

04-0286-MED



Frank H. Murkowski, Governor

Division of Corporations, Business and Professional Licensing
550 W. 7th Avenue, Suite 1500
Anchorage, AK 99501-3567
Telephone: (907) 269-8160
Fax: (907) 269-8156
Website: www.commerce.state.ak.us/occl/

Received
JAN 17 2006
State of Alaska
Office of Administrative Hearings

**CERTIFIED # 7002 3150 0001 1621 5024
RETURN RECEIPT REQUESTED**

January 13, 2006

Colin M. Muir, M.D.
C/o Michael L. Smith, Attorney
The Health Law Firm
220 E. Central Parkway, Suite 2030
Altamonte Springs, Florida 32701

Dear Mr. Smith:

Re: Case No. 2850-04-006

This letter is formal notice to you under AS 44.62.500 ("Decision in a Contested Case"), that the State Medical Board, at their meeting, adopted Administrative Law Judge Stebing's decision and order (decision) in the above matter as its final decision. A copy of the decision, as adopted, is enclosed.

The Board's decision becomes effective thirty (30) days after the decision is mailed or otherwise delivered to you. (See AS 44.62.520)

However, under the provision of AS 44.62.540 ("Reconsideration"), you may request reconsideration of this decision by filing a petition. To be considered by the Board, a petition for reconsideration must be filed with the Division of Corporations, Business and Professional Licensing within 15 days after delivery or mailing of the decision. The power of the Board to agree to reconsideration expires thirty (30) days after the decision is mailed or otherwise delivered to you. If the Board takes no action on your request for reconsideration within the time allowed, it is considered denied. If you elect to petition for reconsideration, the petition should be forwarded directly to Richard C. Younkings, Chief Investigator, State of Alaska, Department of Commerce, Community and Economic Development, Division of Corporations, Business and Professional Licensing, 550 West 7th Avenue, Suite 1500, Anchorage, Alaska 99501-3567.

You may also elect to file for Judicial Review in Superior Court under the provisions of Appellate Rule 602, by filing an appeal within thirty (30) days.

January 13, 2006

Should you have any questions, please feel free to contact me at the Division's office in Anchorage at (907) 269-8165.

Richard C. Younkins
Chief Investigator

Enclosures: Decision and Order
Appellate Rule 602
Return Address Envelope

cc: All Members, State Medical Board
Jennifer Strickler, Chief, w/original
David Brower, Assistant Attorney General
Office of Administrative Hearings
Steven Winker, Paralegal
Investigator I
Leslie Gallant, Executive Administrator
Litigation File: 2850-04-006

RCY:ab

1986 and was re-certified in 1996. Muir obtained medical licenses in Tennessee (1978), Colorado (1981) and Florida (1984). He practiced medicine in Florida from 1984 to the time of the hearing, first providing OB/GYN services in private practice, and later while employed or under contract with Health First Physicians, Inc. through a Participating Provider Agreement between Health First Physicians, Inc. and Health First HMO, Inc.³ Muir also contracted with 8-10 other health maintenance organizations (HMO) while practicing medicine in Florida. Most recently, Muir has worked as a physician for Carnival Cruise Line. (Direct and cross-exam of Muir, tapes 1B, 2A; Exhs. C, I, K, L)

2. On October 2, 2003, the National Practitioner Data Bank (NPDB)⁴ of the U.S. Department of Health & Human Services (DHHS) issued an Adverse Action Report concerning practitioner Colin M. Muir, M.D. The Adverse Action Report arose from a report to NPDB by Health First Health Plans, Inc., with whom Muir contracted to provide health care services. The confidential NPDB report is attached to this decision as appendix "A." Dr. Muir challenged the accuracy of the NPDB report and sought to have DHSS withdraw it. He has been unsuccessful in this endeavor thus far. In addition, Health First Health Plans, Inc. had not withdrawn its report to NPDB as of the hearing date in this case. (Cross and re-direct exam of Muir, tapes 1B, 2A; Direct and cross-exam of Gallant, tapes 2A, 2B; Exhs. I, R, 2)

3. By application received by division on November 10, 2003, Dr. Muir applied for a license to practice medicine in Alaska. Muir responded "yes" to question 23 of the application, which inquired whether he was the subject of malpractice claims while practicing medicine in Florida. As part of his application, Muir disclosed the below seven malpractice cases arising

³ Muir stated in an April 2, 2005, affidavit "In 1996, I signed a contract to become a panel physician for the Health First Health Plans, Inc. health maintenance organization panel." (Exh. L) Muir was on a "provider panel" that included 20 physicians who were either employed or contracted through First Health Physicians, Inc. The Participating Provider Agreement was signed by a representative of Health First Physicians, Inc., and Health First HMO, Inc. (Exh. K)

⁴ The NPDB is a federally mandated repository of information regarding the professional competence and conduct of physicians. See 45 C.F.R. part 60 (2004). Alaska's medical board reviews NPDB reports on applicants seeking to be licensed in the state. (Direct exam of Gallant, tape 2A) AS 08.64.200(b) and board regulations allow the use of disciplinary history from other states collected in the data bank of the Federation of State Medical Boards (FSMB). See AS 08.64.200(b)(required Alaska's board to "determine whether each physician applicant has any disciplinary or other actions recorded in the nationwide data bank); 12 AAC 40.050(3)(clearance from FSMB regarding previous disciplinary actions in other jurisdictions required before licensure in Alaska); 12 AAC 40.015(d)("Before the board will consider issuance of a license, an applicant . . . must receive clearance from the National Practitioner Data Bank"); 12 AAC 40.055(b)(8)(board may consider applicant's professional license status and history from other jurisdictions during interview).

from his practice of medicine in Florida. He represented that each claim settled for the amount indicated.

<u>Nature of Allegation</u>	<u>Settlement Amount</u>	<u>Year</u>
(a) Failure to diagnose abdominal pregnancy	\$190,000	1994
(b) Tubal ligation without consent	\$50,000	1995
(c) Improper performance of oophorectomy	\$17,000	1996
(d) Improper performance of oophorectomy	\$90,000	1997
(d) Improper placement of trocar	\$125,000	1998
(e) Failure to obtain appropriate tests	\$40,000	1998
(f) Improper performance of surgery	\$65,000	2000

Dr. Muir supplemented his license application with explanatory narratives for the above cases. His explanation includes "My insurance carrier chosen by my employing company was financially unsound and unable to ever give me my day in court before becoming either bankrupt or leaving the state. An aggressive defense would have turned away most of these cases." (Direct exam of Muir, tape 1B; Direct exam of Gallant, tape 2A; Exh. I)

4. In response to question 29a of the application, Muir stated "no" to the inquiry: "Have you ever voluntarily or involuntarily resigned or withdrawn from professional training, from employment, or your privileges from any hospital or other health care facility to avoid the imposition of disciplinary sanction, restriction, or termination?" In response to question 32a of his application, Muir answered "no" concerning whether he had "ever been under investigation by any medical licensing jurisdiction or authority." Medical malpractice claims in Florida result in a disciplinary investigation by the Department of Health, Agency for Health Care Administration. By letters dated April 6, 1998 (AHCA Case # 98-10249) and August 2, 1999 (AHCA Case No. ME 1999-54022), the agency notified Muir of two pending investigations regarding his Florida medical license. The Florida licensing agency disclosed to Alaska's board nine investigations regarding Muir. None of the Florida investigations resulted in discipline being imposed. (Direct and cross-exam of Muir, tapes 1A, 1B; Direct exam of Gallant, tape 2A; Exhs. A, C, I, 3)

5. Dr. Muir's November 4, 2003, letter (or memorandum) accompanying his Alaska license application and which has no addressee states:

Preparatory to leaving Florida, I resigned from Health First Health Plans and am presently negotiating a release from Health First Physicians.

Subsequent to my resignation from Health First Health Plan, the Plan made an erroneous entry to the Physician Data Bank [NPDB]. This is presently under dispute.

Muir stated in the Subject Statement of the NPDB report that "On 12/31/03 we executed a settlement agreement successfully resolving all claims between us." While Muir contended that the NPDB report should not have been filed, as of the hearing date on May 5, 2005, the report remained on file with DHHS. (Cross and re-direct exam of Muir, tapes 1B, 2A; Direct and cross-exam of Gallant, tapes 2A, 2B; Exhs. I, R, 2)

6. At a meeting on July 15, 2004, the State Medical Board considered Dr. Muir's application for a license to practice medicine in Alaska. Muir did not participate with the board during its meeting, although the board previously invited him through a letter to "appear for a full board interview" because of its concerns about his malpractice claim history and his past investigative history in Florida.⁵ By a 6-to-2 vote, the board denied his application. Muir requested a hearing. He and his attorney participated by telephone at the hearing. (Direct and cross-exam of Gallant, tapes 2A, 2B; Exhs. C)

III. Discussion

The medical board based its denial of Muir's license application on AS 08.64.326(a)(1). This statute provides that an application may be denied if the applicant attempted to obtain a license by "deceit, fraud, or intentional misrepresentation." The board's letter to Muir dated August 16, 2004, constituting the statement of issues, indicates two reasons for denial under the statute. First, Muir failed to report nine Florida investigations to the Alaska board. Second, Muir failed to completely disclose the matter involving his voluntary resignation while under investigation for adverse clinical events, as addressed in the NPDB report.

Dr. Muir argued that he was not deceptive and that he interpreted question 32a in the license application ("ever been under investigation by any medical licensing jurisdiction or authority?") as addressing behavioral or moral grounds, not malpractice. He refused to divulge some facts surrounding his resignation from Health First Health Plans, Inc., and his release from Health First Physicians, Inc., claiming that the information was confidential and privileged.

⁵ Muir was working seven days a week for the cruise line as a ship physician. According to Ms. Gallant, two days before the July 15, 2004, board meeting, Muir contacted her for the first time and by letter stated that he could not participate at the July 15 meeting and that he desired to meet with the board at the end of August. (Direct exam of Gallant, tape 2A; Exh I)

Alternatively, he argued that even if there was a misrepresentation in his application, he had no intent to deceive. The division argued that Muir intentionally misled the board about whether he has ever been under investigation by Florida licensing authorities by answering “no” to question 32a.

The remainder of this discussion will address AS 08.64.326(a)(1) as a basis for denying licensure. Deceit, fraud, and intentional misrepresentation are discussed first concerning Florida disciplinary investigations. The discussion thereafter addresses the NPDB report on Dr. Muir.

AS 08.64.326(a)(1) (Fraud, Deceit, or Intentional Misrepresentation Regarding Florida Investigations) – The elements for knowing misrepresentation or deceit include “a false representation of fact, scienter, intention to induce reliance, justifiable reliance, and damages.”⁶ The scienter element requires that the individual knew the falsity of the representation.⁷ Intent is a question of fact that may be proven by inference through circumstantial evidence.⁸

In applying the above elements, Muir’s 2003 license application contained a false representation of fact on whether he had “ever been under investigation by any medical licensing jurisdiction or authority” (question 32a). Under Florida law at Fla. Stat. sec. 458.331, a medical malpractice claim against a physician results in a disciplinary investigation by the Department of Health, Agency for Health Care Administration. As a consequence, for each of Muir’s malpractice claims, an attendant disciplinary investigation commenced. Muir testified that he understood the Florida licensing agency investigated every malpractice claim.⁹

The words from question 32a “ever been under investigation” are unambiguous. The question does not seek to determine whether discipline was ultimately imposed, rather, whether there was an investigation. Florida commenced nine investigations involving Dr. Muir. He disclosed none of them in response to question 32a.

Dr. Muir testified that he did not intentionally withhold from Alaska’s medical board information about Florida investigations. Muir argued that he disclosed all of the information

⁶ See Barber v. National Bank of Alaska, 815 P.2d 857, 862 (Alaska 1991).

⁷ See City of Fairbanks v. Amoco Chemical Co., 952 P.2d 1173, 1176 (Alaska 1998).

⁸ See Gabaig v. Gabaig, 717 P.2d 835, 838 (Alaska 1986); Dargue v. Chaput, 88 N.W.2d 148, 155 (Neb. 1958). See also City of Fairbanks, 952 P.2d at 1179 (evidence of scienter is “usually circumstantial”). In Instanbooly v. Ohio State Medical Board, 2004 WL 1559511 (Ohio App. 10 Dist.), the court upheld the medical board’s suspending a physician based on a finding that the physician intentionally failed to disclose a prior disciplinary proceeding. The physician answered “no” to the application question seeking information whether he had prior investigations, charges, and complaints. The court held that intent to deceive may be inferred from surrounding circumstances and noted that a Michigan charge against the physician was expunged from the NPDB.

⁹ Direct exam of Muir, tape 1A.

that he could recall and that he misinterpreted some of the questions on the application. This is not a credible position with regard to question 32a given the nine investigations in Florida, a state where he practiced medicine for nearly two decades. Written correspondence between the Florida Department of Health and Muir's attorneys in two cases¹⁰ indicate investigations against Muir arising from separate complaints.

The Florida agency also advised Alaska's board that it sent a letter of caution to Muir in two cases (97-00375 and 00-07474). When asked whether he received the letters Muir testified "I don't recall."¹¹ Muir had previously been the subject of complaints and agreed to malpractice settlements (one for \$190,000) while practicing in Florida. It is likely that he would remember receiving these two letters of caution from Florida regulatory authorities.

Muir also denied knowing about complaints and ensuing investigations against him in cases 98-10249 and 99-54022. Yet, a letter written by his attorney referencing case no. 98-10249 states "we have been retained to represent Colin M. Muir, M.D." The letter has a cc notation for Muir.¹² A letter by a different attorney referencing case no. 99-54022 states: "This law firm represents Colin M. Muir, M.D., in the above referenced investigation."¹³

A letter from the Florida Health Care Administration to Muir dated October 12, 1999, in case no. 98-10249 states "the complaint referenced above, filed against you by . . . regarding an allegation that you failed to appropriately treat her has been investigated and the findings reviewed by the Probable Cause Panel of the Board of Medicine." It is unlikely Muir would forget the investigation in this case. More likely than not, Muir knew of the preceding investigations and he intentionally chose not to disclose them to Alaska's medical board.

Muir's November 4, 2003, letter or memorandum is perplexing.¹⁴ The document is not addressed to anyone, although it acknowledges his resignation from HFHP, his negotiations for a release from HFPI, an "erroneous entry" to the data bank that he indicates is disputed, and his current attorney's name and phone number. The document's date, November 4, 2003, also is the date he signed his Alaska application. His initial application materials do not reference the NPDB report created a month earlier on October 2, 2003. The questions in the application do not on their face appear to require disclosure of an NPDB report.¹⁵

¹⁰ Exh. 3.

¹¹ Cross-exam of Muir, tape 1B.

¹² Exh. 3.

¹³ Exh. 3.

¹⁴ Exh. B.

¹⁵ Many questions in the application potentially relate to an NPDB report insofar as the report may provide a factual basis for an affirmative answer to a question. (e.g., questions 24a through 36b)

Muir, the subject of many complaints and investigations, had an incentive not to disclose Florida investigations in the hope of increasing the likelihood he would obtain an Alaska license. He signed each page of his application and the last page contains his sworn signature beneath the statements:

I declare, under penalty of perjury, that all the information contained herein and evidence or other credentials submitted herewith are true and correct.

* * *

I understand that any falsification or misrepresentation of any item or response in this application, or any attachment hereto or falsification or misrepresentation of credentials to support this application, is sufficient grounds for denying, revoking, or otherwise disciplining a license or permit to practice medicine in the State of Alaska.

Muir's argument that he misinterpreted question 32a as limited to behavioral or moral grounds implies that he made a mistake in answering the question. His assertion raised the following legal issue as a defense for an individual completing a license application: May a license applicant who certifies "the information in this application to be true and correct" avoid responsibility for providing false information to the State Medical Board because of a mistaken interpretation of the question? There are no published cases in Alaska on point or addressing the issue in the broader context of license applications in general.

An applicant's obligation to provide accurate information to a licensing authority is non-delegable.¹⁶ The individual's personal accountability is indicated by the certification above a signature and by requiring the signature to be sworn. As a practical matter, the licensing agency (division) may not have the resources to investigate all of the representations in thousands of new and renewal applications it receives each year in processing licenses.¹⁷

The agency may justifiably rely on an applicant's verification under oath that his answers to questions in the application are truthful and complete. The applicant has a responsibility to provide information requested in a license application regardless of whether the information sought may be obtained by the licensing agency through inquiry to other public entities. An

¹⁶ See Matter of Moser, Case No. 04-0294-REC (June 14, 2005 Decision).

¹⁷ See Wilkerson v. State of Alaska, 993 P.2d 1018, 1025-26 (Alaska 1999)(government interest includes fiscal and administrative burdens an additional procedural requirement would entail).

applicant for a medical license in Alaska, therefore, has an unavoidable personal legal obligation to truthfully answer questions in a license application.¹⁸

Based on the foregoing considerations, the intent and scienter requirements were met. Muir's misrepresentation was made with the intent of inducing reliance by Alaska's medical board and for the purpose of obtaining a license.

AS 08.64.326(a)(1) (Fraud, Deceit, or Intentional Misrepresentation Regarding NPDB Report) – The statement of issues in this case (a division letter to Dr. Muir dated August 16, 2004) identifies as a second reason for denying licensure Muir's failure to "completely disclose the matter reported by Health First to the [NPDB] that involved your voluntary resignation while under investigation for adverse clinical events during your employment with that organization." The division alleges that this failure constituted fraud, deceit, or intentional misrepresentation under AS 08.64.326(a)(1).

Muir filed his application on November 10, 2003. The division obtained the October 2, 2003, NPDB report regarding Muir on July 9, 2004, a week before the board deliberated on his application.¹⁹ The medical board saw the report for the first time on July 15, 2004, at its meeting. Muir was not present as the board had requested, although his work commitment as a ship physician precluded him from being physically present. The NPDB report, entitled Adverse Action Report, identifies the Reporting Entity as Health-First Health Plans. Colin M. Muir, M.D., is identified as Subject of the adverse action. Under the Information Reported section, the following information was listed:

Type of Adverse Action:	Title IV Clinical Privileges
Adverse Action Classification Code:	Voluntary Surrender of Clinical Privilege(s), While Under, or to Avoid, Investigation Relating to Professional Competence or Conduct (1635)
Date Action Was Taken:	09/01/2003
Length of Action:	Permanent

¹⁸ The medical board's licensing authority extends to disciplining an untruthful applicant for fraud, deceit, or intentional misrepresentation in obtaining a license. The authority may be exercised if the conduct occurred before a license is issued and as a basis for denial, or as a basis for discipline if it occurred after a license is initially issued, or even after renewal. See AS 08.64.326(a)(1)(State Medical Board). See, e.g., AS 08.38.040(1)(Board of Dental Examiners); AS 08.88.071(a)(3)(B), 12 AAC 64.160(a)(Real Estate Commission). In Alaska, as in other states, the state has "inherent power to revoke a license upon discovery that the application contained fraudulent misrepresentations." See *Kjarstad v. State of Alaska*, 703 P.2d 1167, 1170 (Alaska 1985).

¹⁹ Before it received the NPDB report, the medical board gave notice to Muir that it wanted to interview him regarding his application in accordance with 12 AAC 40.055(b)(8). Muir wrote a letter to the board's executive administrator on June 16, 2004, requesting to personally meet with the board at the end of August.

Description of Acts or Omissions
or Other Reasons for Actions Taken:

First Health Plans While Under Investigation for
Adverse Clinical Events During His Tenure as a
Panel Physician

On January 14, 2004, Muir submitted to NPDB a response for inclusion in the report identified as the Subject Statement. The statement begins "I resigned from the panel of Health First Health Plans, Inc. (HFHP), an HMO, after confirming with the HFHP Director of Quality, that there were no pending investigations or other matters that would negatively affect me and that there would be no NPDB report or other action, because I had applied for the U.S. Army, and been accepted."²⁰ (attached as Appendix "A")

Dr. Muir was one of twenty employed or contracted providers providing services under a participating provider agreement between Health First Physicians, Inc., and Health First Health Plans, Inc.²¹ Muir does not dispute that he resigned from HFHP in September 2003.²² The circumstances surrounding the resignation are in dispute. Muir testified and represented in the Subject Statement that before resigning and as a condition of resigning, he confirmed with HFHP that there were no pending investigations against him and further, there were no "other matters that would negatively affect me." However, DHHS never withdrew the Adverse Action report. No one from DHHS testified in this case regarding the Adverse Action Report. No one from the Florida licensing agency testified in the case either. When asked about the terms of his settlement with HFHP, Muir refused to answer and indicated they were confidential. Muir did not request a hearing from DHHS concerning the NPDB report.

Alaska's board is left with the situation where there is an Adverse Action report against Muir that DHHS has refused to withdraw, and Muir claims that it should be withdrawn based on an agreement he had with HFHP. Muir denies the accuracy of the NPDB report that he voluntarily resigned from Health First Health Plans and voluntarily surrendered clinical privileges while under, or to avoid, investigation relating to adverse clinical events bearing on his professional competence during his tenure as a panel physician providing services to an HMO. However, Muir refused to divulge the agreement he had with HFHP and stated that he and HFHP are prohibited from discussing the matter because of confidentiality constraints. There was no

²⁰ Muir did not enter the Army.

²¹ Muir testified that he had an "employment contract" with Health First Physicians, Inc. (Cross-exam of Muir, tape 1B)

²² The NPDB Adverse Action report identifies the resignation as a "voluntary surrender" on September 1, 2003. (Exh. R)

indication in the record that the division subpoenaed documents pertaining to Muir's settlement with HFHP.

Based on the report and Muir's Subject Statement within it, a material discrepancy exists concerning the circumstances surrounding Muir's resignation. The NPDB report says one thing and Muir takes the opposite position. Muir characterized HFHP's "erroneous entry to the Physican data bank." HFHP has chosen not to withdraw the report. Notwithstanding Muir's request for NPDB to withdraw the report, DHHS has not withdrawn the report and it remains part of the data bank.

While Muir as a license applicant has the burden under AS 44.62.460(e)(2) to establish by a preponderance of the evidence that he is entitled to a license, the division has the burden to establish fraud, deceit, or intentional misrepresentation by Muir as a basis for license denial. The agency did not meet its burden to show a violation of AS 08.64.326(a)(1) with regard to the NPDB report.

The division also argued at the hearing that Muir engaged in fraud, deceit or intentional misrepresentation in answering Question 29a in his license application. This argument relates to the NPDB report issue. Question 29a asks:

Have you ever voluntarily or involuntarily resigned or withdrawn from professional training, from employment, or your privileges from any hospital or other health care facility to avoid the imposition of disciplinary sanction, restriction, or termination?

Muir responded "no." An alleged failure by Muir to accurately answer this question is not within the scope of the statement of issues in this case.²³ Accordingly, no ruling will be made under authority of AS 08.64.326(a)(1) with regard to this provision of the license application. Muir's response to the question and other evidence bearing on question 29a nonetheless are relevant to whether Muir failed to "completely disclose the matter reported by Health First to the [NPDB] that involved your voluntary resignation while under investigation for adverse clinical events during your employment with that organization."

Applying the facts in this case to question 29a leads to the following conclusions. Muir's resignation involved his "employment" as a panel provider to Health First HMO, whether he was an employee or under contract through the Health First Physicians -- Participating Provider Agreement. According to Dr. Muir, clinical privileges are hospital or office granted rights to perform medical actions. Muir's resignation did not involve clinical privileges at a hospital, but

his action did involve privileges at a "health care facility."²⁴ Muir testified that he was under contract to provide clinical services and medical services under the Health First Health Plan. The remaining inquiry from question 29a pertains to the conditional language "to avoid the imposition of disciplinary sanction, restriction, or termination." Muir denies that this condition exists. The division did not present sufficient evidence to outweigh Muir's assertion that he did not resign to avoid the imposition of disciplinary sanction, restriction, or termination.²⁵ This determination supports a conclusion that Muir did not commit fraud, deceit, or intentional misrepresentation regarding his disclosures about the NPDB report.

In summary, as of the date of the hearing in this case, a NPDB report of Adverse Action was on record for Dr. Muir. He disputes the Adverse Action, but he has been unsuccessful in convincing DHHS to remove the report from the data bank.²⁶ Muir's failure to provide information to the medical board regarding the NPDB report frustrates the board's charge to investigate applicants and licensees in order to protect the public.²⁷ Nonetheless, the division did not prove that Muir engaged in fraud, deceit, or intentional misrepresentation concerning the NPDB report.

IV. Conclusion

Dr. Colin Muir had nine investigations commenced against him by Florida licensing authorities arising from his practice as an OB/GYN. Seven of the investigations were based on malpractice claims that occurred between 1994-2000. The division proved by a preponderance of the evidence that Muir engaged in fraud, deceit, or intentional misrepresentation concerning his response to question 32a of the Alaska license application. The division did not prove that Muir engaged in fraud, deceit, or intentional misrepresentation regarding the National Practitioner Data Bank report. Under AS 08.64.326(a)(1), it is appropriate to deny Dr. Muir's license application.

²³ The statement of issues does not reference question 29a or the words of the question.

²⁴ The term "health care facility" is not limited to hospitals. It includes facilities where outpatient services are provided, including clinics. See Haceesa v. United States, 309 F.3d 722, 724 (10th Cir. 2002); Askew v. DCH Regional Health Care Authority, 995 F.2d 1033, 1035 (11th Cir. 1993); AS 18.15.149(3).

²⁵ No one from the Health First corporate family (Health First HMO, Inc., Health First Health Plans, Inc., Health First Physicians, Inc.) was called as a witness or gave a sworn statement in the case.

²⁶ Notwithstanding the allegations of error in the NPDB report asserted by Muir, the report is currently effective. The medical board is entitled to rely on the Adverse Action Report in making a decision in this case. See AS 08.64.200(b)(board is required to determine an applicant's disciplinary history in the nationwide data bank); 12 AAC 40.015(d)(board must receive clearance for an applicant from NPDB).

²⁷ As indicated in minutes of medical board proceedings, concerns were expressed at the July 15, 2004, board meeting about Muir's history of malpractice claims and disciplinary investigations.

DATED this 31st day of October, 2005.

By: _____
David G. Stebing
Administrative Law Judge

BOARD ACTION ON DECISION AND ORDER

The board having reviewed the proposed Decision and Order by the administrative law judge in: The Matter of **Colin Muir, M.D.**, OAH Case No. 04-0286-MED, hereby

Option 1: adopts the proposed decision in its entirety under AS 44.62.500(b).

Date: 1-12-06 By: _____
Chairperson

Option 2: rejects the proposed decision under AS 44.62.500(c), and remands this case to the same/different administrative law judge to receive additional evidence on the following issues:

Date: _____ By: _____
Chairperson

Option 3: rejects the proposed decision under AS 44.62.500(c) and orders that the entire record be prepared for board review and that oral or written argument be scheduled in front of the board prior to final consideration of the decision in this case.

Date: _____ By: _____
Chairperson

RULES OF APPELLATE PROCEDURE

Rule 602. Time — Venue — Notice — Bonds.

(a) When Taken.

(1) *Appeals from the District Court.* An appeal may be taken to the superior court from the district court within 30 days from the date shown in the clerk's certificate of distribution on the judgment.

(2) *Appeals from Administrative Agencies.* An appeal may be taken to the superior court from an administrative agency within 30 days from the date that the decision appealed from is mailed or otherwise distributed to the appellant. If a request for agency reconsideration is timely filed before the agency, the notice of appeal must be filed within 30 days after the date the agency's reconsideration decision is mailed or otherwise distributed to the appellant, or after the date the request for reconsideration is deemed denied under agency regulations whichever is earlier. The 30-day period for taking an appeal does not begin to run until the agency has issued a decision that clearly states that it is a final decision and that the claimant has thirty days to appeal. An appeal that is taken from a final decision that does not include such a statement is not a premature appeal.

(3) Rule 204(a)(2) — (6) concerning the timing of appeals applies to appeals to superior court.

(b) Venue.

(1) *Appeals from the District Court.* Venue for an appeal from a district court decision shall be at the superior court location within the same judicial district as the district court that would best serve the convenience of the parties.

(2) *Appeals from Administrative Agencies.* Unless otherwise provided by law, venue for an appeal from an administrative agency decision shall be at the superior court location that would best serve the convenience of the parties.

(c) Notice of Appeal.

(1) A party may appeal from a judgment or agency decision by filing a notice of appeal with the superior court. The notice of appeal must specify the parties taking the appeal and their current addresses, designate the judgment, agency decision or part thereof appealed from, and name the court to which the appeal is taken. At the time the notice of appeal is served and filed, it must be accompanied by:

(A) a statement of points on which appellant intends to rely on appeal. The grounds for appeal stated in the statement of points on appeal constitute the sole basis for review by the superior court. On motion in the superior court, and for cause, the statement of points may be supplemented;

(B) if required, the filing fee as provided by Administrative Rule 9;

(C) if required, a bond for costs on appeal as provided by paragraph (d) of this rule;

(D) a copy of the district court judgment or agency decision from which the appeal is taken; and

(E) proof of service on all parties to the appeal. In an appeal from an agency decision, the notice of appeal must be served on the head of the agency and, if the agency is a state agency, on the Attorney General of Alaska, at Juneau, Alaska.

(2) An appellant seeking to have the cost bond waived or reduced, an extension of time to file the bond, or to appeal at public expense shall file an appropriate motion at the time the notice of appeal is filed.

(3) The clerk of the superior court shall refuse to accept for filing any notice of appeal not conforming with the requirements of this rule.

(d) Notification by Clerk.

(1) In an appeal from a district court which is not at the same location as the superior court, the clerk shall send a copy of the notice of appeal to the district court and shall notify the district court of the date by which it must

forward the record on appeal as provided by Rule 604(a)(1).

(2) In an appeal from an administrative agency, the clerk shall send a copy of the notice of appeal to the agency and request the agency to submit a list of the names and addresses of all counsel who appeared in the matter before the agency, and of all persons who appeared therein pro se. The agency shall file the list with the clerk within ten days of service of the request. The clerk also shall notify the agency of the date by which it must prepare the record in accordance with Rule 604(b)(1).

(e) Cost Bond.

(1) In a civil case or an appeal from an administrative agency, unless a party is exempted by law, or has filed an approved supersedeas bond under Rule 603(a)(2), a bond for costs on appeal must be filed in superior court with the notice of appeal. The amount and terms of the bond are governed by Rule 204(c)(1) and Civil Rule 80.

(2) The cost bond exemptions provided by Rule 204(c)(2) apply in appeals to superior court.

(f) **Supersedeas Bond.** The appellant may file a supersedeas bond pursuant to Rule 603(a)(2) in lieu of a cost bond.

(g) **Cash Deposit.** The appellant may deposit cash in the amount of the bond with the court in lieu of filing a cost or supersedeas bond. At the time of the deposit, appellant also shall file a written instrument properly executed and acknowledged by the owner of the cash, or by the owner's attorney or the owner's authorized agent, setting forth the ownership of the fund; agreement to the terms of Civil Rule 80(f); and satisfaction of the conditions specified in Rule 204(c)(1) if the deposit is in lieu of a cost bond, or Rule 204(d) if the deposit is in lieu of a supersedeas bond.

(h) **Parties to the Appeal.** All parties to the trial court or agency action when the final order or judgment was entered are parties to the appeal. A party who files a notice of

appeal, whether separately or jointly, is an appellant under these rules. All other parties, including the agency in an appeal from an administrative agency decision, are deemed to be appellees. An appellee may elect at any time not to participate in the appeal by filing and serving a notice of non-participation. The filing of a notice of non-participation shall not affect whether the party is bound by the decision on appeal.

(i) **Joint or Consolidated Appeals.** If two or more parties are entitled to appeal from a judgment or order of a court or agency and their interests are such as to make joinder practical, they may file a joint notice of appeal. Appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party.

(j) **Service of Documents.** Papers filed or served in the appeal must be served on all parties, except appellees who have elected not to participate in the action.

(SCO 439 effective November 15, 1980; amended by SCO 460 effective June 1, 1981; by SCO 495 effective January 4, 1982; by SCO 510 effective August 30, 1982; by SCO 514 effective October 1, 1982; by SCO 554 effective April 4, 1983; by SCO 575 effective February 1, 1984; by SCO 847 effective January 15, 1988; by SCO 888 effective July 15, 1988; by SCO 1015 effective January 15, 1990; by SCO 1250 effective July 15, 1996; by SCO 1284 effective January 15, 1998; by SCO 1385 effective April 15, 2000; by SCO 1411 effective October 15, 2000; and by SCO 1476 effective October 15, 2002)

Note: Ch. 77 SLA 2002 (HB 157), Section 2, adds new Chapter 26 to Title 6 of the Alaska Statutes, concerning providers of fiduciary services. According to Section 9 of the Act, AS 06.26.760(b)(2) has the effect of amending Appellate Rule 602 by postponing the deadlines for the filing of appeals to the superior court from a district court or an administrative agency by a trust company when the Department of Community and Economic Development has taken possession of the trust company.