/27/22
15. NC Amended Consent Order, 10/20/22

¹The Exhibits placed under seal at the hearing were Exhibits 4, 30, 31, 32, 33, 34, 38 and 39.

16. NC Partial Relief of Consent Order, 2/24/23
17. VA License Suspension Order, 8/30/21
18. KY Emergency Order of Restriction, 11/4/21
19. KY Order of Revocation, 3/21/22
20. WV BOM Complaint, Notice of Hearing, etc., 3/14/23
21. Proof of Service by Kirchin, 3/22/23
22. Letter, BOM to Smith with Subpoena, 7/26/22
23. Letter, BOM to Smith with Subpoena, 7/26/22
24. Email, Smith to Foster, 8/10/22
25. Email, Foster to Smith, with documents, 8/11/22
26. Letter, Thornton to Smith, with documents, 8/22/22
27. Letter, Thornton to Smith, with documents, 8/22/22
28. Email, Smith to Frame, with certificate, 9/7/22
29. Letter, Spangler to Smith, 9/9/22
30. Email, Foster to Smith, 9/10/22
31. Letter, Spangler to Smith, 10/4/22
32. Letter, Spangler to Smith, 10/4/22
33. Email, Foster to Smith, with documents, 10/4/22
34. Email, Foster to Smith, 10/21/22
35. Email, Thornton to Smith, with attachment, 10/25/22
36. Email, Foster to Smith, 11/14/22
37. Email, Smith to Foster, 3/2/23
- 38A. Affidavit and Authorization for Release of Information
- 38B. Uniform Application for Licensure
- 38C. Initial Application - Medical Doctor
- 38D. State Licensure Verifications, Multiple
- 38E. Address Questionnaire for Pending Licensees
39. Emails, Walker to Smith, 5/24/21-7/1/21
40. Letter, Spangler to Committee, 3/11/22
41. WVBOM Agreement to Extend Deadline for Final Ruling

ISSUE

The issue before the Undersigned is whether the Board has proven the violations of laws and rules alleged in the Complaint and Notice of Hearing by clear and convincing evidence.

The Board identified four Counts in its March 13, 2023 Complaint and Notice of Hearing ("CNOH"). The CNOH sets forth Four (4) Counts of professional misconduct against Dr. Smith. Counts 1 through 3 charge Dr. Smith with professional misconduct for

having disciplinary action taken against his medical licenses by other state medical boards, and Count 4 charges Dr. Smith with obtaining his initial West Virginia medical license by fraudulent misrepresentation.

Count 1 relates to a Consent Order entered by the North Carolina Medical Board ("NC Board") on July 19, 2021, which suspended Dr. Smith's North Carolina medical license for two years. This suspension was immediately stayed, and the NC Board imposed certain restrictions, conditions and limitations on Dr. Smith's practice of medicine in North Carolina. **Count 2** relates to the Emergency Order of Restriction issued November 4, 2021, and the subsequent Order of Revocation issued March 21, 2022, of Dr. Smith's Kentucky medical license by the Kentucky Medical Board. **Count 3** relates to the suspension of Dr. Smith's Virginia medical license by the Virginia Medical Board on August 30, 2021. And **Count 4** charges Dr. Smith with obtaining his West Virginia medical license by fraudulent misrepresentation for failing to disclose disciplinary actions pending against him in North Carolina when Dr. Smith applied for, and obtained, initial medical licensure in West Virginia in 2021. It is noted Dr. Smith did not submit a response to the CNOH.

FINDINGS OF FACT

1. The West Virginia Board of Medicine is the duly constituted body responsible for licensure and professional discipline of allopathic physicians in West Virginia. [Tr. at 80.]

2. The Board's mission is to protect the public through the licensing, discipline and regulation of its licensees. [Tr. at 80.]

3. Dr. Smith began the application process for an initial West Virginia license on March 1, 2021. [Exhibit 38A; Tr. at 92.]

4. Dr. Smith's application was fully completed on July 1, 2021, upon submission of his Address Questionnaire, the final component part of the initial licensure application process. [Exhibit 38E; Tr. at 101-102.]

5. Following completion of the application process, Dr. Smith was granted an unrestricted license to practice medicine and surgery in West Virginia, License No. 30635, on July 12, 2021. [Exhibits 4 & 5; Tr. at 106.]

6. Dr. Smith's self-identified medical specialty is cardiovascular disease. [Exhibits 4 & 5.]

7. At all times since the issuance of his West Virginia medical license on July 12, 2021, Dr. Smith's West Virginia medical license has remained in active status and unencumbered. [Exhibits 4 & 5; Tr. at 86.]

8. Dr. Smith's West Virginia medical license was due to expire on June 30, 2023, unless renewed prior to that date.² [Exhibits 4 & 5; Tr. at 120-122.]

**Procedural Background of Initiated Complaint
No. 21-96-W and Delay Caused by Dr. Smith**

9. On September 21, 2021, the Complaint Committee of the Board issued Initiated Complaint No. 21-96-W against Dr. Smith based upon an alert from the Federation of State Medical Boards received on August 17, 2021. This alert informed the Board that disciplinary action had been taken against Dr. Smith's North Carolina medical

²At this point in time, Dr. Smith has not requested to renew his license.

license pursuant to a Consent Order entered by the North Carolina Board ("NC Board") on July 19, 2021. [Exhibits 1 & 2; Tr. at 18-22.]

10. As this North Carolina Consent Order ("NCCO") was formally entered one week after Dr. Smith was issued an unrestricted West Virginia medical license on July 12, 2021, it is clear Dr. Smith knew at the time he applied for a West Virginia license that he was under investigation in North Carolina. [Exhibits 3, 4, & 5.]

11. The Initiated Complaint No. 21-96-W ("Complaint No. 21-96-W") alleged that Dr. Smith obtained his West Virginia medical license by fraudulent misrepresentation, as he failed to disclose he had disciplinary action(s) pending against his license in North Carolina when he applied for medical licensure in West Virginia. [Exhibits 1 & 3; Tr. at 19.]

12. As detailed below, the Board's investigation into Complaint No. 21-96-W was significantly delayed because of Dr. Smith's failure to timely respond and/or cooperate with the Board's investigation.

13. Dr. Smith listed his preferred contact address of record with the Board as P.O. Box 511, Waxhaw, North Carolina 28173. [Exhibits 5 & 38E; Tr. at 33.]

14. Ms. Thornton attempted to serve Complaint No. 21-96-W upon Dr. Smith via certified mail at his preferred address of record on October 12, 2021, December 2, 2021, and December 29, 2021. These mailings went unclaimed and were returned to the Board. [Exhibits 6, 7, & 8; Tr. at 31-35.]

15. On December 29, 2021, Ms. Thornton notified Dr. Smith, via email, that Complaint No. 21-96-W had been initiated against him by the Complaint Committee, and this Complaint had been sent to him via certified mail. Ms. Thornton informed Dr. Smith that he needed to collect his mail from the post office. Dr. Smith responded to Ms.

Thornton's email on December 29, 2021, but did not collect his mail, which was returned to the Board unclaimed. [Exhibits 8 & 9; Tr. at 36-38.]

16. By correspondence dated March 8, 2022, the Board successfully served Dr. Smith, via certified mail, with Complaint No. 21-96-W at his home address at 1600 Churchill Downs Drive in Waxhaw, North Carolina. The complaint was delivered to Dr. Smith on March 14, 2022. [Exhibit 10; Tr. at 38-39.]

17. Dr. Smith was required to submit a written response to the complaint, on or before, April 7, 2022, but failed to do so. [Exhibit 10; Tr. at 39, 42-43.]

18. On March 11, 2022, the Board provided the Complaint Committee, the Complainant, with the six-month status report, in accordance with W. VA. CODE § 30-1-5(c). [Exhibit 40 at BOM 422; Tr. at 116-117.]

19. Also on March 11, 2022, the Board served Dr. Smith with the six-month status report regarding Complaint No. 21-96-W, pursuant to W. VA. CODE § 30-1-5(c). This six-month status report was successfully delivered to Dr. Smith, via certified mail at his home address, on March 15, 2022. [Exhibit 40 at BOM 423-426; Tr. at 116-118.]

20. On April 2, 2022, the Board successfully served Dr. Smith, via certified mail at his home address, with a subpoena for his appearance before the Complaint Committee at its May 15, 2022 regular meeting. [Exhibit 11; Tr. at 40-41.]

21. By email dated April 14, 2022, Ms. Thornton again provided Dr. Smith with Complaint 21-96-W and a final opportunity to submit a written response on or before May 11, 2022. Ms. Thornton's email also attached the previously served subpoena for his appearance at the Complaint Committee's May 15, 2022 meeting. [Exhibit 13; Tr. at 42-43.]

22. Dr. Smith failed to submit a response to Complaint No. 21-96-W or otherwise communicate with the Board by the extended May 11, 2022 deadline. [Tr. at 43.]

23. Dr. Smith failed to appear before the Complaint Committee on May 15, 2022, as directed by the subpoena. [Tr. at 43.]

24. Via email on May 27, 2022, Dr. Smith submitted a response to Complaint 21-96-W. [Exhibit 14; Tr. at 43-44.]

25. This May 27, 2022 response stated: 1) Dr. Smith was not aware he was licensed in West Virginia; 2) He did not expect he would be issued a Consent Order by North Carolina, so he had no action to disclose; 3) The Consent Order was not warranted; and 4) Since he did not intentionally try "to mislead or apply under false pretenses, . . . any further action against [him] should be off the table." [Exhibit 14 at BOM 215).

26. Dr. Smith was again subpoenaed to appear before the Complaint Committee at its September 11, 2022 regular meeting. Multiple attempts were made to serve Dr. Smith with this subpoena, via certified mail at both his preferred contact address of record and his home address, all of which were returned unclaimed. [Exhibits 22, 23, 26, & 27; Tr. at 62-65.]

27. Dr. Smith was finally served with the subpoena for his September 11, 2022 appearance via email on August 11, 2022. [Exhibit 25; Tr. at 64.]

28. On September 7, 2022, Dr. Smith advised the Board, via email, that he was unable to appear in person to attend the Complaint Committee's September 11, 2022 meeting. [Exhibit 28; Tr. at 66-67.]

29. Dr. Smith was subpoenaed to appear before the Complaint Committee at its November 13, 2022 regular meeting. The Board's attempts to serve Dr. Smith with this

subpoena, via certified mail at both his addresses, were returned to the Board unclaimed. [Exhibits 31 & 32; Tr. at 69-71.]

30. The Board was finally able to serve Dr. Smith with a subpoena for his November 13, 2022 appearance before the Complaint Committee via email on October 4, 2022. [Exhibit 33; Tr. at 71.]

31. In email correspondence with the Board, Dr. Smith sought to defer his November 13, 2022 appearance until a later date or to appear virtually. Dr. Smith's deferral request was denied, but he was permitted to appear virtually before the Complaint Committee at its November 13, 2022 meeting. [Exhibit 34; Tr. at 71.]³

32. Dr. Smith appeared before the Complaint Committee via video conference at its November 13, 2022 meeting. [Tr. at 72.]

33. After the Complaint Committee completed its investigation, the Committee filed this report with the Board. The Board, at its January 8, 2023 meeting, found probable cause to institute formal disciplinary charges against Dr. Smith. [Exhibit 20 at BOM 619 - 36; Tr. at 54.]

34. On March 2, 2023, before this disciplinary hearing was scheduled, Dr. Smith falsely reported to the Board that his North Carolina Consent Order ("NCCO") had been fully lifted. This assertion was untrue as the NCCO still remained in place as of the day of the hearing, although some partial relief had been granted. [Exhibit 37; Tr. at 73-74.]

³It should be noted that Dr. Smith had reported he was unable to travel to appear before the Complaint Committee, but he had flown to the Virgin Islands in September 2022 to work at a hospital there. [Tr. at 72 - 73]

35. Due to the delay caused by Dr. Smith's false assertions, the Board and Complaint Committee executed an extension agreement to extend the deadline to issue a final ruling with respect to Complaint No. 21-96-W while the matter proceeded to hearing, in accordance with W. VA. CODE § 30-1-5(c). [Exhibit 41; Tr. at 118-120.]

36. On March 13, 2023, the Board issued the CNOH against Dr. Smith, setting forth the Four (4) counts of professional misconduct against Dr. Smith and scheduling the matter for public hearing on May 23, 2023. [Exhibit 20 at BOM 610-624; Tr. at 54-56.]

37. Because of the prior failures of Dr. Smith to pick up/accept his certified mail, the CNOH was served on Dr. Smith, via hand-delivery, by Ernie Kirchin ("Mr. Kirchin"), an investigator employed by the North Carolina Board. Mr. Kirchin served Dr. Smith with a sealed envelope containing the CNOH and the Board's Mandatory Disclosures. These documents had been previously mailed to Mr. Kirchin by Ms. Thornton. [Exhibits 20 & 21; Tr. at 57-59; 126-129.]

38. Mr. Kirchin effected service on Dr. Smith by personally serving him with the CNOH on March 22, 2023, at an Arby's restaurant located at 9615 Hwy 521 in Indian Land, South Carolina. [Exhibit 20; Tr. at 126-129.]

The North Carolina Consent Order

39. On July 19, 2021, the NC Board entered into a Consent Order ("NCCO") with Dr. Smith. This Consent Order was in response to the complaints the NC Board had received in the spring of 2019 against Dr. Smith. [Exhibit 3; Tr. at 22, 24.]

40. Dr. Smith personally signed the NCCO on July 1, 2021, prior to the issuance of his West Virginia license on July 12, 2021. [Exhibit 3 at BOM 015; Tr. at 26.]

41. The NCCO found Dr. Smith engaged in professional misconduct due to his failure to be present and to properly supervise and oversee operations, employees and patient care at multiple medical clinics that he owned or was named a "straw" owner of, which resulted in the mismanagement of the clinics, patient care deficiencies, and lack of supervision over advanced practice practitioners at these clinics. [Exhibit 3; Tr. at 23.]

42. The facts of the NCCO specifically provide as follows:

Dr. Smith owns Premier Cardiology in Charlotte. The practice was managed by an outside entity and employed a nurse practitioner ("NP"). In the spring of 2019, the Board received complaints that the NP became the only clinician consistently present at the practice seeing patients[,] and that Dr. Smith was neglecting the practice. The allegations of neglect included a patient not being informed of diagnostic test results. In addition to not informing the patient or her primary care physician of the test results, Dr. Smith reportedly failed to follow up on these diagnostic studies and formulate a treatment plan in response to the test results. When the patient attempted to contact Dr. Smith to learn of test results, she was either unable to reach him or unable to leave messages on his voicemail. The Board received other complaints from patients being unable to reach Dr. Smith despite numerous phone calls.

During this period of time, Dr. Smith accepted other employment, including becoming the registered owner and Medical Director of Dynamic Health (a practice ostensibly owned by a chiropractor which offered integrative medicine therapies), a low testosterone clinic, and an opioid use disorder treatment or "Suboxone" clinic. Dr. Smith also accepted locum tenens assignments, some of which were out of state. These additional practices and work assignments together contributed to Dr. Smith's lack of presence at Premier Cardiology.

The employed NP who was left running Premier Cardiology received little supervision from Dr. Smith. Admission orders and other necessary documents went unsigned by Dr. Smith, causing the practice to lose revenue. The NP and other staff employed by Premier Cardiology's outside management company reported that by the end of their employment at Premier Cardiology, they were essentially working without pay.

In 2019, Dr. Smith became the owner of the aforementioned Dynamic Health Medical Group, PLLC. Dynamic Health markets itself as an anti-aging medical practice. Dynamic Health & Pain Management was the subject of a prior Board investigation for violating the Corporate Practice of Medicine Doctrine. As a general rule, with few exceptions none of which are applicable here, medical practices must be owned by licensees of the Board. Dynamic Health attempts to circumvent the rule of physician ownership by setting up a physician as a "straw owner." A "straw owner" has no control over the practice, does not enjoy the profits of the practice, does not control the revenue of the practice, and cannot sell his or

her ownership interest in the practice without the permission from the *de facto* lay owner, who in this case was Peter Cox, DC.

A medical practice which follows the straw owner model of health care generally relies on advanced practice practitioners ("APP"), primarily physician assistants and nurse practitioners, to provide direct care to patients. The physician straw owner of the practice also serves as the primary supervising physician for the APPs and usually is not on site at the practice. Dr. Smith was reported to be rarely at the practice despite being the primary supervising physician for the APPs employed by Dynamic Health. Not only did Dr. Smith agree to supervise the APPs at Dynamic Health, but he also supervised multiple APPs at the low testosterone clinic as well as his Suboxone clinic. Interviews of those APPs confirmed a similar pattern of Dr. Smith rarely being present at the clinics and that he provided little supervision of the APPs who provided direct patient care.

[Exhibit 3 at BOM 008-010.]

43. The NCCO found that Dr. Smith's conduct constituted unprofessional conduct in violation of N.C. Gen. Stat. § 90-14(a)(6), and further that Dr. Smith aided and abetted the unlicensed corporate practice of medicine in violation of N.C. Gen. Stat. § 90-14(a)(7).

[Exhibit 3.]

44. Pursuant to the NCCO, Dr. Smith's North Carolina medical license was suspended for two years. But, that suspension was "stayed" pursuant to the following conditions, restrictions and limitations:

a. Dr. Smith shall, at his own expense, participate in an executive coaching program to be approved in writing by the North Carolina Board's Office of Medical Director.

b. Dr. Smith shall practice in a hospital or group practice setting and have a practice monitor, with both the practice setting and monitor, and any changes thereto, to be approved in advance by the North Carolina Board's Office of Medical Director.

c. Dr. Smith shall not own or operate his own practice, nor shall he be the medical director of a practice.

d. Dr. Smith shall not be the primary supervising physician for any advance practitioner ("APP"), specifically a physician assistant, nurse practitioner, or clinical pharmacist practitioner. Dr. Smith may be designated as a back-up supervising physician for an APP.

[Exhibit 3 at BOM 011-12; Tr. at 25-26.]

45. On October 20, 2021, the North Carolina Board and Dr. Smith entered an Amended Consent Order solely to provide a limited exception, at Dr. Smith's request, to restriction (b) of the original Consent Order. Specifically, pursuant to the Amended Consent Order: "[T]he requirement for a practice monitor and/or pre-approval of a hospital setting shall not apply to locum tenens cardiology assignments and/or call coverage for care provided in a locums setting." [Exhibit 15; Tr. at 46-48.]

46. Other than the limited exception described above, all other conditions, restrictions and limitations of the NCCO remained in effect. [Exhibit 15; Tr. at 47-48.]

47. On February 24, 2023, the North Carolina Board entered a Partial Relief of Consent Order Obligations with respect to Dr. Smith. This Order only relieved Dr. Smith of the requirement to complete the executive coaching program, as he had successfully completed that requirement on March 22, 2022. All other conditions, restrictions and

limitations set forth in the North Carolina Consent Order, as Amended, remained in effect, and continue to remain in effect to this day. [Exhibit 16; Tr. at 48-49.]

Actions Against Dr. Smith's Medical Licenses in Virginia and Kentucky

48. While the Board's investigation into Complaint No. 21-96-W was ongoing, other states, where Dr. Smith held medical licensure, took disciplinary action against Dr. Smith based upon the NCCO. [Tr. at 49.]

49. On August 30, 2021, based upon the NCCO, the Virginia Department of Health Professional ("Virginia Board") issued an Order of Mandatory Suspension that suspended Dr. Smith's Virginia medical license in accordance with Virginia Code § 54.1-2409. [Exhibit 17; Tr. at 50.]

50. On November 4, 2021, the Commonwealth of Kentucky Board of Medicine issued an Emergency Order of Restriction against Dr. Smith's Kentucky medical license based upon the NCCO. [Exhibit 18 at BOM 038-043; Tr. at 51.]

51. The Kentucky Board's Emergency Order of Restriction imposed restrictions on Dr. Smith's Kentucky license that were reciprocal in nature to the restrictions imposed by the NCCO. [Exhibit 18 at BOM 042-043; Tr. at 51-52.]

52. On November 4, 2021, simultaneously with the issuance of the Emergency Order of Restriction, the Kentucky Board instituted a complaint and filed disciplinary charges against Dr. Smith and set the matter for public hearing on March 1, 2022. [Exhibit 18 at BOM 044-047; Tr. at 52-53.]

53. Dr. Smith failed to respond to the Kentucky Board's complaint, and the charges filed against him. He was found to be in default by the Kentucky Board's Hearing Examiner. [Exhibit 19 at BOM 050-054; Tr. at 53-54.]

54. On March 21, 2022, due to Dr. Smith's default, the Kentucky Board entered an Order of Revocation which revoked Dr. Smith's Kentucky medical license. [Exhibit 19; Tr. at 53-54.]

Dr. Smith's Failure to Disclose the Pending Disciplinary Action in North Carolina on his West Virginia Licensure Application

55. Dr. Smith began the process for applying for an initial West Virginia medical license on March 1, 2021, and he was issued an unrestricted West Virginia medical license, License No. 30635, on July 12, 2021. [Tr. at 92; Exhibits 4, 5, & 38.]

56. Dr. Smith was granted unrestricted licensure in West Virginia based upon the truth of his representations in his licensure application. [Exhibit 38A; Tr. at 90, 98-99, 106.]

57. The application process for an initial West Virginia medical license includes various component parts, including: the Uniform Application Affidavit and Authorization for Release of Information; the Uniform Application; the West Virginia Initial Application; primary source verifications and other required reports (related to medical education, medical training, medical licensure in other states, examination scores, criminal background check, National Practitioner Data Bank report, etc.); and the Address Questionnaire for Pending Licensees. [Exhibit 38; Tr. at 87-102.]

58. The first components an applicant must complete are the Uniform Application Affidavit and Authorization for Release of Information (the "UA Affidavit"). [Tr. at 89; Exhibit 38A at BOM 519.]

59. The UA Affidavit is a notarized document and requires the applicant to attest to the truthfulness of their application, and includes the following attestations:

I, the undersigned, being duly sworn, hereby certify under oath that I am the person name in this application, that all statements I have made

or shall make with respect thereto are true, that I am the original and lawful possessor of and person named in the various forms and credentials furnished or to be furnished with respect to my application, and that all documents, forms or copies thereof furnished or to be furnished with respect to my application are strictly true in every respect.

I acknowledge that I have read and understand the Uniform Application for Physician State Licensure and have answered all questions contained in the applications truthfully and completely. **I further acknowledge that failure on my part to answer questions truthfully and completely may lead to my being prosecuted under state and federal laws.** (Emphasis added).

[Exhibit 38A at BOM 519; Tr. at 89-92.]

60. The applicant further attests;

I will immediately notify the Board in writing of any changes to the answers to any of the questions contained in this application if such change occurs at any time prior to a license to practice medicine being granted to me, and;

I understand my failure to answer questions contained in this application truthfully and completely may lead to denial, revocation, or other disciplinary sanction of my license or permit to practice medicine. (Emphasis added).

[Exhibit 38A at BOM 519; Tr. at 89-92.]

61. An applicant's attestations in the UA Affidavit apply to and govern all component parts of the application and all responses provided by the applicant. [Tr. at 92.]

62. Dr. Smith executed the UA Affidavit on February 19, 2021, and his notarized UA Affidavit was received by the Board on March 1, 2021. [Exhibit 38A; Tr. at 92.]

63. The second component of the application process is the Uniform Application. This application is provided through the Federation of State Medical Boards and is used by many states as part of their medical licensure application process. The applicant provides various information, including his or her medical education, medical training,

employment history, exam results, licensure history in other states, and contact information. The Uniform Application is a repository of information that applicants can update and reuse when applying for medical licensure in other states that utilize the Uniform Application. [Exhibit 38B; Tr. at 92-94.]

64. Dr. Smith completed a Uniform Application and submitted it to the Board on March 1, 2021. Dr. Smith's Uniform Application indicated that he had no disciplinary actions, or pending disciplinary actions, against his medical licenses in any state where he held licensure.⁴ [Exhibit 38B; Tr. at 93-94.]

65. The third component of the application process is the West Virginia Initial Application ("WVIA"), the component specific to West Virginia applicants.⁵ [Exhibit 38C; Tr. at 95.]

66. As part of the WVIA, all applicants are required to answer a series of fifteen Yes or No questions titled "Professional Practice, Character and Fitness Questions ("PPCF Questions"). [Exhibit 38C at BOM 503-505; Tr. at 96-100.]

67. The first page of the PPCF Questions expressly informs applicants that **"false or fraudulent answers to the [PPCF] questions may result in licensure denial or revocation."** (Emphasis added). [Exhibit 38C at BOM 503.]

68. The PPCF Questions ask a variety of questions regarding an applicant's background and history, including but not limited to: whether they have been charged or

⁴ Information regarding disciplinary actions and/or pending disciplinary actions is not solicited in the Uniform Application, so such information is not expected to be contained therein. [Exhibit 38B.]

⁵ The West Virginia Initial Application is commonly referred to as the West Virginia Online Addendum, and applicants pay the licensure application fee in conjunction with this component.

convicted with a crime, have been subject to disciplinary action by another state medical board or have any disciplinary actions currently pending against them in another state, have had hospital privileges limited or revoked, have had medical malpractice judgments or settlements, have been denied a medical license, etc. [See Exhibit 38C at BOM 503-505.]

69. The PPCF Questions are an important component of the application process in vetting whether an applicant is qualified and fit to be issued a medical license in West Virginia. [Tr. at 96-97.]

70. If an applicant answers "YES" to any of the PPCF Questions, the applicant is required to provide an explanation and/or upload documents to provide information and background regarding their "YES" answers. An affirmative response to one or more of the PPCF Questions does not automatically disqualify an applicant for licensure, but may result in further review and vetting by the Board's Licensure Committee. [Tr. at 97-98.]

71. Dr. Smith submitted his West Virginia Initial Application on March 1, 2021, and he answered "NO" to all fifteen PPCF Questions. [Exhibit 38C at BOM 503-505; Tr. at 97-98.]

72. In pertinent part, Dr. Smith falsely answered "NO" to PPCF Question No.4, which asked:

Have you, in any jurisdiction, for any reason had limitations, restrictions or conditions placed upon your license to practice by a medical board, or had your license to practice suspended, revoked or subjected to any kind of disciplinary action, including censure, reprimand or probation by a medical board and/or are any disciplinary actions pending against you?
(Emphasis added.)

[Exhibit 38C at BOM503; Tr. at 98.]

73. Dr. Smith did not change any of his answers to the PPCF Questions prior to the issuance of his West Virginia medical license on July 12, 2021. [Exhibit 38.]

74. If an applicant has an open disciplinary complaint pending against them in another state when applying for West Virginia licensure, this information would not be known or available to the Board through a collateral source or verification because open investigations by medical boards are confidential. The Board is only notified of disciplinary actions taken by other medical boards after an investigation is completed, and an Order is entered. Accordingly, it is the duty of the applicant to truthfully disclose the existence of pending disciplinary complaints in other states when applying for West Virginia licensure. [Tr. at 99.]

75. The Board received all required primary source verifications and other reports related to Dr. Smith's initial licensure application. The collateral information and verifications received by the Board did not indicate the existence of any disciplinary actions, or pending disciplinary actions in another state. [Exhibit 38D; Tr. at 101.]

76. The final component of the initial licensure application process is the submission of the Address Questionnaire. Applicants are to provide updated contact information to the Board at the end of the application process. [Tr. at 101-102.]

77. In the months of May and June 2021, Dr. Smith was advised, via multiple emails from the Board Licensure Analyst handling his application, that his application was complete and would be placed on July 12, 2021 meeting agenda, pending his submission of the Address Questionnaire. The emails notified Dr. Smith that his failure to timely submit the Address Questionnaire prior to the July 12, 2021 Board meeting would delay action on his application. [Exhibit 39.]

78. Dr. Smith finally executed the Address Questionnaire on June 30, 2021, and submitted it via email to the Board on July 1, 2021. [Exhibit 39.]

79. Dr. Smith's submission of the Address Questionnaire to the Board on July 1, 2021, was **the same day that Dr. Smith personally executed the North Carolina Consent Order.** (Emphasis added) (Compare Exhibit 39 at BOM 457-458 & Exhibit 3 at BOM 015.)

80. Dr. Smith did not disclose the North Carolina disciplinary actions, or the fact that he had signed the NCCO, when he submitted his Address Questionnaire on July 1, 2021. And, he did not disclose this information to the Board prior to the issuance of his unrestricted medical license on July 12, 2021. [Exhibits 38 & 39.]

81. Mr. Kirchin, an investigator for the North Carolina Board, testified he served Dr. Smith with the West Virginia Board's CNOH. Mr. Kirchin also testified regarding his involvement with, and the time frame of, the North Carolina Board's investigations which led to Dr. Smith's NCCO. [Tr. at 124-132.]

82. The North Carolina Board's investigations into Dr. Smith began in 2019. Six of these investigations were assigned to Mr. Kirchin. [Tr. at 129-130.]

83. In December 2019 and in the spring of 2020, Mr. Kirchin served six official Notice of Investigations ("NOI's") on Dr. Smith. Four were served on Dr. Smith personally, and, after Dr. Smith retained counsel, two were served on his counsel. It is the North Carolina Board's protocol to serve NOI's on licensees for each investigation that is being conducted. [Tr. at 130-131.]

84. Dr. Smith personally signed three of the NOI's on December 11, 2019, and one NOI on December 13, 2019. After Dr. Smith retained counsel, the NOI's for the two additional investigations were served on Dr. Smith's counsel in March 2020 and May 2020. [Tr. at 131.]

85. Clearly, these NOI's notified Dr. Smith that there were ongoing investigations pending against him in North Carolina. [Tr. at 131.]

86. Mr. Kirchin personally interviewed Dr. Smith in furtherance of the North Carolina Board's investigations on three occasions in 2020: January 6, 2020, January 28, 2020, and July 27, 2020. These investigatory interviews related to the complaints that ultimately led to the NCCO. [Tr. at 131-132.]

87. Dr. Smith had been repeatedly and formally notified of the ongoing disciplinary actions/investigations pending against him in North Carolina at the time he completed and submitted his "NO" response to PPCF Question 4 on March 12, 2021.

88. Pursuant to the above Findings of Fact, the Undersigned finds it is clear Dr. Smith lied on his application to the Board when he answered "No" to Professional Practice, Character and Fitness Question 4, which asks "are there any disciplinary actions pending against you?"

89. If an applicant's completed application satisfies all requirements for licensure, does not contain any "YES" answers to the PPCF Questions, and does not otherwise contain any red flags, derogatory, or conflicting information, the applicant is considered to have a "clean" application.⁶ [Tr. at 103-104.]

⁶There are a few limited exceptions for when a "YES" answer to a PPCF question would not trigger a review by the Committee. None of which were applicable to Dr. Smith. For

90. "Clean" or "pristine" applications do not require individual review and discussion by the Licensure Committee. The Licensure Committee is provided the names of the applicants with "clean" applications, and this list is only reviewed by Committee members for personal conflicts of interest. Applicants on the "clean" list are recommended for licensure as a group. [Tr. at 103-104.]

91. Based upon the information and responses provided by Dr. Smith in his application, including his "NO" answers to all PPCF Questions, Dr. Smith met all requirements for licensure. His application, on its face, did not contain any red flags, derogatory, or conflicting information. Accordingly, Dr. Smith's application was placed on the "clean" list, and he was approved for unrestricted licensure at the Board's July 12, 2021 meeting. [Tr. at 106.]

92. If Dr. Smith had truthfully reported he had a disciplinary action pending against him in another state, his application would have been placed on the Licensure Committee's agenda for specific review and discussion. [Tr. at 107-108.] The Licensure Committee would then seek additional information, or request the applicant to appear in support of their application prior to making a final determination. [Tr. at 104-106.]

93. If an applicant has an open disciplinary action pending against them in another state, the Licensure Committee has historically offered two options to the applicant: (1) to place their application on hold until the complaint is resolved in the other state, so that there is a clear understanding of the facts and circumstances of the

example, if an applicant had a medical malpractice settlement that is 25 to 30 years old, and the settlement amount was insignificant, this information may not trigger a review by the Licensure Committee. [Tr. At 104 - 105].

complaint, and any disciplinary action taken; or (2) allow the applicant to withdraw their application. [Tr. at 107-108.]

94. Given that Dr. Smith's license is significantly restricted in North Carolina, revoked in Kentucky, and suspended in Virginia, these actions would present a public safety concerns for West Virginia residents. If other jurisdictions have determined that Dr. Smith requires strict practice limitations because he engaged in unprofessional conduct, then those same limitations should apply in West Virginia upon his initial licensure to protect the public interest. [Tr. at 86.]

Status of Dr. Smith's West Virginia License

95. In West Virginia, physicians are required to renew their medical licenses every two years. The year of renewal depends on the first letters of the physician's last name. [Tr. at 120-121.]

96. The 2023 renewal period for Dr. Smith opened on May 3, 2023, and will close on June 30, 2023. Dr. Smith's license will automatically expire on June 30, 2023, unless he renews prior to that date. [Tr. at 120.]

97. The existence of an open complaint against a licensee does not prevent a licensee from renewing their West Virginia license, and it is common practice for licensees that have pending complaints to renew their license while a complaint is pending against them. [Tr. at 122.]

98. At the time of this hearing, May 23, 2023, Dr. Smith had not renewed his West Virginia medical license. [Tr. at 122.] (The Board also represented in its Proposals dated June 30, 2023, that Dr. Smith has not renewed his West Virginia license.)

99. In the past, the Board has taken disciplinary action, including revocation, against prior licensees who have allowed their license to automatically expire in the midst of the disciplinary process. [Tr. at 122-123.]

Further Procedural Matters after Dr. Smith was Served with the CNOH

100. On May 9, 2023, Mr. Foster asked for a conference to discuss pre-hearing matters, including Dr. Smith's failure to file a response to the CNOH, and his intention to appear at the scheduled hearing on May 23, 2023. This request was also sent to Dr. Smith.

101. On May 12, 2023, the Hearing Examiner emailed Dr. Smith, introduced herself, informed him of the need for a pre-hearing conference before the scheduled hearing, and proposed the date of May 15, 2023. If no response was received, this pre-hearing conference would be scheduled on May 15, 2023. The Hearing Examiner received no response.

102. On May 15, 2023, the Hearing Examiner convened the telephonic pre-hearing conference. Dr. Smith had received notice of this pre-hearing conference via email from the Hearing Examiner dated May 12, 2023. This conference was convened as scheduled at 2:00 p.m. on May 15, 2023, via the Board's conference call line. After allowing for a ten-minute delay for Dr. Smith to join the conference, and Dr. Smith failed to appear, the pre-hearing conference proceeded at 2:10 p.m.

103. On May 18, 2023, the Undersigned issued an Order detailing the matters discussed and clarified at this pre-hearing conference.

104. The evidentiary hearing was held as scheduled on May 23, 2023, and Dr. Smith did not appear or respond in any way.

105. On June 30, 2023, Mr. Foster timely submitted his Proposals as planned to the Hearing Examiner and Dr. Smith.

106. Later that day, June 30, 2023, James McQueen emailed the Hearing Examiner stating Dr. Smith had asked him to represent him; he had sent a Notice of Appearance to Mr. Foster; and he was requesting time to submit "something" on behalf of Dr. Smith before a Decision was issued.

107. Even later that day, the Hearing Examiner, by email, granted Mr. McQueen's request, and he was given until July 28, 2023, to file his post-hearing submissions based on the hearing record, and Mr. Foster had the right to respond by August 4, 2023.

108. On July 6, 2023, the Undersigned issued an Order reflecting the above stated extension of time.

109. No response was received from Mr. McQueen, and on August 2, 2023, Dr. Smith emailed Mr. Foster and Mr. McQueen stating, "I have just learned of my attorney's inability to appear" and asked for more time to secure a replacement. Mr. Foster strenuously objected to an extension.

110. Mr. McQueen replied and noted Dr. Smith had failed to: 1) inform him of his disciplinary record in other states; 2) sign a representation agreement; and 3) send a retainer. Additionally, Mr. McQueen had informed Dr. Smith weeks ago that he would not represent him after he had read Mr. Foster's Proposed Order.⁷

⁷ On August 31, 2023, the Undersigned and parties received a rambling email from Dr. Smith addressed to "Attorney Utt." This email was concerning in its accusations and alleged targeting, harassment, and referred to lynching. The Undersigned has received nothing from this individual.

CONCLUSIONS OF LAW

1. The practice of medicine and surgery in West Virginia is a privilege, not a right. W. Va. Code § 30-3-1; *Healy v. W. Va. Bd. of Medicine*, 203 W. Va. 52, 55, 506 S.E.2d 89, 92 (1998); *Devernja v. W. Va. Bd of Medicine*, 185 W. Va. 594, 596, 408 S.E.2d 346, 348 (1991).
2. The West Virginia Board of Medicine is the "regulatory and disciplinary body for the practice of medicine and surgery" for physicians, podiatrists and physician assistants in West Virginia. W. VA. CODE §§ 30-3-5 & 30-3-7(a).
3. Dr. Smith's license to practice medicine and surgery in the State of West Virginia is subject to regulation and discipline by the West Virginia Board of Medicine. W. VA. CODE §§ 30-3-5 and 30-3-7(a).
4. The Board has jurisdiction over the subject matter and over the Respondent. W. VA. CODE § 30-3-5.
5. If Dr. Smith fails to renew his West Virginia license, the automatic expiration of Dr. Smith's West Virginia medical license on June 30, 2023, does not operate to relieve the Board of jurisdiction in this matter.
6. Failure to complete the license renewal process renders a West Virginia medical license invalid, but not extinguished. Certain property rights are retained by a licensee who holds an expired medical license. (For example, an expired license to practice medicine and surgery in West Virginia may be revived by filing a reinstatement application within a year of the date of expiration.) W. VA. CODE § 30-3-12(g).
7. There is no provision in West Virginia law that would deprive the Board of continued jurisdiction in a disciplinary proceeding when the license at issue was permitted

to expire by the licensee, after formal disciplinary charges were instituted and after the public hearing concluded, but prior to the issuance of a final order by the Board. See *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 294 P.3d 287 (2013) (finding that Kansas Medical Board had jurisdiction to revoke an expired license because the acts that gave rise to the disciplinary proceeding occurred while the physician was actively licensed and practicing in Kansas); *Patel v. Kansas State Bd. of Healing Arts*, 22 Kan. App. 2d 712, 920 P.2d 477 (1996) (Board had continuing jurisdiction to revoke license that licensee allowed to expire after Board instituted disciplinary proceedings); *Wang v. Bd. of Registration in Medicine*, 405 Mass 15, 20, 537 N.E.2d 1216, 1219 (Mass. 1989) ("A jurisdictional standard must confer authority to discipline physicians who commit misconduct while fully licensed; otherwise a physician's obligation to respond to charges arising out of his or her licensure would be defeated and the board's public protection function would be frustrated."); *Boedy v. Dept. of Professional Regulation*, 433 So. 2d 544, 544 (Fla. 1983) ("To permit a licensee to indefinitely hide behind an inactive status while evidence is lost, witnesses disappear and memory is eradicated serves no useful public interest."); *Cross v. State Bd. Of Dental Examiners*, 37 Colo. App. 540, 552 P.2d 38 (1976) (Dentist could not resign or surrender license on his own accord during the pendency of disciplinary proceedings to divest the Board of its jurisdiction); *Oni v. Tennessee Dept. of Health*, 2016 WL 4467690 (Tenn. Client. App. 2016) (Board retained authority to revoke physician's medical license even though physician allowed license to expire by the time of the remand hearing); *Matter of Thompson*, 935 N.W.2d 147 (Minn. Client. App. 2019)

(Board of Psychology was authorized to revoke license that expired during pendency of disciplinary proceeding due to psychologist's failure to renew).

8. The Board issued a timely Notice of Hearing in this matter. W. VA. CODE R. § 11-3-11.4. Accordingly, Dr. Smith had legally sufficient notice of the public hearing. W. VA. CODE §§ 30-3-14(h) & (l). Additionally, the Board has complied with the requirements set forth in W. VA. CODE § 30-1-5(c).

9. Dr. Smith was timely and properly served with the CNOH, via personal service, in accordance with W. VA. CODE §§ 29A-5-1 & 29A-7-2.

10. The practice of medicine is a high calling; a professional license is a high privilege; the state may attach to its possession conditions which are "onerous and exacting." *Barsky v. Bd. of Regents*, 305 N.Y. 89, 98, 111 N.E.2d 222, 226 (1953), *aff'd*, 347 U.S. 442 (1954).

11. The Board has a general mandate to ensure "a professional environment that encourages the delivery of quality medical services" to protect the public interest. W. VA. CODE § 30-3-2.

12. The general provisions applicable to state licensing and examination boards authorize the Board to promulgate legislative rules that "delineate conduct, practices or acts which, in the judgment of the board, constitute professional negligence, a willful departure from accepted standards of professional conduct and/or which may render an individual unqualified or unfit for licensure, registration or other authorization to practice." W. VA. CODE § 30-1-8(c).

13. The Board's Legislative Rule Series 1A, *Licensing and Disciplinary Procedures: Physicians; Podiatrists*, enumerates additional conduct for which discipline

may be imposed, including conduct which is dishonorable, unethical and/or unprofessional conduct. W. VA. CODE R § 11-1A-12 (2019).

14. W. VA. CODE § 30-3-14 (1) sets forth conduct which may render an individual unqualified for licensure or subject to discipline or other restrictions upon licensure. Specifically, the Board may discipline “a physician . . . who, after hearing, has been adjudged by the board . . . as unqualified due to . . . attempting to obtain . . . a license to practice medicine and surgery by . . . fraudulent misrepresentation. . . .”

15. The Board may designate a Hearing Examiner to conduct hearings. The Hearing Examiner is a licensed attorney and was so designated in this case by the Board. The hearing was conducted pursuant to the West Virginia Code and the Board's Legislative and Procedural Rules. See W. VA. CODE § 30-3-14(b); W. VA. CODE §§ 29A-5-1 *et seq.*; W. VA. CODE R §§ 11-1A-12 *et seq.*; & W. VA. CODE R § 11-3-1 *et seq.* (2010).

16. Pursuant to W. VA. CODE R § 11-3-14.3, the Hearing Examiner shall submit written findings of fact and conclusions of law to the Board pursuant to W. VA. CODE § 29A-5-3, which the Board may adopt, modify or reject.

17. At the hearing, the rules of evidence as applied in civil cases in the circuit courts of this state were followed. See W. VA. CODE R § 11-3-11.5(c).

18. All exhibits admitted into evidence at the hearing are authentic, valid, and were admitted with the proper evidentiary foundation.

19. The West Virginia Supreme Court of Appeals defines clear and convincing proof as that measure or degree of proof which produces in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. *Webb v. W. Va. Bd. of Medicine*, 212 W. Va. 149, 156, 569 S.E.2d 225, 232 (2002), *citing Wheeling Dollar*

23. The Hearing Examiner finds the Board has met its burden of proof and established the allegations of professional misconduct set forth in Counts 1, 2, 3, and 4 of the Complaint and Notice of Hearing (“CNOH”) by clear and convincing evidence.

COUNT 1

24. The Board has established by clear and convincing evidence that Dr. Smith was the subject of disciplinary action by the North Carolina Board and signed a North Carolina Consent Order (“NCCO”) on July 1, 2021. This NCCO found Dr. Smith had engaged in unprofessional conduct, and had aided and abetted the unlicensed, corporate practice of medicine in violation of N.C. Gen. Stat. § 90-14(a)(7).

25. This NCCO suspended Dr. Smith license for two years, but stayed this suspension and required compliance to certain terms, conditions, restrictions and limitations on his practice of medicine in North Carolina.

26. Accordingly, the Board has established, by clear and convincing evidence, that Dr. Smith's West Virginia medical license is subject to disciplinary action pursuant to W. VA. CODE § 30-3-14(c)(17) and W. VA. CODE R § 11-1A-12.1.g, for having his license to practice medicine in another state revoked, suspended, restricted or limited, or otherwise acted against or subjected to any other disciplinary action.

COUNT 2

27. The Board has established by clear and convincing evidence that Dr. Smith was subjected to disciplinary action by the Kentucky Board pursuant to the November 4, 2021 Order of Emergency Restriction and a subsequent March 21, 2022 Order of Revocation.

28. Accordingly, based upon the Kentucky Board's Emergency Order of Restriction and Order of Revocation, the Board has met its burden of proof, by clear and convincing evidence, that Dr. Smith's West Virginia medical license is subject to disciplinary action pursuant to W. VA. CODE § 30-3-14(c)(17) and W. VA. CODE R § 11-1A-12.1.g, for having his license to practice medicine in any other state revoked, suspended, restricted or limited, or otherwise acted against or subjected to any other disciplinary action.

COUNT 3

29. The Board has established by clear and convincing evidence that Dr. Smith was subjected to disciplinary action by the Virginia Board pursuant to the August 30, 2021 Order of Mandatory Suspension.

30. Accordingly, based upon the Virginia Board's Order of Mandatory Suspension, the Undersigned finds the Board has met its burden of proof and established, by clear and convincing evidence, that Dr. Smith's West Virginia medical license is subject to disciplinary action pursuant to W. VA. CODE § 30-3-14(c)(17); W. VA. CODE R § 11-1A-12.1.g, for having his license to practice medicine in any other state revoked, suspended, restricted or limited, or otherwise acted against or subjected to any other disciplinary action.

COUNT 4

31. The Board has met its burden of proof and established by clear and convincing evidence that Dr. Smith obtained an unrestricted West Virginia medical license on July 12, 2021, by fraudulent misrepresentation.

32. The essential elements for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it. Syl. Pt. 1, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981).

33. The West Virginia Board established : 1) the NC Board started it investigation in 2019, and this investigation was continued until the parties signed a NCCO, on July 1, 2021, listing Dr. Smith's multiple violations of North Carolina statutes; 2) Dr. Smith was clearly aware he was under investigation and lied on his application to the West Virginia Board; 3) at no time during the application process did Dr. Smith inform the West Virginia Board of these investigations or the NCCO; and 4) Dr. Smith's unrestricted license to practice medicine in West Virginia was granted on July 12, 2021, based to Dr. Smith's falsehoods and critical omissions.

34. Had the West Virginia Board been aware of the investigations and NCCO, Dr. Smith would not have been issued an unrestricted license to practice medicine in West Virginia.

35. Additionally, the Board has met its burden of proof and proven by clear and convincing evidence, that: 1) Dr. Smith's misrepresentations and/or omissions, both individually and collectively were fraudulent, material and false; 2) the Board was justified in relying upon these assertions when it granted Dr. Smith an unrestricted West Virginia medical license on July 12, 2021; and (3) the Board was damaged as the issuance of an

⁸See Finding of Fact 3. Dr. Smith began his West Virginia application on March 1, 2020.

unrestricted West Virginia medical license to Dr. Smith is inconsistent with the public interest. *See Syl. Pt. 1, Lengyel v. Lint, supra.*

36. Accordingly, the Board has established, by clear and convincing evidence, that Dr. Smith obtained an unrestricted West Virginia medical license by fraudulent misrepresentation and/or omission, and that Dr. Smith's West Virginia medical license is subject to disciplinary action pursuant to W. VA. CODE § 30-3-14(c)(l) and W. VA. CODE R § 11-1A-12.1.a.

37. Further, the Board has established, by clear and convincing evidence, that Dr. Smith's failure to disclose the pending disciplinary actions in North Carolina constitutes dishonorable, unethical and/or unprofessional conduct of a character likely to deceive, defraud or harm the public or any member thereof, and that Dr. Smith's West Virginia medical license is subject to disciplinary action pursuant to W. VA. CODE §§ 30-3-14(c)(1) & (17) and W. Va. Code R. § 11-1A-12.1.e.

38. W. VA. CODE § 30-3-14(j) authorizes the Board to impose disciplinary measures, as relevant and appropriate, including restrictions of a license to practice, suspension, revocation, and fines.

39. W. VA. CODE R §11-1A-12.3.g. authorizes the Board to impose other sanctions and penalties, and to assess the costs of the Board's investigation and administrative proceedings against the licensee.

40. Based upon Dr. Smith's multiple violations of the professional conduct standards set forth above, lying on his application for licensure, and actions taken by the Commonwealths of Kentucky and Virginia and the State of North Carolina, Dr. Smith is

subject to disciplinary action against his West Virginia medical license, including revocation.

RECOMMENDED DECISION

The Hearing Examiner respectfully recommends the Board find that it is in the public's interest, health, welfare, and safety that:

1. Dr. Smith's West Virginia medical license be **REVOKED** as permitted by W. VA. CODE § 30-3-14(j)(4); and
2. Dr. Smith be **ORDERED** to pay the costs and expenses of these proceedings, as permitted by W. VA. CODE R § 11-1A-12.3.g, including, but not limited to, costs associated with the services provided by the Hearing Examiner, the court reporter, and all other costs of the investigation and prosecution of this matter, excluding attorneys' fees; and that payment to the Board be made within thirty (30) days of the issuance of an Invoice by the Board.

CONCLUSION

Pursuant to W. VA. CODE R. § 11-3-14.3, the Board may adopt, modify, or reject any findings of fact and conclusions of law as well as the Recommended Decision submitted by the Hearing Examiner.

DATED: November 13, 2023



Janis I. Reynolds
Hearing Examiner
WV State Bar No. 4363