

BEFORE THE WEST VIRGINIA BOARD OF MEDICINE

WEST VIRGINIA BOARD OF MEDICINE,

Petitioner,

V.

Complaint No. 22-86-W

PHILLIP ALLEN PETERSON, M.D.,

Respondent.

WEST VIRGINIA BOARD OF MEDICINE'S
FINAL DECISION AND ORDER

On April 10, 2024, the West Virginia Board of Medicine met and considered the “Hearing Examiner’s Recommended Findings of Fact, Conclusions of Law, and Recommended Decision” issued on March 19, 2024, by Hearing Examiner Lewis G. Brewer, Esquire, 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 with the following modification to correct a typographical error: In Conclusion of Law #20, on page 33, in the third sentence, the Hearing Examiner refers to “*Dr. Peterson’s* recollection of disciplinary actions.” This sentence should refer to Dr. Lee Smith’s testimony. Accordingly, the Board modifies Conclusion of Law #20 of the Hearing Examiner’s Recommended Findings of Fact, Conclusions of Law, and Recommended Decision as follows:

20. Dr. Lee Smith’s testimony regarding factual matters was generally credible. However, his opinion testimony regarding the merits of the Complaint against Dr. Peterson is afforded no weight because he admitted that he and Dr. Peterson are “personal friends” and he would necessarily be ethically recused from participating in any disciplinary matter regarding Dr. Peterson if he was presently serving on the Board. In addition, Dr. Lee Smith’s recollection of disciplinary actions taken by the Board regarding CME violations by physicians during his tenure on the Board was substantially impeached by reliable documentary evidence presented during Dr. Smith’s cross-examination by counsel for the Board. Further, Dr. Smith has not served on the Board at any time

since this West Virginia-specific controlled substance CME requirement was enacted.


Wherefore, having adopted and accepted the recommended decision with the modification noted above, 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 as modified.

Accordingly, Respondent is hereby **FINED** five hundred dollars (\$500.00), to be paid no later than thirty (30) days from the 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 12th DAY OF April, 2024.

 4/12/2024

ASHISH P. SHETH, M.D.
PRESIDENT

 4/10/2024

MATTHEW Q. CHRISTIANSEN, MD, MPH
SECRETARY

**BEFORE THE WEST VIRGINIA BOARD OF MEDICINE
HEARING EXAMINER**

WEST VIRGINIA BOARD OF MEDICINE,

Petitioner,

v.

PHILLIP ALLEN PETERSON, M.D.,

Complaint No. 22-86-W

Respondent.

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

PROCEDURAL HISTORY

This matter came on for hearing on December 13 and 14, 2023, in the Hearing Room of the West Virginia Board of Medicine, 101 Dee Drive, Charleston, West Virginia, pursuant to the Order Continuing and Rescheduling Hearing entered by the Hearing Examiner on October 10, 2023. At the hearing, the West Virginia Board of Medicine ("Board" or "Petitioner") was represented by counsel, Greg S. Foster, Esquire, and Jamie S. Alley, Esquire. The Board appeared through its Executive Director, Mark A. Spangler. The Respondent, Dr. Phillip Allen Peterson, M.D. ("Respondent" or "Dr. Peterson"), was present throughout the hearing while represented by counsel, William L. Mundy, Esquire, and C. William Davis, Esquire.

The Board issued the Complaint, Notice of Hearing, Pre-Hearing Directives and Protective Order ("CNOH") in this matter on September 20, 2023, setting forth a single count alleging professional misconduct by Dr. Peterson arising from a Board-initiated complaint, identified as Complaint No. 22-86-W. The CNOH originally scheduled the

public hearing in this matter to convene on December 7, 2023. By motion filed on October 10, 2023, Respondent moved to continue the hearing due to counsel's scheduling conflict. Respondent's motion was granted by the undersigned Hearing Examiner by Order entered October 13, 2023, rescheduling the hearing to commence on December 13, 2023.

During the hearing, the Board presented testimony from Executive Director Mark Spangler. The Board also called the Respondent, Dr. Peterson, as a witness. The Respondent presented testimony from Dr. Jennifer Schneider, Dr. Lee Smith, and recalled Dr. Peterson.

The public hearing was recorded and transcribed by a court reporter, and the parties were given an opportunity to obtain a copy of the transcript. On March 5, 2024, the parties timely filed Proposed Findings of Fact and Conclusions of Law which have been carefully considered in the adjudication of this matter.

ISSUE

Whether or not the West Virginia Board of Medicine should discipline the Respondent's medical license and impose some penalty pursuant to the West Virginia Medical Practice Act and/or the Board of Medicine's Legislative Rules.

MOTIONS

All decisions rendered during or prior to the hearing in this case on motions filed or otherwise made in this case are hereby affirmed. Further, all other motions filed or otherwise made in this case by either of the parties which were not previously ruled upon by the undersigned Hearing Examiner are hereby denied and rejected. After a review of the record and the exhibits admitted into evidence, any stipulations entered

into by the parties, any matter of which the undersigned Hearing Examiner took administrative notice during the proceedings, assessing the credibility of the witnesses, and weighing the evidence in consideration of the same, the undersigned Hearing Examiner makes the following findings of fact and conclusions of law. To the extent that the testimony of any witness is not in accord with these findings and conclusions, such testimony is not credited. To the extent that these findings of fact and conclusions of law are consistent with any proposed findings of fact and conclusions of law submitted by the parties, the same are adopted by the undersigned Hearing Examiner, and to the extent that the same are inconsistent with such proposed findings and conclusions, they are rejected. Any proposed finding of fact, conclusion of law, or argument proposed and submitted by a party but omitted herein is deemed irrelevant, or unnecessary to the determination of the material issues in this matter.

In accordance with 11 C.S.R. 3 §§ 14.1 & 14.3 (2010), the following Proposed Findings of Fact are made based upon the testimony taken and documentary evidence presented before the undersigned Hearing Examiner.

FINDINGS OF FACT

1. The West Virginia Board of Medicine ("the Board" or "Petitioner") 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).

2. The Board is responsible for regulating the practice of medicine to protect public health. W. Va. Code § 30-3-1, *et seq.* See *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953).

3. Dr. Peterson graduated from the University of Iowa School of Medicine in 1985. B Ex 6 at BOM004; R Ex 9 at Peterson 0208.¹
4. Dr. Peterson continued his medical education as a Family Practice Resident at Spartanburg Regional Medical Center from 1985 to 1988, serving as Chief Resident from 1987 to 1988. R Ex 9 at Peterson 0208. See B Ex 6 at BOM004.
5. Dr. Peterson holds an active status West Virginia license, No. 15474, to practice medicine and surgery in the state of West Virginia. Dr. Peterson's West Virginia license was initially issued on May 16, 1988. See Ex 6 at BOM004.
6. Dr. Peterson has been continuously licensed to practice medicine in the Commonwealth of Virginia since 1988, holding license No. 42006. Tr. at 49; B Ex 5 at BOM1114. See R Ex 9 at Peterson 0210.
7. Dr. Peterson's self-identified medical areas of specialty are family practice and geriatric medicine (family practice). See Ex 6 at BOM0004.
8. Dr. Peterson has been continuously Board Certified in Family Practice by the American Academy of Family Medicine since 1988. R Ex 9 at Peterson 0210.
9. Dr. Peterson has been continuously Board Certified in Geriatrics by the American Academy of Family Practice since 2010. R Ex 9 at Peterson 0210.
10. Dr. Peterson was Board Certified in Hospice and Palliative Care from 2012 to 2022, when he elected not to renew his certification. R Ex 9 at Peterson 0210.
11. As a Chapter 30 licensing board, the West Virginia Board of Medicine is required by law to establish continuing medical education ("CME") requirements as a

¹ Exhibits proffered by the Board will be referenced as "B Ex ____" followed by a number. Exhibits proffered by the Respondent will be referenced as "R Ex ____" followed by a number. Where pertinent, the Bates page numbers within an exhibit will also be specified, e.g. "B Ex 6 at BOM035." The hearing transcript will be cited as "Tr. at ____," followed by the pertinent page numbers, e.g., "Tr. at 123."

prerequisite to license renewal. More particularly, the Board is statutorily obligated to “develop continuing education criteria appropriate to its discipline, which shall include, but not be limited to, course content, course approval, hours required and reporting periods.” W. Va. Code § 30-1-7a(a). See B Exs 2 & 3.

12. The Board has promulgated CME rules which establish CME requirements for physicians through the legislative rule-making process. W. Va. Code § 30-3-7; 11 C.S.R. 6 §§ 1.1, *et seq.*, (2018). See B Ex 1 at BOM943-949.²

13. The Board’s standard CME requirement for all licensed physicians mandates completion of fifty (50) CME hours during every two-year licensure cycle. This 50-hour CME requirement may be satisfied in multiple ways, including completing individual CME courses, successfully passing a certifying or recertifying examination from a board within the American Board of Medical Specialties (“ABMS”), and other activity involving the maintenance of specialty certifications. See 11 C.S.R. 6 § 3.1 (2018); Tr. at 30-31.

14. In addition, W. Va. Code § 30-1-7a mandates that the Board, along with other health profession boards, require those renewing licensees who prescribe, administer, or dispense a controlled substance, to complete CME including “drug diversion training, best practice prescribing of controlled substances training, and training on prescribing and administration of an opioid antagonist and other relevant trainings . . . , as the trainings are established by his or her respective licensing board.” W. Va. Code § 30-1-7a(b)(1); Tr. at 32-33.

² The Legislative Rule adopted in 2018 is the Board’s CME rule which was in effect during the relevant licensure cycle of July 1, 2019, through June 30, 2021.

15. The statutory requirement for certain physicians to complete drug diversion training and best practice prescribing of controlled substances training during each renewal cycle was originally enacted by the Legislature in 2012 and implemented by the Board effective May 1, 2014. See W. Va. Code § 30-1-7a (2012) and 11 C.S.R. 6 § 3.3 (2013); Tr. at 35, 37-39.

16. The legislative purpose behind the enactment of the specific CME requirement for drug diversion and related training involved a response to the opioid overdose epidemic and the number of opioid-related deaths in West Virginia. Tr. at 38.

17. A renewing licensee may seek a waiver of the drug diversion training and best practice of prescribing controlled substances training if he or she did not prescribe, administer, or dispense a controlled substance pursuant to their West Virginia license for the entire reporting period preceding license renewal. W.Va. Code § 30-1-7a(b)(2); 11 C.S.R. 6 § 3.3.b (2018); Tr. at 33-38.

18. W. Va. Code § 30-1-7a(b)(1) also mandates the Board, and other specified health professional boards, to “establish continuing education requirements and criteria appropriate to their respective discipline on the subject of drug diversion training, best-practice prescribing of controlled substances training and prescribing and administration of an opioid antagonist training” W. Va. Code § 30-1-7a(b)(1); Tr. at 35-37.

19. At the time of the 2021 licensure renewal period, the drug diversion training and best practice prescribing of controlled substances training was the only subject matter-specific CME requirement mandated by statute for the Board’s licensees. Tr. at 38. See W. Va. Code § 30-1-7a.

20. In accordance with W. Va. Code § 30-1-7a, the Board has established requirements and criteria for the CME on drug diversion training and best practice of prescribing of controlled substances training, which must be completed each licensure cycle by physicians who prescribe, administer, or dispense controlled substances pursuant to their West Virginia license. Tr. at 32, 35-37. See 11 C.S.R. 6 (2018).

21. The Board's legislatively-approved rule provides that the drug diversion training and best practice prescribing of controlled substances training shall be satisfied through completion of at least three CME hours in a Board-approved CME course. 11 C.S.R. 6, §§ 1.1, *et seq.* (2018).

22. The applicable provision in the rule reads as follows:

Mandatory Continuing Education Activity for Physicians and Podiatric Physicians. – As a prerequisite to license renewal, a licensee who has prescribed, administered, or dispensed any controlled substance pursuant to a West Virginia license during the reporting period shall complete a Board-approved continuing education activity for a minimum of three hours of drug diversion training and best practice prescribing of controlled substances training.

11 C.S.R. 6 § 3.3 (2018).

23. Licensees that are required to complete a Board-approved course on drug diversion training and best practice prescribing of controlled substances training may use the 3 CME hours earned from this CME activity to meet the Board's standard 50 CME hour requirement for the reporting period. 11 C.S.R. 6 § 3.3.a (2018).

24. The rule specifically provides that this mandatory CME requirement for drug diversion training and best practice prescribing of controlled substances training may only be satisfied through successful completion of a Board-approved course as follows:

The biennial requirement to complete a minimum of three hours of drug diversion training and best practice prescribing of controlled substances training requires successful completion of a Board-approved course.

11 C.S.R. 6 § 6.1 (2018).

25. The Board's legislative rule defines "drug diversion training and best practice prescribing of controlled substances training" as training that includes each of the following components:

- a. Drug diversion, including West Virginia statistics on prescription drug abuse and resulting deaths.
- b. Epidemiology of chronic pain and misuse of opioids.
- c. Indication for opioids in chronic pain treatment including general characteristics, toxicities and drug interactions.
- d. Examination of patient evaluation and risk assessment and tools to assess risk and monitor benefits.
- e. Initiation and ongoing management of chronic pain patients treated with opioid based therapies, including treatment objectives, monitoring and periodic review; referrals and consultation; informed consent; prescription of controlled substance agreements, urine screens and pill counts; patient education on safe use, storage and disposal of opioids; discontinuation of opioids for pain due to lack of benefits or increased risks; documentation and medical records.
- f. Case study of a patient with chronic pain.
- g. Identification of diversion and drug seeking tactics and behaviors.
- h. Best practice methods for working with patients suspected of drug seeking behavior and diversion.
- i. Compliance with controlled substances laws and rules.

- j. Training on prescribing and administration of an opioid antagonist.
- k. Registration with and use of the West Virginia Controlled Substances Monitoring Program established in West Virginia Code Chapter 60A, Article 9.
- l. Maintenance of a record of attendance of each individual who successfully completes the drug diversion training and best practice prescribing of controlled substances training.

11 C.S.R. 6 § 2.5 (2018); Tr. at 40-41.

26. Paragraphs a, i, and k, set forth above in the previous Finding of Fact, describe educational information or data which are specific to West Virginia. See 11 C.S.R. 6 §§ 2.5.a, 2.5.i, & 2.5.k. (2018); Tr. at 41.

27. Those Board-approved courses on drug diversion training and best practice prescribing of controlled substances training are geared toward West Virginia licensees to ensure that West Virginia providers are very aware of West Virginia state laws regarding prescribing and the opioid-related statistics and resulting deaths in West Virginia. Tr. at 41, 93-95. See also B Ex 18 at BOM1034, 1046-1053 & 1059-1068.

28. Mark Spangler is employed by the Board as its Executive Director, having held that position since January 2017. Tr. at 12.

29. As Executive Director Mr. Spangler oversees the overall administration of the Board, supervises the Board's 15 other staff members, and serves as the Board's custodian of records. Tr. at 12-13, 15.

30. In order for a course to receive Board approval as a CME activity eligible to satisfy the specific CME requirement for drug diversion training and best practice prescribing of controlled substances training, the CME provider must submit the

proposed course to the Board for pre-approval on an annual basis, and at least thirty days in advance of the CME activity. 11 C.S.R. 6 §§ 6.3 & 6.4 (2018); Tr. at 41-43.

31. Board staff is required to respond to a CME provider's request for course approval within twenty days of receipt of the request. 11 C.S.R. 6 § 6.6 (2018); Tr. at 189.

32. The Board meets regularly every other month for a total of six meetings per year. Tr. at 189-90.

33. The review and approval of proposed courses submitted by CME providers to satisfy this CME requirement involves an administrative process which has been delegated to the Board's Executive Director. Tr. at 157-58.

34. Conducting this administrative review and approval of proposed CME courses has been one of Executive Director Mark Spangler's duties since he was hired into the position in January 2017, and was also one of the duties assigned to his predecessor. Tr. at 157-58.

35. The Board has an established process by which CME providers may request approval to offer a course that qualifies for the controlled substance CME requirement. A CME provider must submit a Request for Approval Form, along with the course materials, to the Board at least thirty days in advance of the educational activity. The Request for Approval Form includes a checklist of all the required course components established by the Board, and the CME provider must complete the checklist and specifically reference the location of each required component within the course materials. Tr. at 44-45. See B Ex 4.

36. Under the purview of the Board's Executive Director, the CME provider's submission is reviewed to confirm that the proposed course includes all required components previously established by the Board pursuant to its legislatively approved rule. Tr. at 41-46; 189-90.

37. If the proposed course includes all required components established by the Board, the Board's Executive Director notifies the CME provider that the course meets the Board's requirements for the controlled substance CME, and the course is listed on the Board's website as a Board-approved course. Tr. at 41-46.

38. The Board maintains a list of the numerous courses that have been approved by the Board and are available for licensees to satisfy this particular CME requirement ("West Virginia-approved controlled substance courses") on its website for the licensees' ease of reference. Tr. at 46-47. See B Ex 8.

39. The West Virginia-approved controlled substances courses listed on the Board's website include live courses as well as pre-recorded online courses available for immediate viewing at a licensee's convenience. Tr. at 46-47. See B Ex 8.

40. The Board provides e-mail reminders to licensees of this controlled substance CME obligation, including reminders that the CME requirement may only be satisfied through participation in an approved course which is listed on the Board's website. Tr. at 46-47, 112-114; B Ex 20 at BOM492.

41. All physicians due to renew their medical license during the May-June 2021 renewal cycle, including Dr. Peterson, received an e-mail from the Board on March 22, 2021, which specifically reminded renewing licensees of the requirement to complete a WV-approved controlled substance course, and that only approved courses

listed on the Board's website are eligible to satisfy this requirement. Tr. at 112-114; B Ex 20 at BOM492.

42. For those physicians who were required to renew their licenses in 2021, the list of all West Virginia-approved controlled substance courses was hyperlinked to the Board's online renewal application, providing licensees with direct access to either confirm compliance with this CME requirement or to immediately complete an approved course before submitting their renewal application. Tr. at 60-62. See B Ex 7 at BOM012 & B Ex 8.

43. Completion of the West Virginia-approved controlled substance course by those licensees covered by this CME requirement is very important to the Board's mission to protect the public due to the opioid epidemic and related prescription drug issues in West Virginia. Tr. at 183.

44. In order to assure compliance with the Board's CME requirements, the Board conducts an annual CME audit of approximately 100 physicians in or around January of each year. This annual CME audit serves as a safeguard to ensure that physicians have properly complied with all CME requirements and that their certifications of CME completion in their renewal applications are accurate. Tr. at 25-27.

45. Physicians are explicitly informed in their licensure renewal application that they may be selected for a CME audit, and, if audited, they will be required to provide proof that they have completed all required CME. Tr. at 63; B Ex 7 at BOM012.

46. CME audit participants are randomly selected from physicians who renewed their medical licenses between May and June of the preceding year. Tr. at 25-27.

47. Audited licensees are given thirty (30) days to produce documentation satisfactory to the Board which corroborates successful completion of all required CME for the subject reporting period. Tr. at 27. See B Ex 9.

48. Licensees who fail the CME audit, and are unable to corroborate their renewal application attestation, are referred to the Complaint Committee of the Board for possible disciplinary action. Tr. at 27-28.

49. Physician medical licenses issued by the Board are subject to renewal on a fixed, two-year schedule. Tr. at 15-16.

50. Licensees with last names beginning with the letters "A" through "L" are required to renew their medical licenses during the renewal period ending on the last business day of June in even-numbered years. Tr. at 16.

51. Licensees with last names beginning with "M" through "Z" are required to renew their medical licenses during the renewal period ending on the last business day of June in odd-numbered years. Tr. at 16.

52. To be eligible for medical license renewal, physicians must successfully complete all required CME during the preceding two-year cycle ("the CME reporting period"). W. Va. Code § 30-3-12(b); 11 C.S.R. 6 § 3 (2018). See *a/so* Tr. at 23.

53. As part of the renewal application and as a requirement for license renewal, physicians complete a Certificate of Continuing Education Compliance, which requires renewing physicians to attest that they have successfully completed all required CME during the applicable CME reporting period. W. Va. Code § 30-3-12(b); 11 C.S.R. 6 § 3 (2018). See *a/so* Tr. at 23-24.

54. Physicians are not required to provide the Board with documentation of their CME completion, either during the CME reporting period or at the time of license renewal. Tr. at 23-24.

55. It is the responsibility of the licensee to timely and successfully complete all required CME. Tr. at 25.

56. It is the responsibility of the licensee to ensure that all information on a renewal application is accurate and complete. Tr. at 65.

57. On June 8, 2021, Dr. Peterson submitted an application to renew his West Virginia medical license for the period of July 1, 2021, through June 30, 2023 (the "2021 Renewal application." Tr. at 53. See B Ex 7.

58. For physicians who renewed their West Virginia medical license in 2021, the CME reporting period was July 1, 2019, through June 30, 2021. Tr. at 59; B Ex 7 at BOM012.

59. To be eligible to renew his West Virginia medical license in 2021, Dr. Peterson was required to have participated in and successfully completed all required CME between July 1, 2019, through June 30, 2021. Tr. at 59-60; B Ex 7 at BOM012.

60. Like all physicians whose medical licenses were due for renewal in 2021, Dr. Peterson received e-mail renewal reminders from the Board regarding the Board's CME requirements prior to renewal. Dr. Peterson received an e-mail reminder from the Board on March 22, 2021, which provided in pertinent part:

The Complaint Committee of the West Virginia Board of Medicine would like to remind all licensees whose last names begin with the letters M through Z that license renewal is just around the corner. Now is the perfect time to make sure you have completed all biennial CME requirements, including completion of a 3-hour Board-approved course in drug diversion training and best practice prescribing of controlled substances training.

Pursuant to state law, if you have prescribed, ordered, administered or dispensed any controlled substances whatsoever pursuant to a West Virginia license since July 1, 2019, you must complete a 3-hour Board-approved course in drug diversion training and best practice prescribing of controlled substances training between July 1, 2019 and the date you submit your renewal application to the Board.

The Complaint Committee, which is tasked with evaluating noncompliance with the Board's annual CME audit, strongly encourages renewal applicants to avoid these common errors:

* * *

4. Board Approved Course: Licensees will only receive credit for Board-approved courses. Even if a provider advertises a course as Board-approved, please review the Board's list of approved courses for 2021 renewal³ to verify that the course is approved by the West Virginia Board of Medicine. Currently there is one upcoming conference and three online courses available which satisfy the 3-hour Board-approved course in drug diversion training and best practice prescribing of controlled substances training CME. The list of approved courses is updated when the Board approves new courses.

Tr. at 113-114; B Ex 20 at BOM492 (emphasis in original).

61. The Board sent the above-quoted March 22, 2021, e-mail to remind renewing licensees of the importance of this CME requirement, that they would only receive credit through completion of a West Virginia-approved controlled substance course, and in an effort to deter licensee noncompliance. Tr. at 114.

62. Dr. Peterson acknowledged that he received e-mail reminders from the Board regarding CME requirements. Tr. at 201.

63. Dr. Peterson personally completed his 2021 West Virginia licensure renewal application. Tr. at 204-205.

³ The underlined portion provided a hyperlink to the Board's website listing of all Board-approved courses available to satisfy this CME requirement for the 2021 renewal cycle. See B E 8.

64. On his 2021 Renewal Application, Dr. Peterson certified and attested to the Board that he had complied with all CME requirements for the renewal of his license, including the requirement to complete a West Virginia-approved controlled substance course. B Ex 7 at BOM012.

65. Dr. Peterson prescribed controlled substances pursuant to his West Virginia medical license between July 1, 2019, and June 30, 2021, and did not seek, nor was he eligible for, a waiver of the CME requirement to complete a West Virginia-approved controlled substance course. Tr. at 203.

66. Dr. Peterson acknowledged that it was his responsibility, as a licensee of the Board, to ensure that his CME certification and attestation was accurate and complete. Tr. at 201.

67. On his 2021 Renewal Application, Dr. Peterson attested that he completed a West Virginia-approved controlled substance course between July 1, 2029, and June 30, 2021. More particularly, Dr. Peterson attested:

Between July1, 2029 and today, I completed a minimum of three (3) hours of drug diversion training and best practice prescribing of controlled substances CME through a course which has been approved by the West Virginia Board of Medicine. I attest that I have reviewed the list of Board approved courses, and that the course I took is on the list and was completed between July 1, 2019 and today. Click here⁴ for a list of Board approved courses which satisfy this requirement for your current renewal cycle.

B Ex 7 at BOM012 (underlining in original).

68. Dr. Peterson admitted that he did not click the hyperlink to review the list of West Virginia-approved controlled substance courses to confirm whether he had

⁴ The underlined portion provided a hyperlink to the Board's website listing of all Board-approved courses available to satisfy this CME requirement for the 2021 renewal cycle. See B E 8.

completed a West Virginia-approved controlled substance course during the CME reporting period prior to submitting his 2021 renewal application. Tr. at 205.

69. Dr. Peterson knew that the Board maintains a list of West Virginia-approved controlled substance courses on its website. Tr. at 204.

70. Dr. Peterson was aware of this mandatory CME requirement for completing a West Virginia-approved controlled substance course when he completed his 2021 renewal application. Tr. at 203.

71. Dr. Peterson knew of this specific CME requirement because it was in effect when he renewed his West Virginia medical license in 2015, 2017, and 2019, and he has never been eligible for a waiver of this CME requirement. Tr. at 203.

72. Dr. Peterson did not attempt to contact the Board to determine if the Board would accept a CME course that was not on the list of West Virginia-approved controlled substance courses to satisfy this CME requirement. Tr. at 208.

73. Prior to submitting his 2021 renewal application, Dr. Peterson certified that he had carefully read the application questions, answered them completely, and provided true and correct answers. Dr. Peterson further certified that he understood furnishing false or misleading information on his renewal application would constitute good cause for disciplinary action or the subsequent revocation of his license. Tr. at 64-65; B Ex 7 at BOM012.

74. Based upon the content of Dr. Peterson's renewal application, including his certification of completion of all required CME requirements, Dr. Peterson's West Virginia medical license was renewed for the period of July 1, 2021, through June 30, 2023. Tr. at 54. See B Ex 5.

75. On January 3, 2022, the Board of Medicine issued correspondence to Dr. Peterson advising him that he had been randomly selected for a Continuing Medical Education ("CME") audit to verify his compliance with all applicable CME requirements. See B Ex 9 at BOM016-019.

76. Dr. Peterson has maintained active medical licensure in West Virginia since 1988 and had never previously been selected for a CME audit by the Board. Tr. at 106-107, 198, 200; B Ex 20.

77. Dr. Peterson responded to the CME audit on or about January 10, 2022. See B Ex 10 at BOM020.

78. Dr. Peterson's response to the CME audit included documentation that demonstrated completion of his basic CME obligation to complete 50 CME hours. More particularly, Dr. Peterson produced documentation of his current board certification through the American Board of Family Medicine ("ABFM"), and his successful involvement in maintenance of certification from the ABFM during the July 1, 2019, through June 30, 2021, reporting period. Tr. at 72-73. See B Ex 10 at BOM021-022.

79. Because Dr. Peterson attested on his 2021 renewal application that he had successfully completed a West Virginia-approved controlled substance course, not being eligible for a waiver of this requirement, Dr. Peterson was required to provide documentation that he had completed a West Virginia-approved controlled substance course between July 1, 2019, and June 30, 2021, in order to successfully pass the CME audit. Tr. at 74; B Ex 7 at BOM012; B Ex 9 at BOM016-017; B Exs 11 & 12.

80. In further response to the CME audit, Dr. Peterson produced a CME certificate for having completed a 21-hour CME entitled "PBI Prescribing Course:

Opioids, Pain Management and Addiction” on January 9-10, 2021 (“PBI Course”). B Ex 10 at BOM023.

81. The PBI Course was not previously approved as a controlled substance course appropriate for licensees who were required to satisfy this CME requirement. Tr. at 73-74, 87; B Ex 8 at BOM165-171.

82. On January 18, 2022, the Board, by correspondence sent by Executive Director Spangler, notified Dr. Peterson of his CME noncompliance due to his failure to complete a West Virginia-approved controlled substance course during the CME Reporting Period. Tr. at 75-76; B Ex 11 at BOM024-026.

83. Subsequently, on January 28, 2022, Dr. Peterson completed a West Virginia-approved controlled substance training course, over six months after the end of the applicable CME Reporting Period. Tr. at 77-78. See B Ex 12 at BOM034-041.

84. The West Virginia-approved controlled substance course which Dr. Peterson completed on January 28, 2022, was presented by CME provider NetCE and entitled “#91602 Prescribing Opioids, Providing Naxalone, Preventing Drug Diversion: the West Virginia Requirement” (the “NetCE Course”). See B Ex 12 at BOM041.

85. The NetCE Course was a 3-hour CME which had been prerecorded and made available online, and which was listed on the Board’s website beginning on or about March 19, 2021. See B Ex 8 at BOM 166.

86. Executive Director Spangler referred Dr. Peterson to the Board’s Complaint Committee for CME noncompliance due to Dr. Peterson’s failure to complete a West Virginia-approved controlled substance course during the applicable CME Reporting Period. Tr. at 79. See B Ex 13.

87. On September 11, 2022, the Complaint Committee authorized Initiated Complaint No. 22-86-W against Dr. Peterson. Tr. at 80-81. See B Ex 14 at BOM044-046.

88. When the parties were unable to resolve Complaint No. 22-86-W by agreement, the Complaint Committee determine that probable cause existed to institute disciplinary charges against Dr. Peterson, alleging a violation of the Board's rule requiring completion of specific controlled substance CME training. Tr. at 88.

89. Dr. Peterson maintains that the PBI Course which he completed on January 9-10, 2021, should satisfy his West Virginia CME obligation to complete a West Virginia-approved controlled substance course. See B Ex 12.

90. The PBI Course was not a West Virginia-approved controlled substance course, nor was it ever submitted by the CME provider for consideration to be approved as a West Virginia-approved controlled substance course. Tr. at 87. See B Ex 8.

91. Dr. Peterson had been ordered to attend the PBI Course as a disciplinary sanction by the Virginia Board of Medicine (the "Virginia Board") pursuant to a Consent Order which Dr. Peterson entered with the Virginia Board on November 20, 2020 (the "Virginia Order"). See B Ex 29 at BOM214-221.

92. In the Virginia Order, the Virginia Board found that Dr. Peterson violated certain provisions of the Virginia Code and the Virginia Board's regulations with respect to chronic pain treatment he provided to eight (8) patients, identified as Patients A through H. The Virginia Order identified violations with respect to Dr. Peterson's care and treatment of the patients, particularly with respect to his prescribing of controlled substances, medical recordkeeping, and monitoring patient compliance. See B Ex 29.

93. The Virginia Order imposed discipline on Dr. Peterson's Virginia medical license in the form of a reprimand, and also required Dr. Peterson to complete twenty (20) CME hours in the subject of proper prescribing, and an additional fifteen (15) CME hours in the subject of recordkeeping. See B Ex 29 at BOM219-220.

94. In order to satisfy the 20 CME hour requirement in proper prescribing required by the Virginia Order, Dr. Peterson attended the PBI Course on January 9-10, 2021. Tr. at 229. See B Ex 12.

95. The Virginia Order explicitly prohibited Dr. Peterson from using the CME hours he earned from the PBI Course toward meeting his CME obligations in Virginia. Tr. at 229-230. See B Ex 29 at BOM219.

96. Although Dr. Peterson was prohibited from using the PBI Course to satisfy his basic Virginia CME requirements, he is seeking to apply the PBI Course to satisfy the West Virginia CME requirement for completion of a West Virginia-approved controlled substance CME course. Tr. at 230.

97. Dr. Peterson testified that he believed the PBI Course was sufficient to satisfy the West Virginia controlled substance CME requirement in view of a Consent Order he entered into with the West Virginia Board of Medicine on May 21, 2021, in the matter of Complaint No. 20-96-W (the "2021 WV Consent Order"). Tr. at 208-209; B Ex 29.

98. The 2021 WV Consent Order was reciprocal disciplinary action which publicly reprimanded Dr. Peterson for having disciplinary action taken against his Virginia medical license pursuant to the Virginia Order, discussed above, and also for

Dr. Peterson's guilty plea in a federal criminal case, in which he pled guilty to one misdemeanor count of misbranding medications. See B Ex 29.

99. The 2021 WV Consent Order was unrelated to Dr. Peterson's West Virginia CME obligations and did not contain any provision which either expressly or impliedly relieved or otherwise excused Dr. Peterson from completing a West Virginia-approved controlled substance course during the 2021 CME Reporting Period, or any other reporting period. Tr. at 209-210. See B Ex 29 at BOM187-221.

100. During his testimony, Dr. Peterson confirmed that the 2021 WV Consent Order did not relate to his West Virginia CME obligations and does not contain any provision or language which excuses him from his West Virginia CME obligation to complete a West Virginia-approved controlled substance course. Tr. at 231.

101. Dr. Peterson acknowledged that he mistakenly believed that the PBI Course qualified as a West Virginia-approved controlled substance course. Tr. at 212-213; B Ex 12.

102. Dr. Peterson agreed that his mistaken belief was not based upon any representation made to him by the Board. Tr. at 218.

103. Dr. Peterson proposes that the Board should accept the PBI Course as satisfaction of the mandatory West Virginia CME requirement because the 21-hour PBI Course CME he completed was an intensive prescribing course that was superior to the West Virginia-approved controlled substance courses. Tr. at 315-321.

104. Jennifer Schneider, M.D., called as a witness by Respondent, is a retired physician who previously practiced in the areas of internal medicine, addiction medicine, and pain medicine. Tr. at 239-240.

105. Dr. Schneider created and presented the PBI Course attended by Dr. Peterson. Tr. at 244.

106. The PBI Course involved a comprehensive approach to chronic pain management, including treatment through both opioid and non-opioid medications, as well as other treatment modalities. Tr. at 244-245.

107. The PBI Course was presented live via videoconferencing and typically had up to 12 participants in the course. This 21-hour CME included 6 hours of pre-course self-study work and 15 hours of live videoconferencing over the course of two days. All participants completed an exam at the end of the course and prepared a protection plan which outlined what they learned and what steps they would take to improve their practice. Tr. at 245-247.

108. The six hours of pre-course self-study work included direction to participants to visit websites, including medical board websites, in their respective states, to review state-specific information. Tr. at 249.

109. While Dr. Peterson asserts that he completed the pre-course self-study work for the PBI Course by going online to read about opioid issues affecting West Virginia and Virginia and state-specific laws, Dr. Peterson has no record or evidence of what material he reviewed in the course of his self-study activity. Tr. at 314, 327.

110. Dr. Schneider did not know what state-specific material a participant may have reviewed as part of his or her self-study. Dr. Schneider provides a list of state websites for the participants to visit, but is not personally familiar with the websites, does not know what material is on the websites, and does not know whether a participant actually visited any website. Tr. at 277-278.

111. According to Dr. Schneider, the PBI Course was not state specific, and she did not discuss or present information specific to any certain state or West Virginia. Tr. at 250.

112. After reviewing the list of components required by the Board's legislative rule to be included in a West Virginia-approved controlled substance course, Dr. Schneider observed that the PBI Course covered the listed components except for the West Virginia-specific components. Tr. at 273-274.

113. The PBI Course did not cover West Virginia statistics on prescription drug abuse and resulting deaths. Tr. at 259-260. See B Exs 17 & 8.

114. The PBI Course did not cover West Virginia controlled substance and prescribing laws. Tr. at 275-276. See B Exs 17 & 8.

115. The PBI Course did not cover registration with and use of the West Virginia Controlled Substance Monitoring Program. Tr. at 262-263. See B Exs 17 & 8.

116. Dr. Schneider testified that she reviewed the course material from two separate West Virginia-approved controlled substance courses, including the NetCE Course which Dr. Peterson completed in January 2022 after the CME Audit. Dr. Schneider opined that PBI Course and the West Virginia-approved controlled substance courses were generally equal with respect to dealing with the issues of opioid abuse, "except that these West Virginia courses are obviously better, in that they've got specific slides and stuff for West Virginia." Dr. Schneider opined that the PBI Course was better with respect to educating physicians on how to treat patients with chronic pain. Tr. at 263-265.

117. Dr. Schneider opined that the WV-controlled substances courses "were excellent courses, in terms of, you know, the legal aspects and so forth, but didn't really address what you really need to be able to do a good job treating a patient with chronic pain." Tr. at 265.

118. Dr. Schneider acknowledged that the PBI Course has never been submitted to the West Virginia Board of Medicine for consideration for approval as a West Virginia-approved controlled substance course. Tr. at 272.

119. The Board acknowledged in its post-hearing brief that the PBI Course is a quality CME and that PBI has a good reputation as a CME provider.

120. Mr. Spangler explained that CME hours earned from the PBI Course could be utilized by licensees towards satisfying their baseline CME requirement to obtain 50 CME hours. Tr. at 172-173.

121. Mr. Spangler further explained that the PBI Course is not eligible to satisfy the separate CME requirement to complete a West Virginia-approved controlled substance course because: (1) the PBI Course was not a West Virginia-approved controlled substance course listed on the Board 's website, (2) the PBI Course has never been submitted by the CME Provider to the Board for consideration as an approved course, and (3) the PBI Course did not include all required components established by the Board's legislative rule necessary to satisfy this mandatory CME requirement. Tr. at 87-88; B Exs 1 & 8.

122. Lee Smith, MD ("Dr. Smith"), testified as a witness for the Respondent at the hearing. Tr. at 330-410.

123. Dr. Smith is a retired physician who practiced as a facial plastic surgeon for approximately 37 years, mostly in Princeton and Bluefield, West Virginia. Tr. at 331.

124. Dr. Smith and Dr. Peterson are personal friends. Dr. Smith knew Dr. Peterson for years as a referral source, and they later became friends. Dr. Smith testified that he and Dr. Peterson go to dinner a couple of times a year, visit each other's houses, and have celebrated Christmas together. Tr. at 332.

125. Dr. Smith previously served as a Board member of the West Virginia Board of Medicine from approximately 1997 to 2008. R Ex 10.

126. During his terms on the Board, Dr. Smith served on various Board committees, including chairman of the Complaint Committee from 2002 to 2005 and chairman of the Licensure Committee from 2006 to 2008. Dr. Smith also served as Vice President of the Board from 2006 to 2008. See R Ex 10.

127. Dr. Smith ceased being a member of the Board in or about 2008. R Ex 10; Tr. at 376-377.

128. Dr. Smith generally opined, based upon a set of assumed facts proffered by Dr. Peterson's counsel, that a CME course that is required to be Board approved must be approved by the Board and not the Board's Executive Director, unless the Board delegated approval authority to the Board's Executive Director in a formal rule. Tr. at 346.

129. At the time Dr. Smith served on the Board, there was no CME requirement in effect that required any specific CME course to go through a Board approval process. Tr. at 382.

130. Dr. Smith was not a member of the Board when the CME requirement at issue in this matter was enacted by the legislature in 2012 and implemented by the Board in 2014. See W. Va. Code § 30-1-7a (2012) & 11 C.S.R. 6 § 3.3 (2013). Tr. at 38-39, 382-383.

131. Dr. Smith was not involved in the Board's legislative rulemaking process which developed the components of the West Virginia-approved controlled substance course, nor was he involved in the Board's deliberations in implementing the CME requirement or developing administrative processes for reviewing and approving CME courses submitted by CME providers. Tr. at 382-383.

132. Dr. Smith has no knowledge of the Board's established administrative processes for approving CME courses on drug diversion training and best practice prescribing of controlled substances training. Tr. at 382-383.

133. Dr. Smith agreed that the Board "definitely can" delegate processes to the Executive Director of the Board. Tr. at 387.

134. It was Dr. Smith's opinion that the Complaint Committee's finding of probable cause against Dr. Peterson was unwarranted because Dr. Peterson had completed the PBI Course. Tr. at 357-359, 406.

135. Dr. Smith agreed that if he were currently serving on the Board's Complaint Committee, he would be ethically obligated to recuse himself from a disciplinary matter involving Dr. Peterson due to their personal friendship. Tr. at 350-351.

136. Dr. Smith recalled that when he served on the Board's Complaint Committee, the Committee regularly initiated complaints against physicians for CME

noncompliance, and these complaints were often resolved through a consent order which assessed a fine and a public reprimand against the licensee. Tr. at 391-392.

137. Upon cross-examination, Dr. Smith was presented with four consent orders related to CME noncompliance that were entered by the Board while he was chair of the complaint committee between 2004-2006. These consent orders indicated that while Dr. Smith was chair of the Complaint Committee, licensees were fined, publicly reprimanded and in some cases suspended for CME noncompliance. Tr. at 393-405.

138. It is in the public interest for licensees to complete all required CME in order to provide the best possible care for the citizens of West Virginia. Tr. at 118-119.

139. Consistent discipline and equal treatment of licensees for CME noncompliance is fair to licensees and important to the integrity of the Board, its mission and its CME compliance system. Tr. at 119-121.

140. The Board's Complaint Committee commonly initiates complaints against licensees for CME noncompliance. Tr. at 83.

141. CME noncompliance for failure to complete the mandatory West Virginia-approved controlled substance course is the most common CME deficiency referred to the Complaint Committee each year. Tr. at 83.

142. Complaints based on CME noncompliance are typically resolved by a voluntary consent order wherein the licensee agrees to pay an administrative fine. Tr. at 83.

143. The consistent fine imposed by the Complaint Committee for a licensee's CME noncompliance for failure to complete the mandatory WV-approved controlled

substance course is a \$500.00 administrative fine pursuant to a voluntary consent order. Tr. at 83-84.

144. The Board does not receive money from administrative fines assessed to licensees. The money from fines paid by licensees passes through the Board to the general revenue fund of the legislature. Tr. at 83-84.

145. The Board cannot impose any disciplinary action against a licensee, including an administrative fine, without either a voluntary consent order or a Board Order. Tr. at 120.

146. CME noncompliance complaints are typically resolved without the initiation of formal disciplinary charges or a public hearing. Tr. at 83-85.

147. Consistent with Board precedent, and on multiple occasions after Complaint No. 22-86-W was initiated, Dr. Peterson was offered the opportunity to resolve Complaint No. 22-86W by his agreement to a Consent Order imposing a \$500.00 administrative fine. Tr. at 84.

148. After the parties were unable to resolve Complaint No. 22-86-W by agreement, the Complaint Committee determined that probable cause existed to institute disciplinary charges against Dr. Peterson due to his CME noncompliance. Tr. at 88.

Consistent with the foregoing Findings of Fact, the undersigned Hearing Examiner concludes, as a matter of law:

CONCLUSIONS OF LAW

1. West Virginia Code § 30-3-1, *et seq.*, provides the West Virginia Board of Medicine ("Board") with authority to issue licenses to practice medicine and surgery in this state, and with authority to act as the regulatory and disciplinary body for the

practice of medicine in this state. W. Va. Code § 30-3-5 & 30-3-7(a)(1); 11 C.S.R. 1A § 1.1, *et seq.* (2023).

2. The Board is authorized to establish regulations necessary to carry out the purposes of the West Virginia Medical Practice Act. W. Va. Code § 30-3-7(a)(1). See 11 C.S.R. 1A § 1.1, *et seq.* (2023).

3. The Board has jurisdiction over the subject matter and over the Respondent. W. Va. Code § 30-3-5.

4. Dr. Peterson's license to practice medicine and surgery in the State of West Virginia is subject to regulation and discipline by the Board. W. Va. Code §§ 30-3-5 & 30-3-7(a).

5. 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).

6. 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.

7. The West Virginia Medical Practice Act sets forth conduct which may render an individual unqualified for licensure or subject to discipline or other restrictions upon licensure. W. Va. Code § 30-3-14.

8. The inherent object of the statute regulating the practice of medicine and surgery is the protection of the public health. Syl. Pt. 2, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953).
9. The Board issued a timely Complaint and Notice of Hearing (“CNOH”) in this matter on September 20, 2023. See W. Va. Code § 30-1-5(c).
10. Dr. Peterson was properly served with the CNOH via certified mail and in accordance with the requirements of W. Va. Code §§ 29A-5-1 & 29A-7-2. See W. Va. Code § 56-2-1.
11. The Respondent and Petitioner had legally sufficient notice of the public hearing in this matter. See W. Va. Code § 30-3-14 (h) & (i); 11 C.S.R. 3 § 11.4 (2010).
12. The Petitioner complied with the procedural requirements set forth in W. Va. Code § 30-1-5(c).
13. Pursuant to regulation, the Board may designate a Hearing Examiner to conduct hearings. The undersigned Hearing Examiner is a licensed attorney and was so designated in this case by the Board. Such hearing was conducted pursuant to 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.*; 11 C.S.R. 1A § 12 (2023); 11 C.S.R. 3 § 11, *et seq.* (2010).
14. At hearing, the rules of evidence as applied in civil cases in the circuit courts of this state were followed. See 11 C.S.R. 3 § 11.5(c) (2010). All exhibits entered into evidence at hearing are authentic and valid and were admitted with the proper evidentiary foundation.

15. In a proceeding such as this, it is proper to take into consideration Board precedent. See W. Va. Code § 29A-2-9.

16. Credibility is determined by the Hearing Examiner in administrative cases, based upon thorough evaluation of witness testimony. See *Darby v. Kanawha County Bd. of Educ.*, 227 W. Va. 525, 711 S.E.2d 595 (2011). The Hearing Examiner is uniquely situated to make such determinations and such determinations are binding unless patently without basis in the record. *Webb v. W. Va. Bd. of Medicine*, 212 W. Va. 149, 156, 569 S.E.2d 225, 232; *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995). Credibility determinations may be based upon many factors, including the following: the general demeanor and comportment of the witness at hearing; the bias or interest of the witness; the consistency or inconsistency of the statements of the witness; the witness' ability and acuteness to observe; the memory of the witness; the reputation for honesty of the witness; and other factors which tend to cause the trier of fact to believe or disbelieve the testimony of the witness. See *Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers*, § 607.02(1)(b) (5th Ed. 2012).

17. Dr. Jennifer Schneider, called as a witness by the Respondent, may be considered an expert in the subject of controlled substance continuing medical education ("CME") training for physicians. See W. Va. Rules of Evidence 72. See generally, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993), *cert. denied*, 571 U.S. 1129 (1994).

18. Dr. Schneider's testimony was generally credible and consistent, as was the testimony given by the Board's Executive Director, Mark Spangler.

19. The undersigned Hearing Examiner found the factual testimony of Dr. Peterson to be generally credible and consistent but gives no weight to his opinions regarding the merits of the Board's complaint given his self-interest in the proceedings.

20. Dr. Lee Smith's testimony regarding factual matters was generally credible. However, his opinion testimony regarding the merits of the Complaint against Dr. Peterson is afforded no weight because he admitted that he and Dr. Peterson are "personal friends" and he would necessarily be ethically recused from participating in any disciplinary matter regarding Dr. Peterson if he was presently serving on the Board. In addition, Dr. Peterson's recollection of disciplinary actions taken by the Board regarding CME violations by physicians during his tenure on the Board was substantially impeached by reliable documentary evidence presented during Dr. Smith's cross-examination by counsel for the Board. Further, Dr. Smith has not served on the Board at any time since this West Virginia-specific controlled substance CME requirement was enacted.

21. The Petitioner bears the burden of proving the allegations in the Complaint and Notice of Hearing by clear and convincing evidence. W. Va. Code § 30-3-14(b); *Webb, supra*, at 156-57, 231-32.

22. 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, supra*, at 156, 232, citing *Wheeling Dollar Savings & Trust Co. v. Singer*, 162 W. Va. 502, 510, 250 S.E.2d 369, 374 (1978) (quoting *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118, 123 (1954)).

23. The Board's Legislative Rule, Series 1A, *Licensing and Disciplinary Procedures: Physicians; Podiatrists*, enumerates additional conduct for which discipline may be imposed. 11 C.S.R. 1A § 12 (2023).

24. As a Chapter 30 licensing board, the West Virginia Board of Medicine is required by law to establish CME requirements as a prerequisite to license renewal. More particularly, the Board is statutorily obligated to "develop continuing education criteria appropriate to its discipline, which shall include, but not be limited to, course content, course approval, hours required and reporting periods." W. Va. Code § 30-1-7a(a).

25. The Board has promulgated legislatively approved rules which establish CME requirements for physicians. 11 C.S.R. 6 § 1.1, *et seq.* (2018)

26. In accordance with W. Va. Code § 30-1-7a and 11 C.S.R. 6 § 3.3 (2018), every physician licensed by the Board who prescribed, administered, or dispensed any controlled substance pursuant to their West Virginia license during the preceding licensure cycle is required, as a prerequisite for renewal, to have completed a minimum of three hours in a controlled substances CME course approved by the West Virginia Board of Medicine ("West Virginia-approved controlled substance CME course").

27. The statutory CME requirement to complete drug diversion training and best practice prescribing of controlled substances training every renewal cycle was originally enacted by the legislature in 2012 and was implemented by the Board effective May 1, 2014. See W. Va. Code § 30-1-7a (2012) & 11 C.S.R. 6 § 3.3 (2013).

28. As a physician who prescribed controlled substances during the preceding licensure cycle, Dr. Peterson was required to complete a minimum of three hours in a

West Virginia-approved controlled substance CME course. See W. Va. Code § 30-1-7a & 11 C.S.R. 6 § 3.3 (2018).

29. The Consent Order into which Dr. Peterson entered with the Board in May of 2021 did not excuse Dr. Peterson from completing a three-hour drug diversion CME course in compliance with W. Va. Code § 30-1-7a & 11 C.S.R. 6 § 3.3 (2018). See B Ex 29 at BOM187-221.

30. Dr. Peterson did not take a West Virginia-approved controlled substance CME course for the CME reporting period of July 1, 2019, through June 30, 2021.

31. Because Dr. Peterson did not take a West Virginia-approved controlled substance CME course during the CME reporting period of July 1, 2019, through June 30, 2021, Dr. Peterson failed to comply with the specific CME mandates in W. Va. Code § 30-1-7a and 11 C.S.R. 6 § 3.3 (2018).

32. As a consequence of his failure to comply with the specific CME requirement for physicians who prescribed, administered or dispensed any controlled substance, Dr. Peterson failed to perform a statutory and legal obligation of a licensee of the Board, in violation of W. Va. Code § 30-3-14(c)(17) and 11 C.S.R. 1A §§ 12.1.o, and 12.1.bb. (2023).

33. The Board met its burden of proving the substantive allegations of professional misconduct set forth in Count 1 of the Complaint and Notice of Hearing by clear and convincing evidence. See *Webb, supra*, at 569, 231.

34. Pursuant to W. Va. Code § 30-3-14(c), the Board has the authority to discipline Dr. Peterson if the Board finds his conduct violated the West Virginia Medical Practice Act.

35. The West Virginia Medical Practice Act and the Board's Legislative Rules mandate that the Board protect the public interest, safety, health and welfare. W. Va. Code § 30-3-1, *et seq.*; 11 C.S.R. 1A § 1, *et seq.* (2007).

36. Protection of the public interest requires that the Board demand a high degree of integrity from members of the medical profession. *Vest, supra*; *W. Va. Bd. of Medicine v. Romulo Dela Rosa, M.D.* (1989); *W. Va. Bd. of Medicine v. Lagrimas B. Sadorra, M.D.* (1988).

37. Pursuant to West Virginia Code § 30-3-14(j), the Board may enter an Order imposing disciplinary sanctions when, subsequent to a notice and hearing, it is found that the licensee violated West Virginia Code § 30-3-14(c) and/or the legislative rules promulgated pursuant to the Medical Practice Act.

38. The Board is authorized to impose one or more of the following disciplinary measures on Dr. Peterson in this matter, as appropriate:

- (1) Deny his or her application for a license or other authorization to practice medicine and surgery or podiatry;
- (2) Administer a public reprimand;
- (3) Suspend, limit or restrict his or her license to practice medicine and surgery or podiatry for up to five years;
- (4) Revoke a license or authorization to practice medicine and surgery or podiatry or to prescribe or dispense controlled substances, including for the life of the licensee;
- (5) Require a licensee to submit to care, counseling or treatment designated by the Board as a condition for initial or continued licensure or renewal of licensure or other authorization to practice medicine and surgery or podiatry;
- (6) Require participation in a program of education;
- (7) Require supervised practice for a specified period of time; and

(8) Assess a fine of not less than \$1,000 nor more than \$10,000.

W. Va. Code § 30-3-14(j).

39. The Board is further authorized by legislative rule to impose other sanctions and penalties, and to assess the costs of the Board's investigation and administrative proceedings against the licensee. 11 C.S.R. 1A § 12.3.g (2023).

40. In determining an appropriate sanction or sanctions for Dr. Peterson's established violations, the existence of prior discipline regarding Dr. Peterson in West Virginia, or any other jurisdiction, may be considered as an aggravating factor.

41. An administrative agency's decision may be found to be arbitrary and capricious if the decision makers rely on factors that the Legislature did not intend to be considered, entirely ignore important aspects of the problem, explain their decision in a manner contrary to the evidence before it, or reaches a decision that is so implausible that it cannot be ascribed to a difference in view. See *Appalachian Voices v. State Water Control Bd.* 912 F.3d 746,753 (4th Cir. 2019; *Bedford County Mem'l Hosp. v. Health & Human Serv.*, 769 F.2d 1017, 1022 (4th Cir. 1985)

42. In determining whether an agency's action was arbitrary or capricious, the reviewing authority must consider whether the agency considered the relevant factors and whether a clear error of judgment was made. Although this inquiry into the facts must be searching and careful, the ultimate standard of review is a narrow one. A Hearing Examiner may not substitute his judgment for that of the agency. Deference is due where the agency has examined the relevant data and provided an explanation of its decision that includes a rational connection between the facts found and the

choice made. See *Ohio Valley Envtl. Coal. V. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009).

43. Although reasonable minds may differ on whether to discipline Dr. Peterson in the circumstances presented by this complaint, imposing discipline on Dr. Peterson for failing to timely complete a West Virginia-approved controlled substance CME course, as required by statute and the Board's regulations, was not the result of arbitrary and capricious decision making. See *Bedford, supra*.

DISCUSSION AND ANALYSIS

Notwithstanding the detailed Findings of Fact and Conclusions of Law set forth above, this is really a very simple matter. The Board of Medicine has established a CME requirement, in compliance with a statutory directive from the West Virginia Legislature, for certain physicians who prescribe, administer, or dispense any controlled substance pursuant to their West Virginia medical license, to complete one 3-hour course on drug diversion and best practice of prescribing controlled substances during each two-year license renewal cycle. The Board's Legislative Rule implementing this requirement, approved by the Legislature, mandates that the CME course must include certain topics, including matters that are specific to West Virginia, such as the state's Controlled Substances Monitoring Program and West Virginia statistics on prescription drug abuse and resulting deaths. See 11 C.S.R. 6 § 2.5 (2018).

Dr. Peterson clearly did not complete a West Virginia-approved controlled substance CME course during the two-year period preceding his submission of his online application on June 8, 2021, to renew his West Virginia medical license for an additional two years. However, he did attest to having taken a West Virginia-approved

controlled substance course when he submitted his online renewal application. Dr. Peterson has credibly explained that he believed a 21-hour controlled substance CME course he completed through PBI met the Board's CME requirement. However, when he was randomly selected for a CME audit by the Board and submitted proof of successfully completing the PBI course, he learned that the PBI course had not been approved as a course which satisfied the West Virginia-specific requirement. Indeed, although PBI is a reputable and competent CME provider, PBI had never submitted the course Dr. Peterson completed for approval by the West Virginia Board of Medicine. Moreover, even if the PBI course had been timely submitted, it would necessarily have been rejected because it did not include identifiable training which addressed certain data and laws specific to West Virginia essential to comply with the Board's CME Rule.

This violation could easily have been avoided if Dr. Peterson had simply clicked on the hyperlink in his online license renewal application which would have taken him directly to the Board's list of approved controlled substance CME courses. Not finding the PBI course on the list, Dr. Peterson could have done what he did when confronted by an audit that revealed the PBI course was not West Virginia-approved - take an online 3-hour CME course that was listed on the Board's website as West Virginia-approved. Although Dr. Peterson admits he was mistaken and his attestation to the Board in June 2021 was erroneous, he contends he should not be charged with a violation because the PBI course he completed was more detailed and provided better guidance on treating chronic pain and dealing with medication diversion and related topics. These arguments represent matters that may appropriately be considered to mitigate Dr. Peterson's misconduct, but they do not change the fact that he failed to

meet the CME requirement which the West Virginia Legislature determined to be minimally required to combat a medical crisis.

Lacking any defense beyond his mistaken belief that the PBI course would meet the Board's CME requirement for a controlled substance course, Dr. Peterson has elected to obfuscate his own conduct by attempting to misdirect the focus of these proceedings in a different direction. Despite credible and uncontradicted testimony from the Board's Executive Director that one of his duties since taking that position, with assistance from staff, has been approving and disapproving CME courses submitted to meet the West Virginia-specific controlled substance training requirement, Dr. Peterson challenges this testimony. Even though it is obvious that, because the Board of Medicine only meets every two months, the Board's staff, through its Executive Director, must act within 20 days to approve or disapprove a CME submission to comply with the time limits in the Rule, Dr. Peterson insists that this delegation of authority must be properly memorialized and produced as evidence.

Respondent's argument is completely specious. There is no provision in the Board's CME rules which restricts the Board from delegating its authority to approve CME courses to the Board's Executive Director. Similarly, there is no provision in the West Virginia Medical Practice Act, W. Va. Code §§ 30-3-1 to 30-3-18, which requires the Board to follow any particular procedure when delegating authority to its Executive Director or any other part of its staff. Moreover, even if the Board would need to ratify the actions of its Executive Director, the outcome here would not change because the evidence of record clearly established that the PBI course lacked multiple training elements needed to gain Board approval for meeting the controlled substance CME

requirement. There is simply no merit to the Respondent's arguments directed toward the process for approving controlled substance CME training.

The next significant issue raised by the Respondent involves the contention that the Complaint Committee's decision to find probable cause that a violation of the Medical Practices Act occurred, in the context of this Complaint, represents arbitrary and capricious decision making. An administrative decision, such as the decision to initiate a formal complaint for adjudication by the Board, may be found to be arbitrary and capricious if the decision makers rely on factors that the Legislature did not intend to be considered, entirely ignore important aspects of the problem, explain their decision in a manner contrary to the evidence before them, or reach a decision that is so implausible that it cannot be ascribed to a difference in view. *See Appalachian Voices v. State Water Control Bd.* 912 F.3d 746,753 (4th Cir. 2019; *Bedford County Mem'l Hosp. v. Health & Human Serv.*, 769 F.2d 1017, 1022 (4th Cir. 1985)

The legal test for determining whether an agency's action was arbitrary or capricious requires consideration of whether the Committee considered the relevant factors and whether a clear error of judgment was made. Although this inquiry into the facts must be searching and careful, the ultimate standard of review is a narrow one. A Hearing Examiner is not permitted to simply substitute his judgment for that of the Committee. Indeed, deference is due so long as the Committee examined relevant data and provided an explanation of its decision that includes a rational connection between the facts found and the choice made. *See Ohio Valley Env'tl. Coal. V. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009). (The CNOH issued by the Complaint Committee explains its rationale for electing to pursue this Complaint.) Although reasonable minds

might differ on whether to discipline Dr. Peterson in the circumstances presented in this Complaint, imposing discipline on Dr. Peterson for failing to timely complete a West Virginia-approved controlled substance CME course, as required by statute and the Board's regulations, did not result from arbitrary and capricious decision making. See *Bedford, supra*.

The final issue that requires some comment involves Dr. Peterson's attempt to assert a violation of his right to due process because his counsel was not permitted to call three Board Members and question them concerning their actions in these proceedings. This argument was appropriately addressed prior to the hearing in response to a Motion in Limine from the Petitioner, asking to exclude any testimony from these Board Members. The Petitioner's motion was granted because the actions taken by the members of the Complaint Committee, or Board Secretary, are part of an investigative process that may lead to issuance of a Complaint and Notice of Hearing based upon a finding of probable cause to believe a violation of the Medical Practice Act may have taken place. The Complaint and Notice of Hearing is simply a charge, it is not a final order of the Board.

Just as a magistrate who issues a search warrant may not ordinarily be called to appear and be questioned regarding his or her probable cause finding, these three Board Members were not proper witnesses because their decisions are tested by the relevant admissible evidence presented before the Hearing Examiner. The evidentiary hearing on December 13 and 14, 2023, provided Dr. Peterson all the due process to which he is entitled under the federal and state constitutions and the West Virginia Administrative Procedures Act. Respondent's complaint about not being able to vouch

the record with testimony from witnesses whose testimony had previously been disallowed is totally without merit. The time to proffer any relevant testimony that might be gleaned from these Board Member witnesses was in response to the Petitioner's Motion in Limine. Once that motion was granted, the Respondent does not get a second chance by complaining that the witnesses whose testimony was disallowed failed to appear.

The only remaining question is assessing a proper penalty for Dr. Peterson's violation. Contrary to the narrative promoted by Dr. Peterson, this was not merely an innocent mistake. The Board of Medicine provided Dr. Peterson every reasonable opportunity to avoid making this mistake. The online application process presented Dr. Peterson with a hyperlink to the Board's website where he could have verified that the controlled substance CME program which he had taken had been approved by the Board for West Virginia licensees. Dr. Peterson admitted that he failed to take advantage of this hyperlink at the time he attested that he had, in fact, completed a West Virginia-approved controlled substance CME course during the application renewal process. Had he followed the link to the Board's website, he would have found that the course he had taken had not been approved as one of the courses eligible to fulfill this West Virginia-specific CME requirement. Dr. Peterson has no one to blame but himself. Nonetheless, the penalties sought by the Board in this matter, payment of a \$500 fine and reimbursement to the Board for the costs of these proceedings, in tandem, represent a proportional response to Dr. Peterson's violation.

RECOMMENDED DECISION

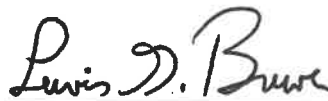
Based upon the Foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner **RESPECTFULLY RECOMMENDS** that the West Virginia Board of Medicine find that Respondent violated the West Virginia Code and the Board of Medicine's Legislative Rules as set forth herein; and, **FURTHER**, that the Board issue a determination that:

(a) Dr. Peterson be **FINED** five hundred dollars (\$500.00), to be paid no later than thirty (30) days from entry of the Board's Final Order in this matter;

(b) Dr. Peterson, be **ORDERED** to pay the costs and expenses of these proceedings pursuant to the authority contained in 11 C.S.R. 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 such payment be made to the Board within thirty (30) days of the issuance of an Invoice by the Board.

Pursuant to 11 C.S.R. 3 § 14 (2010), the Board may adopt, modify, or reject any findings of fact and conclusions of law recommended by the Hearing Examiner. The Board may also modify the recommended decision with a reasonable justification in the interest of public safety. See *Hasan v. W. Va. Bd. of Medicine*, 242 W. Va. 283, 835 S.E.2d 147 (2019). See also *Berlow v. W. Va. Bd. of Medicine*, 193 W. Va. 666, 458 S.E.2d 469 (1995).

Entered: **March 19, 2024**



Lewis G. Brewer, Esquire
Designated Hearing Examiner
WV State Bar No. 446