BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE ALASKA STATE MEDICAL BOARD

In the Matter of:	)	
	)	
DOUGLAS R. MIGDEN, D.O.	)	
	)	
Respondent.	)	OAH No. 10-0376-MED
	)	Board Case No. 2802-09-004

DECISION AND ORDER

I. INTRODUCTION

On July 19, 2010, the Division of Corporations, Business and Professional Licensing (Division) filed a two count accusation against Dr. Migden. The first count alleged that Dr. Migden obtained a license renewal through deceit, fraud, or intentional misrepresentation when he failed to disclose on his application that he had been the subject of an investigation in the State of Washington. The second count alleged that Dr. Migden engaged in unprofessional conduct by failing to disclose the Washington investigation on his application.

Dr. Migden filed a Notice of Defense. Prior to the hearing in this matter, Dr. Migden filed a Motion for Summary Adjudication. His motion was granted as to Count I of the Accusation, subject to adoption by the Board. That order is incorporated in this decision. On November 2 and 3, 2010, a hearing was conducted on Count II. Based on the record in this case, the Alaska State Medical Board should find that Dr. Migden did engage in unprofessional conduct by unintentionally failing to disclose the Washington investigation. As a result of that conduct, Dr. Migden should receive a non-reportable fine in the amount of $500.

II. FACTUAL FINDINGS

With one important exception, the relevant facts in this matter are undisputed.

Dr. Migden received his osteopathy degree from the Chicago College of Osteopathic Medicine in 1984. He is Board Certified in Emergency Medicine, and has practiced in a wide variety of locations around the country.[1] He is an excellent emergency room physician who provides exceptional patient care.[2]

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[1] Exhibit C, Declaration of Douglas R. Migden; Testimony of Dr. Migden.

[2] Testimony of Michael Levy, M.D., Alaska Regional Hospital; Charles Bohannon, M.D., Group Health Cooperative of Puget Sound; David W. Dabell, M.D., Virginia Mason Medical Center. *See also,* Exhibits Z, B2, & C2.

On December 7, 2008, Dr. Migden applied online to renew his inactive license to practice medicine in Alaska.[3] As part of that application, Dr. Migden was asked to answer several questions related to his professional fitness.[4] Question 5 asked:

> Have you been the subject of an investigation by any licensing jurisdiction or are you currently under investigation by any licensing jurisdiction or is any such action pending?

Dr. Migden answered 'No" to that question.[5]

Dr. Migden had in fact been the subject of an investigation in Washington during 2007. Washington closed its investigation without any finding of wrongdoing by Dr. Migden.[6] Dr. Migden agrees that, based on the existence of this closed investigation, he should have answered "Yes" to question 5.

Later in December of 2008 and in January of 2009, Dr. Migden was exploring the requirements for converting his inactive license into an active license because he had an opportunity to work at the Alaska Native Medical Center where he had worked in the past.[7] In looking at other application forms, he realized that the State of Alaska would ask about any prior investigations – even if closed with no adverse findings. He also recognized that he had not sent in any paperwork related to the Washington investigation. He knew that if he had been asked about this on the application to renew his inactive license, he might have answered incorrectly.[8] Accordingly, he promptly sent a letter to Licensing Examiner Linda Sherwood disclosing the Washington investigation and including documentation showing that the investigation had been closed.[9]

III. DISCUSSION

A. Legal Background

The Division has the burden of proving all facts necessary to support the Accusation by a preponderance of the evidence.[10] The Board may impose discipline if it finds that Dr. Migden

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3 Migden testimony; Exhibit C.

4 Exhibit 9, MIGD 0000161.

5 Dr. Migden did not concede that this question was actually asked or, if it was asked, that he answered no. As discussed in section III D below, it is more likely true than not true that the question was asked and that it was answered in the negative.

6 Exhibit 7, MIGD 0000037.

7 Migden testimony; Exhibit Y, Declaration of Richard Brodsky, M.D.

8 Migden testimony.

9 Migden testimony; Exhibit 3.

10 AS 44.62.460(e)(1).

secured his inactive license through "deceit, fraud, or intentional misrepresentation"[11] or that he engaged in unprofessional conduct.[12] Unprofessional conduct is defined by regulation:

> For purposes of AS 08.64.240(b) and AS 08.64.326, "unprofessional conduct" means an act or omission by an applicant or licensee that does not conform to the generally accepted standards of practice for the profession for which the applicant seeks licensure or a permit under AS 08.64 or which the licensee is authorized to practice under AS 08.64. "Unprofessional conduct" includes the following:
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> (2) misrepresenting, concealing, or failing to disclose material information to
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> (A) obtain a license or permit under AS 08.64; or
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> (B) renew a license under AS 08.64.[13]

If the Board finds that a violation has occurred, it may, but is not required to, impose a variety of sanctions.[14] In doing so, the Board is required to be consistent with prior disciplinary actions, or to explain its departure from prior actions.[15]

B. Summary Adjudication of Count I

Count I of the Accusation was dismissed on motion practice prior to the hearing. Summary adjudication is appropriate where there are no material facts in dispute and one party is entitled to judgment as a matter of law.[16] The moving party has the burden of showing there is no genuine issue of material fact.[17] To avoid summary adjudication, the non-moving party need not show that it will ultimately prevail; only that there are material facts to be litigated.[18] All reasonable inferences of fact are drawn in favor of the party opposing summary adjudication.[19] If the moving party has supported its motion with affidavits or other admissible evidence, the opposing party must show "by affidavit or other evidence" that a genuine factual dispute does exist.[20]

In support of his summary adjudication motion, Dr. Migden submitted a declaration explaining what he believed occurred when he completed his application.[21]

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11 AS 08.64.326(a)(1).
12 AS 08.64.326(a)(9).
13 12 AAC 40.967.
14 AS 08.64.331.
15 AS 08.64.331(f); AS 08.01075(f).
16 *Smith v. State*, 790 P.2d 1352, 1353 (Alaska 1990); 2 AAC 64.250(a).
17 *Alaska Rent-A-Car, Inc. v. Ford Motor Company*, 526 P.2d 1136, 1138 (Alaska 1974).
18 *Alaska Rent-A-Car*, 526 P.2d at 1139.
19 *Id.*
20 2 AAC 64.250(b).
21 This declaration was also admitted at the hearing as Exhibit C.

> I concede that I must have misread the question, because I never would have knowingly or intentionally answered that question "No." . . . My best estimate of what may have happened is that I read the question too quickly and only focused on or saw the second and third lines of the three-line question on my computer screen. . . . I must have simply overlooked the first line of the question, which asked whether I *had been* "the subject of an investigation by any licensing jurisdiction." In fact, as noted above, the State of Washington had conducted such an investigation and exonerated me. I had nothing to hide and no motive to answer the question untruthfully, and did not do so intentionally.[22]

Dr. Migden also submitted evidence that on December 8 and again on December 24, he disclosed this investigation in two other applications. The first was an application for staff credentials to the Tuba City Regional Health Care Corporation. The second was an application to Central Washington Hospital.[23]

In opposing summary adjudication, the Division relied on *In the Matter of Kohler*, OAH No. 07-0367-MED. In *Kohler*, as in this case, the doctor answered "No" to the question of whether he had ever been investigated in another jurisdiction. Dr. Kohler had in fact been investigated twice in the State of Washington. He was aware of these investigations, but asserted that the application did not have a definition of "investigation," and he interpreted the question as only asking for investigations that resulted in formal proceedings. The Board found that Dr. Kohler's claim that he did not know the two Washington investigations were reportable was not credible or reasonable. Because he knew of the two investigations and made a conscious decision not to report them, his failure to report was an intentional misrepresentation.

The present case is distinguishable from *Kohler*. Dr. Kohler saw the question asking about prior investigations, interpreted it in a particular way, and answered it incorrectly. In this case, Dr. Migden submitted evidence under penalty of perjury stating that he overlooked the portion of the question asking about prior investigations.[24] If his evidence is accepted as true, then there is no intentional misrepresentation. Instead his actions were careless or negligent.

In its opposition, the Division presented no evidence or argument that Dr. Migden was being untruthful when he stated that he misread the question.[25] While Dr. Migden's intent is a question of fact, he presented evidence on this question while the Division did not. None of the

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22 Exhibit C, ¶ 4.

23 Exhibit C, ¶ 5.

24 He also presented evidence that he had no reason to hide this investigation because the investigation did not result in any negative finding against him and he submitted two subsequent applications for medical privileges at two different hospitals which did inform the hospitals of this investigation.

25 *See* 2 AAC 64.250(b)(party opposing summary adjudication must show that genuine issue of fact exists once moving party has made *prima facie* case).

proposed evidence discussed in the Division's opposition would rebut Dr. Migden's claim that his failure to answer this question correctly was due to carelessness rather than the intent to hide the prior investigation.[26] Because the Division did not address this issue at all, it did not rebut Dr. Migden's *prima facie* showing that he is entitled to judgment as a matter of law on this issue. Accordingly, Dr. Migden's Motion for Summary Adjudication was granted and Count I of the Accusation was dismissed, subject to adoption by the Board.

C. Legal Issues Raised by Dr. Migden

Because Count I was dismissed, the only question remaining is whether the unintentional failure to disclose the Washington investigation was unprofessional conduct. Dr. Migden questions whether the Board has the statutory authority to discipline for unprofessional conduct that did not occur in connection with the delivery of professional services, and argues that his application was not submitted in that connection.

The Board's authority to discipline is derived from AS 08.64.326. The relevant provision says a physician may be disciplined if he engaged in "unprofessional conduct, sexual misconduct, or in lewd or immoral conduct in connection with the delivery of services to patients."[27] Dr. Migden argues that the underlined language modifies "unprofessional conduct," "sexual misconduct," and "lewd or immoral conduct." The Division argues that this phrase only modifies "lewd or immoral conduct."

Dr. Migden's interpretation of the statute is correct. The phrase "in connection with the delivery of services to patients" modifies all three categories of behavior.[28] To hold otherwise would mean that the Board could discipline for any sexual misconduct but only discipline for lewd or immoral conduct when it occurred in connection with services to patients. It is unlikely that this was the legislature's intent, especially since other provisions of this statute permit discipline without any reference to "services to patients."[29] The proper interpretation of the language in AS 08.64.326(a)(9) is that conduct must somehow be connected to the delivery of service to patients in order for the Board to impose discipline for that conduct.

It is, therefore, necessary to determine whether applying for a license is "in connection with" providing services to patients. The answer is yes. A prerequisite for providing any patient services is being validly licensed. Dr. Migden's case presents an unusual twist, however, in that

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[26] While all reasonable inferences are drawn in favor of the non-moving party, it is not reasonable to infer that Dr. Migden is being dishonest without some evidence or argument to support such an inference.

[27] AS 08.64.326(a)(9) (emphasis added).

[28] *See In the Matter of Sykes*, OAH No. 08-0475-MED, fn 31.

[29] *See* AS 08.64.326(a)(4)(A) & 326(a)(7).

he was applying to renew his inactive license. The holder of an inactive license may not practice medicine in Alaska.[30]

Holding an inactive license is still in connection with providing services to patients because the existence of this license eases the process of obtaining an active license in the future. A doctor with a lapsed license must submit a completed application in order to reinstate his or her license.[31] For an unlapsed inactive license, there is no additional application required.[32] While additional information must be submitted, activating an inactive license does not require the physician to answer questions such as question 5 which asks about prior investigations. Therefore, the response to question 5 in the prior renewals of the inactive license is, effectively, relied upon by the board in later stepping that license up to active status. There is a slight but sufficient nexus between answering questions on an inactive license renewal application and providing services to patients to allow the Board to discipline a doctor for answering those questions incorrectly.

That the Board can discipline a doctor for incorrectly answering a question on an application is further supported by the regulation adopted by the Board defining "unprofessional conduct."

> For purposes of AS 08.64.240(b) and AS 08.64.326, "unprofessional conduct" means an act or omission by an applicant or licensee that does not conform to the generally accepted standards of practice for the profession for which the applicant seeks licensure or a permit under AS 08.64 or which the licensee is authorized to practice under AS 08.64. "Unprofessional conduct" includes the following:
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> (2) misrepresenting, concealing or failing to disclose material information to
> (A) obtain a license or permit under AS 08.64; or
> (B) renew a license under AS 08.64.[33]

Thus, the Board has defined unprofessional conduct to include the failure to disclose material information to renew a license.

Dr. Migden argues, however, that the failure to disclose information amounts to unprofessional conduct only if the failure did not "conform to the generally accepted standards of practice."[34] He offered substantial evidence from several prominent physicians that an inadvertent error on an online application form is not an act or omission that fails to conform to

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30 AS 08.64.313; 12 AAC 40.033(c).
31 12 AAC 40.025(a)(1) & (b)(1).
32 12 AAC 40.033(d).
33 12 AAC 40.967
34 12 AAC 40.967.

the generally accepted standards of practice.[35] Expert testimony as to what the generally accepted standards of practice in the profession are in regards to completing license applications was ruled inadmissible because it is for the Board to define what constitutes unprofessional conduct. In doing so, the Board is not limited to subject matter for which there exists a generally accepted standard of practice.

"Generally accepted standard of practice" applies to subjects for which medical professionals have specialized knowledge. It is appropriate to defer to the expertise of the medical community for subjects such as the appropriate treatment for different conditions. It is not appropriate or necessary to defer to the judgment of the medical community for subjects such as whether the careless failure to disclose information in an application is unprofessional.

The Board's definition of unprofessional conduct contains a list of 29 categories of acts.[36] These include: failing to timely provide requested information during an investigation,[37] failing to report the suspension or limitation of hospital privileges,[38] and failing to maintain patient records for seven years.[39] This conduct is unprofessional regardless of what the larger medical community may believe. In addition, 12 AAC 49.967(9) requires the preparation and maintenance of records "in accordance with generally accepted standards of practice." This additional language would not be necessary if these categories were all limited to instances where the conduct fell below the accepted standard of practice. The careless or negligent failure to disclose information when submitting a renewal application is unprofessional conduct.[40]

Dr. Migden argues that even if the negligent failure to disclose may in some circumstances be unprofessional conduct, that does not mean that it will be unprofessional in all circumstances. He cites several examples related to other provisions of 12 AAC 40.967.[41] His strongest example is that many physicians refer patients to other medical providers. In doing so, they often include confidential patient information even though doing so is not required by law or necessary to prevent an imminent risk of harm. This fits squarely within the definition of unprofessional conduct.[42] Dr. Migden argues that this example and the others he provided

35 *E.g.*, Exhibit Y, ¶ 10 (Declaration of Richard Brodsky, M.D.).
36 12 AAC 40.967(1) – (29).
37 12 AAC 40.967(24).
38 12 AAC 40.967(20).
39 12 AAC 40.967(10).
40 12 AAC 40.967(2)(B).
41 *See* Motion for Summary Adjudication, pages 16 – 18.
42 12 AAC 40.967(12).

demonstrate that the failure to disclose material information is only unprofessional if the failure falls below the generally accepted standard of practice.

While Dr. Migden's argument is plausible, and the Board may want to review or amend this regulation, this argument is not applicable to 12 AAC 40.967(2)(B). Despite what other physicians may believe, it is never appropriate to fail to disclose material information on an application. The Board can legitimately expect applicants to take the application process seriously, and complete applications with a high degree of care. While the circumstances surrounding the failure to provide this information must be considered in deciding what sanction, if any, should be imposed, those circumstances cannot convert this failure into anything short of unprofessional conduct.

D. Potential Computer Problems

Dr. Migden has also raised questions concerning whether the online application process worked correctly when he completed his application on December 7, 2009. He suggests that it is possible that question 5 was not displayed properly and therefore he was never asked whether he was the subject of an investigation. In the alternative, he may have actually answered correctly, but his answer was not recorded properly.

Dr. Migden does not have solid evidence to support his suspicions, in part because he did not ask to conduct discovery into how the online computer renewal process worked. Dr. Migden argues that he might have asked to conduct that discovery if he had received certain documents from the Division in a timely manner.

Exhibits 21 and J.2 show that Dr. Migden attempted to renew his license at 6:38 on December 7. That renewal was not successful and his renewal was successfully submitted at 7:00. Dr. Migden asserted that he might have hired an expert to conduct an investigation of the computer system if he had been aware of this issue.[43] This evidence would not be sufficient to establish good cause for discovery into the operation of the online renewal system.[44] Whether a form is properly submitted over the internet is a very different type of problem than whether the form will display properly on a computer screen during the application process. There was evidence that many people have completed the online application and there is no evidence that any applicant had a problem in the manner in which the form displayed on the applicant's

[43] He testified that at the time the accusation was filed he did not recall that he had to make two attempts to complete the application.

[44] Discovery may only be conducted for good cause. AS 42.62.400(a).

screen.[45] In addition, the evidence shows that the failure to process the first submission occurred in connection with the credit card processing.[46] This is a very different type of error than having the questions fail to display properly.

There is one other issue concerning the computer application that needs to be addressed. The online application includes the following language:

> Only the license holder is authorized to renew their license on-line. USE OF THE ON-LINE PROGRAM BY ANYONE OTHER THAN THE LICENSEE IS PROHIBITED. WARNING: It is a Class A misdemeanor under Alaska Statute 11.56.210 to falsify an applicant and commit the crime of unsworn falsification.[47]

Next to this language is a box that must be checked by the applicant in order to continue with the application process. Once an application is completed, a summary sheet is generated. This summary contains the following language:

> I affirm that I am the individual applying for the renewal of this license. I further certify that the information provided is true and correct. I understand that all information is subject to review.[48]

This language from the summary sheet does not appear anywhere in the on-line application. In a different case, this could be important. Although applicants are warned that falsifying an application is a misdemeanor, they are never actually asked to certify that the information is correct and that they understand that the information provided is subject to review. The certification is effectively inserted without their knowledge after they push "submit." This difference is not important in this case. It is apparent that the computer program is designed to generate this statement on the summary form. There is no reason to believe, however, that the program is designed to insert an incorrect answer in response to question 5, or any of the other questions.

Based on the evidence presented at the hearing, it is more likely true than not true that question 5 did in fact display correctly when Dr. Migden completed the on-line application. He was actually presented with this question twice, and answered no each time. It is unlikely that the question would have displayed incorrectly once, and much less likely that it would display incorrectly twice.

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45 Testimony of Leslie Gallant; Testimony of Jenny Strikler.
46 Exhibit 21, page 1.
47 Exhibit 9, page 2 (capitalization in original).
48 Exhibit 12.

E. Merits of Count II of the Accusation

Count II of the Accusation alleges that Dr. Migden engaged in unprofessional conduct in violation of AS 08.64.326(a)(9). Dr. Migden was asked whether he had been the subject of an investigation by any licensing agency.[49] He incorrectly answered "no" to that question.[50] This constitutes unprofessional conduct.[51] The Division has met its burden of proving this violation.

F. Appropriate Penalty.

In an effort to impose consistent discipline, the Board has referred to approved "guidelines" in a document titled "Category of Complaints and Proposed Disciplinary Sanction."[52] At the hearing it was disclosed that the Board recently approved a revised version of these guidelines.[53] Board Chair Jean Tsigonis, M.D., testified about changes in this document relevant to this hearing. She indicated that the Board felt there should be a distinction between intentional and careless failure to provide information. Under the new version, an intentional misrepresentation could result in a Letter of Reprimand and a $2,000 fine. A negligent failure to disclose, on the other hand, might result in a non-reportable fine without reprimand.[54]

These guidelines are not adopted regulations, and while they may be used by the Board, the Board is still required to consider each case individually and ensure that any discipline actually imposed is consistent with actual discipline in prior cases or, if different, explain why there is a difference.

Board actions are summarized on the Board's web page.[55] While the details of the individual violations are not included, a review of this document shows that the Board has usually imposed a fine and reprimand for failing to disclose a prior investigation in another state. These summaries do not indicate whether the prior case involved an intentional failure or a negligent failure. The Board has appropriately determined that this is an important distinction, and with assistance from the revised guidelines, the Board can begin establishing a new pattern of sanction that distinguishes between intentional and negligent omissions.

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49 Exhibit 9, page 7.
50 Exhibit 12; Migden testimony.
51 12 AAC 40.967(2).
52 Exhibit 10. This document has not been adopted as a regulation, but has been used as a guide.
53 Exhibit 19.
54 Exhibit 19.
55 http://www.dced.state.ak.us/occ/pub/Cumulative_Board_Action_Summary.pdf.

Where, as in this case, the error was one of carelessness, a fine of $1,000 without any censure or reprimand would be appropriate.[56] This conduct is clearly less culpable than securing a license through an intentional act of misrepresentation for which a reprimand and $2,000 fine would be imposed.[57] A smaller fine is also appropriate because there is usually no direct threat of harm to patients when an applicant fails to disclose a prior investigation, at least when the investigation did not result in any disciplinary action against the physician.

As a general rule, however, a fine of less than $1,000 would not be appropriate. The fine should be large enough to impress upon applicants the importance of being careful when completing license applications.

In this case, there is a mitigating circumstance that justifies a downward departure from the general rule. Dr. Migden reported his mistake to the Board two months after his application.[58] It is important to encourage self-reports, and this can be done by reducing the penalty when a self-report is made. There was a suggestion during the hearing that Dr. Migden only made this report because he was seeking to activate his license and was concerned that the prior investigation would be discovered during that process. The weight of the evidence does not support that inference, however. It is more likely true that his disclosure was prompted by his realization that he made a mistake, rather than by his fear that the mistake was about to be discovered. Accordingly, a reduction in the civil fine from $1,000 to $500 would be appropriate. This amount properly credits Dr. Migden with his self-report without unduly minimizing the seriousness of the violation.

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[56] Licensees are cautioned that state licensing agencies in other states might consider a fine without reprimand to be reportable discipline when renewing a license in that state.

[57] Exhibit 19.

[58] Exhibit 3.

IV. CONCLUSION

Dr. Migden failed to report a prior investigation conducted by a licensing agency in another state. For the reasons discussed above, there shall be no censure or reprimand issued in this matter. However, the following sanction shall be imposed:

A non-reportable civil fine of $500.

DATED this 19th day of November, 2010.

By: *Signed*
Jeffrey A. Friedman
Administrative Law Judge

[This document has been modified to conform to technical standards for publication.]

(SEE NON-ADOPTION OPTION #2 BELOW FOR FINAL DECISION OF BOARD)
[Unused options not shown]

Non-Adoption Options

A. The Alaska State Medical Board, in accordance with AS 44.64.060, declines to adopt this decision, and instead orders under AS 44.64.060(e)(2) that the case be returned to the administrative law judge to

take additional evidence about _____;

make additional findings about _____;

conduct the following specific proceedings: _____.

DATED this _____ day of _____, 20___.

By: _____
Signature

_____
Name

_____
Title

B. The Alaska State Medical Board, in accordance with AS 44.64.060(e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as follows:

A civil fine of $1000.00.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 21st day of January, 2011.

By: *Signed*
Signature

Ed Hall PA-C
Name

SCMB Secretary
Title
