

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

In the Matter of:)	
)	
PETER OSTERBAUER, M.D.)	
)	OAH No. 18-0846-MED
Respondent.)	Board Case Nos.
_____)	2018-000793, 2017-000541

DECISION

I. Introduction

The Division of Corporations, Business and Professional Licensing (Division) petitioned the Medical Board (Board) for an “automatic suspension” of Dr. Peter Osterbauer’s medical license under AS 08.64.331(c), based on the allegation that he “poses a clear and immediate danger to the public health and safety if [he] continues to practice.”¹ The Board issued an order of summary suspension on August 15, 2018.² The Division subsequently issued an Accusation that added a count to the original petition, alleging that Dr. Osterbauer had violated a prior consent agreement and thus had violated an order of the Medical Board.³

A hearing was held on both allegations on August 30, 2018. The administrative law judge determined that the Division had demonstrated that Dr. Osterbauer had violated the prior consent agreement, but failed to demonstrate that his continued practice of medicine poses a clear and immediate danger to the public health and safety. A proposed decision was issued on September 4, 2018, that would have led to lifting of the suspension, subject to certain conditions. The Board declined to adopt the proposed decision, and instead issued a decision that included changed factual findings and significant disciplinary sanctions.⁴ Dr. Osterbauer requested a hearing as to the sanctions, which was held on December 12, 2018. It should be noted that both the administrative law judge’s and the Board’s factual findings, made after the limited first hearing, are now superseded because new evidence has been taken. The decision below is based on the totality of the evidence.

¹ Petition for Automatic Suspension of a Physician’s License, August 14, 2018, at 1.

² Affidavit of Debora Stovern, August 28, 2018, at 2.

³ Accusation, August 27, 2018. The Division also issued an Amended Accusation on August 29, 2018, alleging that Dr. Osterbauer had engaged in the practice of medicine after being suspended. The Amended Accusation, however, was dismissed prior to the close of the August 30, 2018 hearing, because the evidence showed that the allegation was unsupported, and the Division did not oppose dismissal.

⁴ Final Decision, Non-Adoption Options, September 30, 2018.

Based on the evidence presented at both hearing sessions, this decision concludes that although Dr. Osterbauer breached his consent agreement, his continued practice of medicine does not pose a threat to public health and safety, and he is able to provide safe medical care to his patients if he is subject to strict safeguards. Sanctions should be imposed for his violation of the prior consent agreement in the form of a suspension for six months; a regimen of 90 AA meetings over a 90-day period; continuing his daily Antabuse dosing while having it monitored by his employer; continuing the counseling and work with the Alaska Physicians' Health Committee, as required under the prior consent agreement; undergoing daily UAs at his place of employment; imposition of a 10-year period of probation starting as of the effective date of this decision; immediately beginning payments on the \$10,000 fine already due for violating the consent agreement;⁵ and an additional fine in the amount of \$25,000.

II. Procedural Posture

Dr. Osterbauer has been represented throughout this proceeding by counsel Thomas Amodio. The Division has been represented by Assistant Attorney General Harriet Milks.

As already mentioned, the hearing was held in two sessions. The first hearing session was held on August 31, 2018. Dr. Osterbauer and Division investigators Christina Bond and Sonia Lipker testified at that session, which was conducted on an expedited basis, as required when the Board issues a summary suspension order.⁶ In a technical sense, that first hearing session concerned just the summary suspension and did not concern additional discipline that might be imposed on Dr. Osterbauer. Nonetheless, in addition to addressing the summary suspension, the September 4, 2018 proposed decision discussed potential disciplinary measures because they were discussed by both parties on the record, and the proposed decision would not have presented a complete picture of the hearing record without that discussion.

In response to the proposed decision, Dr. Osterbauer and the Division each submitted proposals for action that essentially agreed with the findings and conclusions in the proposed decision.⁷ The Board declined to adopt the proposed decision, issued a modified decision that

⁵ It is unclear whether Dr. Osterbauer had already started paying the fine as of December 12, 2018.

⁶ AS 08.64.331(c). Although the Board's order was termed a "summary suspension," a suspension arising out of violation of a consent agreement is properly termed an "automatic" or "immediate" suspension.

⁷ Division Proposal for Action, September 4, 2018, at 3 ("suspension for violating the 2017 consent agreement should extend only until the adoption of a new consent agreement"); Osterbauer Proposal for Action, September 4, 2018, at 1 ("Board should limit ... discipline ... to a fine and suspension already served").

deleted several substantive factual findings, substituted other facts without hearing or citing to evidence presented at the hearing,⁸ and issued an order as follows:

Effective immediately, the ... Board orders the suspension of Dr. Osterbauer's Alaska Physician License ... , pursuant to AS 08.64.331(a)(2), for violations of statutes and regulations, pursuant to AS 08.64.326(a)(7), AS 08.64.326(a)(8)(B), AS 08.64.326(a)(9), and 12 AAC 40.967(23). The period of suspension shall be a minimum of two years, and Dr. Osterbauer shall not be allowed to return to the practice of medicine until he can document a minimum of two years of continuous sobriety, successfully complete an in-patient Board-Approved rehabilitation treatment program, and prove to the Board that he can practice medicine with skill and safety, in a manner consistent with public safety. During the period of suspension, Dr. Osterbauer shall remain in compliance with the current Consent Agreement, and any terms, conditions and orders of the Board.

It is further ordered that the suspended portion of the fine imposed under the current Consent Agreement is due and payable immediately. Dr. Osterbauer may work with the Division to establish a plan to pay the \$10,000 fine in monthly installments over a 24-month period, beginning immediately.

It is further ordered that a public reprimand be issued against Peter J. Osterbauer, M.D. for failure to comply with the terms of his 2011 Consent Agreement, his 2014 Consent Agreement, and his 2017 Consent Agreement, orders of the ... Board, by consuming alcohol and missing or failing required random testing, which [constitute] violations of AS 08.64.[⁹]

When the Board's decision was issued, it was accompanied by a notice reading in pertinent part as follows:

Attached is the Alaska State Medical Board's final decision in this matter with respect to summary suspension, which the board voted to adopt on September 27, 2018. ...

...

It is the intent of the board to provide Dr. Osterbauer with an administrative hearing to contest discipline imposed pursuant to AS 08.64.326(a)(7) – (9), 12 AAC 40.967(23), and AS 08.64.331(a). Accordingly, OAH Case No. 18-0846-MED will remain open to provide an opportunity for such a hearing. The Notice of Defense filed on behalf of Dr. Osterbauer on August 16, 2018 will be deemed a request for hearing as to these matters, unless withdrawn or limited by Dr. Osterbauer.

⁸ The Board's order stated that it "hereby ... rejects, modifies or amends one or more factual findings based on the specific evidence in the record." The order and modified decision, however, did not identify "specific evidence" in support of the amended findings. Non-Adoption Options, September 30, 2018, second bullet point. AS 44.64.060(e)(4) does not require the Board simply to recite that it is relying on "the specific evidence in the record," but rather requires the board to "identify[] the testimony and other evidence" it is relying on in changing a particular finding. This procedural error is understandable in the context of a preliminary, expedited decision, but it is one the Board should seek to avoid in the final decision on this matter.

⁹ Non-Adoption Options, September 30, 2018, signed by Board President Dr. Craig Humphrey.

The board's decision may modify certain factual findings that were based on testimony given at the hearing. In accordance with policy, the Office of Administrative Hearings notifies the parties that the audio recording of the hearing was not requested by nor provided to the board.^[10]

Pursuant to Dr. Osterbauer's request, the second hearing session to address the sanctions imposed by the Board was held on December 12, 2018. At that time, the parties and administrative law judge agreed that the record would include the testimony previously given on August 30, so that testimony would not have to be repeated. Dr. Osterbauer testified again, as did Division investigators Lipker and Bond. The record was then closed, and the matter was taken under advisement.

III. Findings of Fact

There are no essential facts in dispute in this matter.¹¹ Dr. Osterbauer has been licensed by the Board as a physician since January 2008.¹² He is a recovering alcoholic who has been subject to three consent agreements with the Board since May 2011, all of which were related to his alcohol use.¹³ He was previously twice suspended for failing to comply with consent agreement terms. His second suspension in May 2016 led to the entry of his third consent agreement in May 2017—the consent agreement that is at issue in this matter.¹⁴ Under that agreement Dr. Osterbauer's license was put on probation for 10 years, beginning on the effective date of the agreement, May 4, 2017. Other key terms of the May 2017 agreement included the following:

- (1) a \$10,000 fine, suspended, but with the full balance being immediately due if the agreement is violated;
- (2) undergo psychotherapy counseling;
- (3) abstain from consuming any alcohol or controlled drugs;
- (4) attend at least three AA meetings per week;
- (5) regularly participate in the Alaska Physicians' Health Committee (PHC) program;

¹⁰ NOTICE TRANSMITTING FINAL DECISION ON SUMMARY SUSPENSION and NOTICE OF OPPORTUNITY FOR HEARING ON REMAINING ISSUES, October 1, 2018.

¹¹ The full Administrative Record packet, and audio recordings of the two hearing sessions, are available to the Board upon request.

¹² Administrative Record (AR) 18 (Investigative Memo to the Board, July 26, 2018, at 2).

¹³ Testimony of Dr. Osterbauer; AR 17-18. The 2011 agreement was a confidential "non-disciplinary consent agreement." AR 238-246. The 2014 agreement is not included in the record of this matter, but documents related to it are in the record at AR 227-237. The 2017 agreement is found at several places in the record; see AR 32-44.

¹⁴ *Id.*

- (6) submit quarterly self-evaluation reports;
- (7) submit to random urinalysis (UA) testing;
- (8) submit to breathalyzer tests as ordered by the Division.¹⁵

The agreement also provided that if Dr. Osterbauer violated its terms, the Division “may enforce this agreement by immediately suspending [his] license.”¹⁶

On June 28, 2018, Dr. Osterbauer consumed a single drink of alcohol, “in a moment of anger and self-pity due to an extreme family issue.”¹⁷ During this relapse event, Dr. Osterbauer was not cognizant of the fact that he was on a daily regimen of Antabuse, although he has been regularly taking Antabuse since 2009 or 2010.¹⁸ Antabuse causes a person to become ill if they consume alcohol; within minutes of consuming the drink, Dr. Osterbauer became violently ill.¹⁹ He did not, however, become intoxicated or drunk under any definition of those terms. In his testimony during the second hearing session, he opined that this was due to the fact that he had vomited up most of the alcohol he had consumed, so the majority of the alcohol in the drink did not enter his bloodstream.²⁰ Dr. Osterbauer explained that when a person drinks alcohol while on Antabuse, the reaction is more than just vomiting; it is a “horrible reaction,” where the person starts to feel feverish, then their face and throat swell up and turn red, they have heart palpitations, then nausea leads to vomiting.²¹

Dr. Osterbauer tested positive for alcohol use in a random UA test the next day, June 29, 2018.²² He received notice of the positive test result on July 16, 2018 and on the same day reported to Investigator Bond that he had used alcohol.²³ Dr. Osterbauer explained in his testimony during the second hearing session that he did not report his consumption of the drink before receiving the positive test result because he was “scared, embarrassed, and ashamed.”²⁴

Since June 28, 2018 Dr. Osterbauer has consumed no alcohol.²⁵

¹⁵ AR 32-44.

¹⁶ AR 37.

¹⁷ Dr. Osterbauer testimony; AR 21 (Dr. Osterbauer letter to Board, July 26, 2018).

¹⁸ Dr. Osterbauer testimony.

¹⁹ *Id.*

²⁰ *Id.* Dr. Osterbauer’s family was present in the home when he consumed this drink of alcohol; his wife heard him being sick in the bathroom and “came up to check on [him].” *Id.*

²¹ *Id.*

²² AR 12 (Affidavit of C. Bond, August 3, 2018).

²³ Dr. Osterbauer testimony.

²⁴ *Id.*

²⁵ *Id.*

Since that time, Dr. Osterbauer has undertaken additional steps to strengthen his recovery program, detailed in his letter to the Board and a PHC letter to the Board.²⁶ These steps include embarking on a regimen of 90 AA meetings over a 90 day period, working with a spiritual mentor, having his daily Antabuse dosing be monitored by his employer, and agreeing to undergo daily UAs at his place of employment (a routine task for his clinic, which performs UAs regularly through its occupational health division). Through his testimony and supporting documents, Dr. Osterbauer credibly and persuasively demonstrated his commitment to his continued recovery and prevention of future relapses. This decision finds that Dr. Osterbauer is committed to maintaining his recovery.

Investigator Bond communicated with the Board's designated Reviewing Board Member about Dr. Osterbauer's case on August 1, 2018; the Board as a whole discussed the case at its meeting on August 2, 2018.²⁷ The Division presented its formal petition for automatic suspension to the Board on August 14, 2018.²⁸ The Board issued its summary suspension order on August 15, 2018; Dr. Osterbauer was served with the order on August 16, 2018.²⁹ He ceased practicing medicine at that time.³⁰

Testimony during the second hearing session fleshed out some of the facts regarding Dr. Osterbauer taking a drink on June 28, 2018. Testimony during that hearing session also focused on precedent for the discipline imposed by the Board's September 30, 2018 order, primarily the requirements of "a minimum of two years of continuous sobriety" and of completion of an in-patient rehabilitation treatment program. The Division confirmed at the hearing that the first requirement is derived from a Board policy, adopted in April 2006, that is entitled "Applicant with Substance Abuse History;" the policy reads as follows:

Historically, the board's position is to require that an individual demonstrate **a couple years of documented sobriety** before they are given the opportunity to have their license restored under the terms of [a consent agreement]. Addiction is a compelling disorder and recovery is a long road. The board wants to see that record of recovery before they consider restoring the license, even under the conditions of [a consent agreement]. When the board decides to return a license, they include terms in the [consent agreement] such as a structured practice

²⁶ AR 21, 22.

²⁷ AR 11-12.

²⁸ AR 9-10.

²⁹ AR 285 (Affidavit of Debora Stovern, August 28, 2018, at 2).

³⁰ Dr. Osterbauer testimony. Both hearing sessions included substantial, credible testimony regarding Dr. Osterbauer's abstention from practicing medicine in any manner since his license was suspended. Because the Amended Accusation asserting that he practiced while suspended was dismissed, that testimony is not recited here.

environment The board wants to be sure that there are support resources available for the individual to stay sober and have the ability to document that to the board’s satisfaction.[³¹]

The Division confirmed that this policy has not been adopted as part of a Board statute or regulation. The testimony of the Division’s witnesses also established that, to the best of their knowledge, the “two years of sobriety” guideline had been imposed by the Board in one other physician discipline case, and the in-patient treatment requirement imposed on Dr. Osterbauer had not been imposed by the Board in any prior physician discipline cases.

III. Discussion and Conclusions of Law

A. *The Board’s “documented sobriety” policy*

1. If applied as a rule, the policy would be an improperly adopted regulation

The Division did not dispute that the Board’s policy indicating that a physician should “demonstrate a couple years of documented sobriety” in order for a suspended license to be restored is not part of a statute or regulation. No evidence was presented regarding the manner in which the Board adopted the policy in 2006,³² nor regarding the meaning of the policy’s reference to the Board’s “historical position.” Nonetheless, it was not disputed that the Board in adopting the policy did not follow the requirements of the Administrative Procedure Act (APA), AS 44.62.010 – 44.62.320 and AS 44.62.640 – 44.62.950. Dr. Osterbauer argues that the policy constitutes a regulation that has not been properly promulgated and adopted in accordance with the APA, and therefore it is invalid. The above-cited provisions of the APA are designed to reduce the risk of arbitrary application and to inform the public of regulations.³³ Under the APA, a “regulation” is defined in pertinent part to include:

Every rule, regulation, order or standard of general application . . . adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of a state agency; . . . “regulation” includes “manuals,” “policies,” “instructions,” “guides to enforcement,” “interpretative bulletins,” “interpretations,” and the like, that have the effect of rules, orders, . . . or standards of general application[³⁴]

³¹ AR 319 (excerpt from Board’s Policies and Procedures; emphasis added).

³² No evidence was presented to establish that the documented sobriety policy has been disseminated to the public, other than Ms. Lipker’s testimony that as of the date of the second hearing session, the policy was posted on the Board’s website; Ms. Lipker did not know when it was first posted there.

³³ *Friends of Willow Lake, Inc. v State*, 280 P.3d 542 (Alaska 2012).

³⁴ AS 44.62.640(a)(3).

On its face, the Board's policy is a guideline, not a regulation. It does not set a precise duration of sobriety, and it merely observes that the Board has historically looked for a substantial period. If it were interpreted as a strict two-year requirement, however, it would be a "rule, regulation, order or standard" that "implement[s], interpret[s] or make[s] specific the law enforced or administered" by the Board, and it would be an illegal regulation that has not been promulgated pursuant to the provisions of the APA.³⁵ It will not be so interpreted here.

2. Dr. Osterbauer is in compliance with the sobriety target referenced in the guideline

Dr. Osterbauer also contends that if the "documented sobriety" policy is not an invalid regulation, he has remained in compliance with the plain meaning of its terms. The key language of the policy states that the Board has generally looked for "an individual [to] demonstrate a **couple years of documented sobriety** before they are given the opportunity to have their license restored under the terms of [a consent agreement]."³⁶ The term "sobriety" means the "quality or state of being sober."³⁷ "Sober" means, among other things, "not drunk."³⁸

The evidence presented at the hearing was undisputed that Dr. Osterbauer did not become intoxicated or drunk when he consumed a single drink of alcohol on June 28, 2018, because he almost immediately became violently ill and vomited up most of the alcohol as a result of his daily dosing of Antabuse. Because he did not get drunk, he maintained his sobriety as that term is defined. Dr. Osterbauer points out that other than the June 28, 2018 incident, he has not consumed alcohol since well before he entered his prior consent agreement in May 2017. He argues, therefore, that he has been in compliance with the Board's sobriety requirement for more than two years, and that he remains in compliance to the present.

None of the Division's witnesses could offer any testimony regarding the Board's intent in adopting the specific language of the guideline.³⁹ Counsel for the Division argued that it is reasonable to draw the inference that the Board intended the policy to refer to **abstention** from the consumption of alcohol. The Board, however, could have said just that when it adopted the

³⁵ See *Kenai Peninsula Fisherman's Co-op Ass'n, Inc. v State*, 628 P.2d 897 (Alaska 1981) (holding that policy of Board of Fisheries was a regulation that should have been adopted under the APA); citing *Coghill v. Boucher*, 511 P.2d 1297 (Alaska 1973). See also *Reichman v. State*, 917 P.2d 1197 (Alaska 1996) (portion of a Department of Natural Resources manual found to constitute a "regulation").

³⁶ AR 319 (excerpt from Board's Policies and Procedures; emphasis added).

³⁷ Merriam Webster's Collegiate Dictionary at 1114 (10th Ed. 1996).

³⁸ *Id.*

³⁹ In addition to the usage of the term sobriety, the policy's reference to a "couple years" is somewhat ambiguous; one must infer that the Board intended to mean "two years."

policy; instead, it used the term sobriety. Dr. Osterbauer argues that it would be unfair for the Board to not strictly construe the language of its own policy in imposing discipline in this case. In this context he cites a 2009 decision of the Alaska Supreme Court, where the Court stated that “[l]aws should give the ordinary citizen fair notice of what is and what is not prohibited.”⁴⁰ In ruling that APOC could not fine state senator Ben Stevens for violating an ambiguous financial reporting requirement, the Court held that “imprecise, indefinite, or ambiguous statutory or regulatory requirements must be strictly construed in favor of the accused before an alleged breach may give rise to a civil penalty.”⁴¹

Although the facts and issues in *APOC v. Stevens* are distinguishable from Dr. Osterbauer’s situation, the Court’s analysis there is persuasive. It would be fundamentally unfair to not strictly construe the Board’s documented sobriety policy in its application to the discipline to be imposed on Dr. Osterbauer. This decision finds that if the Board’s policy is not an invalid regulation and is applied in this case, Dr. Osterbauer has remained in compliance with it.

3. Do the Board’s disciplinary sanctions constitute “stacking”?

Dr. Osterbauer argues that the Board’s disciplinary sanctions are based in large part on the fact that he has violated three consent agreements. The Division effectively conceded that point at the hearing, suggesting that the Board has the authority to impose discipline commensurate with the unique and relatively egregious series of violations. In addition, the Board’s order and modified decision repeatedly mention the fact of the three violations, and the sanctions appear to be intended to be in direct response to that fact. Dr. Osterbauer points out that he already “served his time” and paid the penalties for his prior violations, and he argues that the Board is improperly “stacking” the violations by taking the two prior violations into account in imposing discipline on him for the current violation.

AS 08.64.326 provides the Board with very broad authority to impose disciplinary sanctions upon a physician found to have violated an order of the board or to have demonstrated “addiction to, severe dependency on, or habitual overuse of alcohol or other drugs.”⁴² The Division has not cited to any authority in this matter that speaks to whether a disciplinary sanction for a current violation can take into account prior violations, where the physician has already been disciplined for the prior violations.

⁴⁰ *Alaska Public Offices Comm’n v. Stevens*, 205 P.3d 321, 325 (Alaska 2009).

⁴¹ *Id.*

⁴² AS 08.64.326(a)(7), (8)(B).

An analogous situation was presented to the Board of Nursing, however, in a case entitled *In re Small*, involving a nurse who had violated terms of a prior consent agreement. There the board held that a consent agreement could be deemed a “prior offense” under Board of Nursing regulations, if the agreement showed “that the respondent admitted to an offense or the board’s order component of the agreement includes a finding of violation.”⁴³ In the present case, Dr. Osterbauer’s 2011 consent agreement did not include such admissions or findings by the Board, whereas his 2017 consent agreement did.⁴⁴ It should be noted, however, that the Medical Board’s statutes and regulations do not contain a provision similar to the Board of Nursing regulation that explicitly addresses the role that prior violations can play in assessing discipline for a current violation.⁴⁵

This decision finds that the broad authority afforded to the Board under AS 08.64.326 allows the Board to take into account a pattern of past behavior of a physician in determining appropriate discipline for a current violation. However, the Board cannot discipline the physician again for a violation as to which the physician has already been disciplined. Thus, the provision of the Board’s order that a public reprimand be issued against Dr. Osterbauer “for failure to comply with the terms of his 2011 Consent Agreement, [and] his 2014 Consent Agreement” is improper, as Dr. Osterbauer has already been disciplined for violating those agreements. Discipline to be imposed in this matter must relate to his admitted violation of his 2017 Consent Agreement.

4. The appropriate disciplinary sanctions in this case

Dr. Osterbauer has not disputed that he violated his prior consent agreement and thus violated an order of the Board. His offense, however, was a single off-duty episode where the consumption of alcohol had absolutely no impact on patient care. In addition, due to his regular dosing of Antabuse, Dr. Osterbauer did not become intoxicated. No credible evidence was presented during either hearing session that Dr. Osterbauer’s continued practice of medicine would pose a danger to public health and safety.

⁴³ OAH Case No. 09-0396-NUR (published at <https://aws.state.ak.us/OAH/Decision/Display?rec=4911>).

⁴⁴ As previously noted, the record in this matter does not include a copy of the 2014 consent agreement.

⁴⁵ *In re Small* is also distinguishable because the Board relies not upon the simple fact that Dr. Osterbauer entered into the prior consent agreements, but upon the undisputed fact that he has violated all of them.

The Board must seek consistency with its prior disciplinary actions in imposing sanctions in this case, and it must explain “significant departures from prior decisions.”⁴⁶ The Division presented testimony establishing that a case involving a physician’s violations of three consecutive consent agreements has never before been presented to the Board. The Division argued that the Board based its imposition of the in-patient treatment requirement and the “minimum of two-years” suspension on the fact of the three violations and on the lack of precedent for such a circumstance.

The violation of three consent agreements raises legitimate concerns; a person who violates three agreements may be perceived as more likely to violate another one or otherwise experience another relapse, and such a person may need an enhanced deterrent. One of the Division’s investigators testified to this effect, stating that it is her understanding that the Board believes the danger posed by Dr. Osterbauer’s continuing practice of medicine is the threat of future relapses, based in part on his previous history of violating the prior consent agreements.⁴⁷

In the absence of any precedent in the Board’s prior decisions that would serve as a baseline for consistent application of the Board’s authority to impose discipline, the Board should focus on reasonable steps, commensurate with the violation at issue in this case, that will ensure protection of patients and the public. It is questionable whether a suspension for a minimum of two years is reasonable or furthers these goals, as opposed to having a punitive effect.

Dr. Osterbauer’s testimony was persuasive that the best way for him to ensure against any future relapse is to keep treating his patients. The medical providers on the Alaska State Medical Association PHC who have recently been working with Dr. Osterbauer are in the best position to assess his commitment to recovery, and they agree with this conclusion, stating that allowing Dr. Osterbauer to continue to work with his patients “will help him stay sober and decrease the likelihood of further slips.”⁴⁸ Also weighing against the imposition of severe discipline are the many unsolicited letters written on Dr. Osterbauer’s behalf by his patients, as well as letters of support from other medical care providers and from the PHC.⁴⁹ The letters written by Dr. Osterbauer’s patients (mostly traumatic brain injury victims and persons with

⁴⁶ AS 08.64.331(f); *see Odom v. State of Alaska, Div. of Corps., Business & Prof. Licensing*, 421 P.3d 1, 7 (Alaska Feb. 9, 2018).

⁴⁷ Bond testimony.

⁴⁸ AR 22.

extreme migraine disorders) are noteworthy for the superlatives used in describing how much they trust him, how reliant they are on his medical care, and how committed he is to caring for them.

This decision has found that Dr. Osterbauer is sincere in his commitment to maintaining his recovery, and that he has taken significant additional steps to strengthen his recovery program. Through his testimony and supporting documents, Dr. Osterbauer credibly and persuasively demonstrated his commitment to his continued recovery and prevention of future relapses. It is quite telling, and compelling, that at the hearing the Division did not dispute any of this evidence, nor present any contrary evidence.

Dr. Osterbauer did not appear at his office intoxicated, nor did he go on a binge of drinking; he had a single, short, momentary relapse in which he did not become intoxicated; his relapse had no impact on patient care and did not endanger the public in any manner; he is sincerely and credibly committed to not allowing it to happen again; and his actions since the relapse have demonstrated that commitment. While it was appropriate to immediately impose a suspension pending an evaluation of the violation, the Board now has the benefit of additional information to consider the scope and severity of the discipline it should impose. Dr. Osterbauer has indicated willingness to subject himself to tighter safeguards, and the PHC has endorsed these additional measures. The most important consideration here is that his continued practice of medicine, in the context of these additional measures, will not pose a danger to his patients or public health.

The Board believes that Dr. Osterbauer's repeated violations of consent agreements – specifically his failure to abstain from consuming alcohol – requires us to take accelerated steps to require compliance. Therefore, the Board orders that Dr. Osterbauer's license be suspended for 18 months from this date that the conditions of his 2017 consent agreement are continued and incorporated into his order, including the requirement of complete abstinence from Consuming alcohol, and imposing a regimen of 90 AA meetings over a 90-day period; continuing his daily Antabuse dosing while having it monitored by his employer; the counseling and work with the PHC, as required under the consent agreement; undergoing daily UAs at his place of employment; imposition of a 10-year period of probation starting as of the effective date of this decision; immediately beginning payments on the \$10,000 fine already due for violating the consent

⁴⁹ These letters are included in the record of this matter and are available for the Board's review.

agreement (if not already begun); an additional fine at the maximum level the Board is authorized to impose, \$25,000;⁵⁰ and a public reprimand. These are significant sanctions, but they are commensurate with the nature and severity of the June 28, 2018 incident that constituted a violation of the 2017 consent agreement. The additional fine is imposed in recognition that Dr. Osterbauer's violation imposed a significant, unnecessary expense on the people of Alaska, in the form of the time and effort incurred by the Division staff, the Department of Law, the Board staff, the Board members themselves, and the Office of Administrative Hearings.

IV. Conclusion

Dr. Osterbauer violated his 2017 consent agreement with the Board, the third such agreement that he has violated in the past seven years. This violation warrants the imposition of significant sanctions against his license. The absence of a threat to Dr. Osterbauer's patients or a danger to public health and safety, however, mandates that the Board should not suspend him for a minimum of two years or require him to complete an in-patient treatment program, but instead should impose discipline as discussed above.

DATED this 15th day of January, 2019.

By: Signed _____
Andrew M. Lebo
Administrative Law Judge

Non-Adoption Options

In the matter of Peter J. Osterbauer, M.D., OAH No. 18-0846-MED, the Alaska State Medical Board hereby selects Non-Adoption Option B. In accordance with AS 44.64.060(e)(3), the Board revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as follows:

- On page 2 of the Proposed Decision and Order, revises the last phrase of the first paragraph to read "and an additional fine in the amount of \$25,000."
- On page 12 of the Proposed Decision and Order, revises the last paragraph to read:
The Board believes that Dr. Osterbauer's repeated violations of consent agreements - specifically his failure to abstain from consuming alcohol - requires us to take accelerated steps to require compliance. Therefore, the Board orders that Dr. Osterbauer's license be suspended for 18 months from this date; that the conditions of his 2017 consent agreement are continued and incorporated into this order, including the requirement of

⁵⁰ AS 08.64.331(a)(7).

complete abstinence from consuming alcohol; and imposing a regimen of 90 AA meetings over a 90-day period; continuing his daily Antabuse dosing while having it monitored by his employer; continuing the counseling and work with the PHC, as required under the consent agreement; undergoing daily UAs at his place of employment; imposition of a 10-year period of probation starting as of the effective date of this decision; immediately beginning payments on the \$10,000 fine already due for violating the consent agreement (if not already begun); an additional fine at the maximum level the Board is authorized to impose, \$25,000;50 and a public reprimand.

- The Board wishes to make clear that if he fails to comply with these requirements, it intends, absent compelling evidence in his defense, to move toward revocation of his license.

DATED this 8th day of February, 2019.

By: Signed
Signature
S. Craig Humphreys, M.D.
Name
Board President
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]