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

In the Matter of	)	
	)	OAH No. 19-1016-MED
JOHN PAPPENHEIM	)	Agency No. 2017-000838/2019-
	)	000532/2019-000585

DECISION

I. Introduction

Juneau-based psychiatrist John Pappenheim entered into a consent agreement with the Alaska State Medical Board in June 2017 relating to issues that included an arrest for driving under the influence of alcohol. The agreement imposed a five-year period of probation during which Dr. Pappenheim was to abstain from using alcohol, submit to random urinalysis monitoring, and comply with licensing laws and regulations.

Eighteen months into his five-year probation, Dr. Pappenheim violated the consent agreement by repeatedly drinking alcohol and, when he feared his use would be discovered, soliciting a vulnerable patient to impersonate him for a drug test.

On October 24, 2019, the Division of Corporations, Business and Professional Licensing (Division) suspended Dr. Pappenheim's medical license for violating the consent agreement. Dr. Pappenheim requested a hearing to challenge the suspension.

Because the Division has not brought a disciplinary accusation against Dr. Pappenheim, the scope of the hearing and the Board's decision must be limited to whether Dr. Pappenheim violated the consent agreement, whether the violation warranted a suspension, and, if so, what the terms of that suspension should be. Because of the Division's election, disciplinary sanctions—such as fines, new terms of probation, or revocation—can only be considered in a separate proceeding.

Dr. Pappenheim admits to violating the consent agreement, but urges that the Board should now lift the suspension because he has completed a residential treatment program. This decision finds, however, that the consent agreement's suspension option is an enforcement mechanism that presumes a suspension through the remainder of the probationary period. While mitigating circumstances could, in some cases, warrant a shorter term of suspension, the circumstances here do not. Given the grave ethical implications of Dr. Pappenheim's misconduct, as well as his continuing minimization of certain aspects of that misconduct, his license will remain suspended for the remainder of the probationary period under the 2017

consent agreement. During the remainder of the suspension, the Division is directed to evaluate the case for disciplinary sanctions.

II. Facts

A. Background

Dr. Pappenheim received his medical training at the Medical College of Wisconsin, and received a license to practice medicine in Wisconsin in 1986.[1] He became Board certified in Psychiatry in 1993.[2] After practicing in Wisconsin for more than twenty years, he applied for and was hired as the Medical Director of Behavioral Health Services at Bartlett Regional Hospital in Juneau. He was first licensed by the Medical Board in January 2010.[3]

He worked at Bartlett for five years, and was ultimately terminated. He then worked in a locum tenens capacity at Alaska Psychiatric Institute for about 18 months before opening his own practice.

Until the suspension giving rise to this proceeding, that practice has consisted of patients with a range of mental health concerns ranging from "relatively benign" forms of general anxiety disorder to schizoaffective disorder. Most of his patients carry dual diagnoses of a mental health disorder and a substance use disorder.

B. 2017 Consent Agreement

On February 1, 2017, Dr. Pappenheim was arrested and charged with Driving Under the Influence(DUI). He disclosed the arrest to the Medical Board in a February 27, 2017 letter in which he denied having driven under the influence. The story he told in that letter was that he had "nudged" a car while parking at the grocery store, then fixed his parking and walked to a nearby bar to have drinks before grocery shopping. He claimed he was on his way to call a taxi to take him home when the owner of the car he had "nudged" earlier confronted him, then called police. He was arrested after failing a field sobriety test.[4]

Dr. Pappenheim's letter to the Board denied any history of alcohol use disorder, stated that he was drinking to calm to effects of small fiber neuropathy, and also stated that he had since found a new neurologist to help him better manage his symptoms.[5]

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1 Ex. A, p. 66.
2 Ex. A, p. 87.
3 Ex. A, pp. 20-21.
4 Ex. A, p. 108. His breathalyzer result at the time of his arrest was .209. Ex. A, p. 113.
5 Ex. A, p. 108.

The Board required Dr. Pappenheim to undergo an evaluation for alcohol use disorder.[6] That evaluation, by Dr. Charles Herndon, concluded that Dr. Pappenheim had a severe alcohol use disorder.[7] Dr. Pappenheim did not enter a residential substance abuse treatment program at that time, but did begin attending AA meetings and counseling.[8]

In June 2017, Dr. Pappenheim and the Division entered into a consent agreement covering the DUI arrest and two other licensing matters.[9] In the consent agreement, Dr. Pappenheim three matters as follows:

(1) That in October 2015, while serving as a locum tenens physician at the Alaska Psychiatric Institute (API), he failed to report to the Board that API had taken disciplinary action against his hospital privileges;

(2) That in December 2016 he had inadvertently allowed his medical license to lapse, and therefore inadvertently performed services without a current license for a two-month period of time; and

(3) That he had been charged in February 2017 with a misdemeanor DUI.

The agreement placed Dr. Pappenheim's license on a five-year term of probation, and required abstinence from alcohol, periodic drug testing, compliance with laws governing his license or relating to his fitness to practice, periodic interviews with the board, psychological therapy, AA meetings, and participation in the physician health committee. The agreement also imposed a civil fine and a public reprimand for unlicensed practice and for failure to notify the board of a change in hospital privileges.[10]

Critical to the events of this case, Paragraph B of the consent agreement provided:

> If Respondent fails to comply with any term or condition of this Consent Agreement, the Division may enforce this agreement by immediately suspending respondent's license, without an additional order from the Board or without a prior hearing, for a violation of this agreement.[11]

The Board adopted the consent agreement on August 3, 2017.[12]

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6 Ex. A, pp. 143-148,

7 Ex. A, p. 148. During the evaluation, Dr. Pappenheim stuck to his story of having consumed alcohol only after striking the parked car. Ex. A, p. 144.

8 Ex. A, p. 148; Pappenheim testimony.

9 Ex. A, pp. 163 - 173.

10 Ex. A, pp. 167, 171.

11 Ex. A, p. 166

12 Ex. A, p 173.

C. Communications to the Board during probationary period

In his December 2018 license renewal application Dr. Pappenheim characterized his alcohol use disorder as "in sustained remission."[13] His personal physician, Dr. Malter, submitted a letter to the Board endorsing Dr. Pappenheim as "safe and competent to have his license renewed."[14] Dr. Malter stated that, to his understanding, Dr. Pappenheim was "completely [in] compliance" with the requirements of the Physician's Wellness Program.[15]

On February 7, 2019, Dr. Pappenheim participated in an interview with the Board.[16] At Dr. Pappenheim's request, the Board voted to modify the consent agreement to release him from the requirement that he undergo psychotherapy counseling.[17] It was during that same month that Dr. Pappenheim began secretly drinking.[18]

In an April 2019 quarterly report, two months after he started drinking again in violation of his consent agreement, Dr. Pappenheim requested that the Board reduce the frequency of his random urinalyses (UA) to no more than fourteen per year.[19]

D. Non-compliance with consent agreement

Because he was only subjected to random UAs (from the Division) and required to take "Soberlink" breathalyzer tests (through the Physicians Health Committee) on weekdays, Dr. Pappenheim developed a practice of drinking on Friday nights, which would allow the alcohol to exit his system before the first possible test on Mondays. He also checked in for UAs later in the day on Mondays, increasing the chances that he would have a negative UA despite having consumed alcohol on Friday evening.[20]

He began engaging in this practice no later than February 2019, and did not stop until the events of this case forced him to do so.

Those events began on June 1, 2019, when Dr. Pappenheim had a positive breathalyzer test – caused, he has contended, by a "menthol cough drop."[21] Whatever the cause of the

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13 Ex. A, p. 224.
14 Ex. A, p. 187.
15 Ex. A, p. 187.
16 Ex. A, pp. 229-229.
17 Ex. A, p. 229.
18 Pappenheim testimony; Ex. L.
19 Ex. W, pp. 46, 48.
20 Pappenheim testimony; Skipper testimony.
21 Ex. W, p. 37; Pappenheim testimony.

positive result, the PHC then directed him to take a Phosphatidylethanol ("PEth") test. While the UAs Dr. Pappenheim had been completing tested for alcohol consumption over the prior two to three days, PEth testing is a blood test that detects use over the previous three to four weeks.

Dr. Pappenheim knew the PEth test would show that he had been drinking over the past three to four weeks. Because this was a violation of the consent agreement, he anticipated that a positive PEth test would result in suspension of his medical license. Panicked about this possibility, Dr. Pappenheim made a series of unethical choices.

E. Soliciting a patient to perform the PEth test

Rather than admit his use, or have it discovered through the PEth test, Dr. Pappenheim decided to solicit someone to impersonate him for the PEth test. Dr. Pappenheim now concedes that this was "an egregiously bad decision." Particularly egregious was that Dr. Pappenheim solicited a patient, T.P., for this task. Dr. Pappenheim also admits soliciting at least one other person – an unidentified friend.[22]

U.Q.is a dual diagnosis patient with anxiety, an opioid use disorder, and an alcohol use disorder in sustained remission. At the time of these events, Dr. Pappenheim had been treating U.Q. for about a year, seeing him monthly for talk therapy and also prescribing him suboxone. Through their treatment relationship, Dr. Pappenheim was aware that U.Q. had not consumed alcohol in roughly twenty years.[23]

U.Q. also has a neurological condition for which he receive medical treatment in Anchorage. During the week of June 3, 2019, U.Q. was in Anchorage for a medical procedure. On Wednesday, June 6, he received a call from an unknown number, and the caller identified himself as Dr. Pappenheim. U.Q. was not expecting a call from his psychiatrist during this trip. Dr. Pappenheim told U.Q. he needed to "ask him a serious question," and then asked him when he last consumed alcohol. U.Q. reiterated he had not consumed alcohol in 20 years.

Dr. Pappenheim then told U.Q. that he (Dr. Pappenheim) needed to take a drug test that he knew he could not pass, and asked if U.Q. would "do him a favor" by taking it for him. Dr. Pappenheim told U.Q. that if he failed the test his license would be suspended, and he would no longer be able to prescribe suboxone to U.Q. He also said that having his license suspended

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22 Pappenheim testimony.

23 U.Q. testimony; Pappenheim testimony.

would hurt his other patients. "He said I'd be helping him which in turn would be helping me and other patients because he had a lot of people depending on him, so I'd be helping others also."[24]

Having answered the call while driving, U.Q. reports he had to pull his car over to the side of the road as he processed what was being asked of him.[25] He was incredulous and stressed about the request, finding it disturbing and distressing; it caused him "instant anxiety." He was worried he would lose access to his suboxone if he did not comply with the request. Dr. Pappenheim was "kind of pushy."[26]

When he told Dr. Pappenheim he was in Anchorage for a medical procedure through Friday, Dr. Pappenheim offered to fly U.Q. back to Juneau for the lab test and then fly him back to Anchorage. U.Q. declined.[27]

U.Q. returned to Juneau on Friday, June 8 and had further conversations with Dr. Pappenheim that day as well as on Sunday, June 9. At some point, Dr. Pappenheim persuaded U.Q.to meet him at Bartlett Regional Hospital to take the test.

On the morning of Monday, June 10, Dr. Pappenheim and U.Q. both drove to Bartlett Regional Hospital (BRH). Dr. Pappenheim registered for his test with the Patient Access Services department. He was given an identification wristband. He went into the bathroom and cut off the wristband. He then met up with U.Q. on a bench in a hallway of the hospital. He affixed the wristband to U.Q.'s wrist and reminded him of his birthdate. U.Q. then walked to the lab; Dr. Pappenheim waited. U.Q. exited the lab about 20 minutes later. He found Dr. Pappenheim, and told him that he had completed the test. The two men then exited the hospital together.[28]

The next day, Dr. Pappenheim assisted U.Q. with a problem with his suboxone prescription.[29]

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24 U.Q. testimony; Ex. C.
25 U.Q. testimony; Ex. C.
26 Ex. D; Levenson testimony.
27 U.Q. testimony; Ex. D.
28 Pappenheim testimony; U.Q. testimony; Overson testimony.
29 Pappenheim testimony.

F. June 10, 2019 Complaint and investigation

1. U.Q. call to the Division

On June 10, 2019, at some point after leaving BRH, U.Q. contacted both the BRH compliance office and the Division.[30] In a recorded interview with Investigator Billy Homestead, U.Q. reported being contacted by Dr. Pappenheim as described above.[31] U.Q. reported that Dr. Pappenheim had outlined a potential plan for bypassing the lab security mechanisms by checking in for the test and then transferring his hospital identification bracelet to U.Q. Dr. Pappenheim also told U.Q. he had contacted another patient with the same request, and that U.Q. was "a backup."

U.Q. reported that Dr. Pappenheim then contacted him the evening of Sunday, June 9, saying the other patient had declined to "help him," and asking U.Q.to take the test. U.Q. further reported that Dr. Pappenheim had then called him twice on the morning of June 10th, and that, after discussing these events with friends and his girlfriend, he decided to report it. (U.Q.'s story omitted the significant fact that, unbeknownst to Mr. Homestead, he had actually met with Dr. Pappenheim at the hospital that morning and, at a minimum, pretended to go through with Dr. Pappenheim's plan). Mr. Homestead asked U.Q. to submit a written complaint documenting what had occurred.

After his conversations with Mr. Q., Mr. Homestead contacted Dr. Pappenheim. The call was recorded. Mr. Homestead said he was calling to remind Dr. Pappenheim he was scheduled for a UA (separate from the PEth test). Dr. Pappenheim confirmed he knew about the scheduled UA, and also mentioned that he would be sending a letter requesting that the Board reduce the frequency of his UAs.[32]

Mr. Homestead also called the Physician's Health Committee representative, MaryAnn Foland. Dr. Foland confirmed that Dr. Pappenheim had had a positive breathalyzer test, which he had attributed to a menthol cough drop, and that the PHC was having him complete a PEth test, which she believed he had done.[33]

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30 According to T.P., he made these calls after speaking with several close friends who convinced him that participating in this type of scheme would get him in trouble. U.Q. testimony.

31 The audio recording of the interview is in the record as Exhibit D.

32 Ex. E.

33 Ex. S; Homestead testimony.

2. BRH investigation[34]

Mr. Homestead contacted Bartlett Regional Hospital Compliance Director Nathan Overson to report that the Division was "looking into a situation that indirectly involved" BRH and the way the BRH lab intake procedures work. Mr. Overson contacted the Lab's Quality Director Sarah Hargrave, and asked whether they had received any complaints about chain of custody issues. Ms. Hargrave reported that she had gotten a complaint "about someone taking an alcohol test for someone else." After confirming with Mr. Homestead that this was the issue the Division was investigating, Mr. Overson reviewed the morning's video surveillance footage, and observed the interactions between Dr. Pappenheim and U.Q.in the areas outside the lab waiting room as summarized above.[35]

Within the next few days, Mr. Overson interviewed the registration and lab employees. All three lab employees denied any recollection of the unknown man being in the lab that morning. BRH records also showed no specimen being collected during the period in question, and no specimen being collected under Dr. Pappenheim's medical record number at any point that day.

A few days later, Dr. Pappenheim contacted the BRH lab to find out the results of the PEth test; he was told there was no record of a specimen being given.[36] The same day, someone from the PHC also called BRH to inquire about Dr. Pappenheim's test results, and was likewise informed that the test had not been taken.[37] A new order was ultimately sent – this one by a PHC physician[38] – seeking not just a PEth result but several other tests as well. Dr. Pappenheim took this test, which, predictably, showed the alcohol use he had been attempting to hide.[39]

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34 Except where otherwise indicated, this section is drawn from the testimony of Nathan Overson.

35 Overson testimony; Ex. AC. U.Q. admits he is the man seen meeting with Dr. Pappenheim at BRH on the morning of June 10; that while they were sitting together Dr. Pappenheim attached a hospital bracelet to his wrist and secured it with tape; and that as he rose to go to the lab Dr. Pappenheim reminded him to say the correct birthday – that is, Dr. Pappenheim's birthday – when asked at the lab. He reports checking in with a group of distracted young lab employees who he claims paid little attention to confirming his identity. He reports providing a urine sample and leaving it on a counter in the bathroom. But as he was leaving the lab, he reports, an unknown hospital official entered the lab area, asked the lab employees who he was, and, when they responded that he was Dr. Pappenheim, told them this was incorrect. According to U.Q., he told Dr. Pappenheim he thought they had been caught, and he left the hospital sure that the scheme had been detected. U.Q. testimony.

36 Ex. AC; Pappenheim testimony.

37 Overson testimony; Homestead testimony.

38 Dr. Pappenheim had initially written his own order for the PEth test, despite a PHC order having been sent. Ex. S. p. 7; Overson testimony.

39 Ex. W, p. 139.

G. Deceptive Answers to Medical Board Staff

The Division received U.Q.'s written complaint on June 19, 2019. As in the recorded interview, U.Q.'s complaint reported Dr. Pappenheim having asked him to take a test, but denied that he had completed the test or agreed to do so.[40]

Investigator Homestead contacted Dr. Pappenheim on June 19 to discuss the allegations in the complaint.[41] Investigator Homestead asked Dr. Pappenheim whether he had consumed alcohol while under the Consent Agreement, and Dr. Pappenheim repeatedly denied having done so. When asked directly whether he had asked a patient to take a drug test for him, he denied having done so. When confronted with the possibility that an audio recording to the contrary might exist, Dr. Pappenheim admitted having consumed alcohol and having solicited someone – not a patient, but someone he knew from AA meetings – to take a PEth test for him. Dr. Pappenheim then ended the interview and said he was going to hire counsel.[42]

H. Deceptive Information to Center for Professional Recovery

Following the positive PEth test, a Physician's Health Committee representative spoke with Dr. Pappenheim on June 24, 2019, and "strongly advised" that he seek an evaluation through the Center for Professional Recovery (CPR).[43] The CPR is an addiction center that specializes in the treatment of licensed professionals; it is an "approved recovery center" for a number of states, and works closely with the PHC and other states' comparable organizations.[44]

Dr. Pappenheim was initially resistant to this idea, although he was also reportedly "shocked" by the high value of his PEth test.[45] Dr. Pappenheim eventually participated in a three-day evaluation in early July 2019.[46]

During the evaluation interview, he continued to deny having relapsed, even when confronted with the fact of his positive PEth test.[47] Other portions of the evaluation were also hindered by deceptive behavior. In taking the MMPI-2, for example, by Dr. Pappenheim was

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40 Ex. C.
41 Ex. S, p. 8.
42 Ex. S, p. 8.
43 Ex. S, p. 9.
44 Skipper testimony.
45 Id.; Ex. F. Dr. Pappenheim's PEth level was 52, which is in a range considered to reflect "evidence of moderate to heavy ethanol consumption." Ex. F; Ex. X.
46 Ex. J.
47 Ex. J, p. 12.

noted to have engaged in "a particularly sophisticated attempt to not admit to his true attitudes" by refusing to respond to more than 90% of items on the scale measuring cynicism, rendering that scale unscorable.[48] The evaluator noted this behavior to "echo his similar approach in the interview in which he kept certain information from being divulged or did not elaborate upon (sic)."[49] The evaluation team found Dr. Pappenheim to be "in significant denial," and recommended that he promptly enter a residential substance abuse treatment program oriented towards professionals.[50]

I. Additional Deceptive Statements to Medical Board

After the evaluation, Dr. Pappenheim continued attempts to deceive the Board. In a quarterly report submitted July 15, 2019, Dr. Pappenheim admitted that he had not "complied with every term and condition of [his] probation." By his explanation for that statement was that "[i]nadvertent ingestion and exposure (through skin absorption) of ETOH led to a positive PEth test, reported to AK State Medical Board by PHC."[51] He described both his mental and physical health as good, but stated that, due to the positive PEth test, he had "agreed to enter treatment upon my return from a planned vacation."[52]

J. Center for Professional Recovery: 30-day residential treatment

Dr. Pappenheim entered the CPR program in August 2019.[53] The intensive program involves a 30-90 day stay, with individual psychotherapy, group therapy, and assignments, all specifically geared towards licensed professionals.

During the course of his treatment, Dr. Pappenheim's "biggest barrier was honesty."[54] However, after having been deceptive about his use during his evaluation, when he entered the treatment program, he "readily admitted his drinking and unethical behaviors."[55]

CPR staff found that Dr. Pappenheim "made tremendous progress in facing his addiction," including becoming honest in group therapy and expressing his embarrassment over

48 Ex. J, p. 9.
49 Ex. J, p. 10.
50 Ex. J, p. 10 (recommending no more than a 5-day period to make arrangements for patient care).
51 Ex. W, pp. 39-40. It is not possible to get a positive PEth test due to "exposure through skin absorption."
52 Ex. W, p. 40.
53 Skipper testimony.
54 Skipper testimony.
55 Skipper testimony; Ex. K, p. 4.

his misconduct.[56] His primary therapist's discharge summary described him as having been "forthright and honest about dynamics of his alcohol use, open and engaged throughout the treatment process, and [having] made significant progress."[57]

Dr. Pappenheim was discharged from the CPR program on September 4, 2019, after a 30-day stay. His discharge summary includes a lengthy list of continuing care recommendations including complete abstinence from drugs and alcohol; daily or regularly self-help meetings for 90 days, and then at least four times per week thereafter; random UAs; breathalyzers four times per day within set time frames; and attending a CME boundaries course.[58] The CPR discharge summary set forth the opinion of the CPR "clinical team" that Dr. Pappenheim "is safe to return to the practice of medicine without other restrictions, as long as he complies with all of the above aftercare recommendations."[59]

K. Post-treatment deception in interview with Board's investigators

After their phone call in late June, Division Investigator Homestead was unable to arrange to conclude his interview with Dr. Pappenheim and his counsel for several months. The interview eventually occurred on September 16, 2019, with Dr. Pappenheim, his attorney, Division Investigator Michelle Wall-Rood, and Mr. Homestead participating.

In the interview, Dr. Pappenheim admitted he had been violating the 2017 Consent Agreement by drinking wine on Friday nights. Upon direct questioning about any further violations, and specifically about falsifying test results, Dr. Pappenheim admitted to having asked a patient to take a test for him, although he minimized his own involvement by saying he had "agreed to have somebody take that test in my place."[60]

Throughout the 40-minute interview, Dr. Pappenheim continued to falsely and deceptively claim that this occurred in the context of an offer by an AA acquaintance. Dr. Pappenheim said that he was distressed upon learning he would need to take a test that he was going to file, and that he expressed his concern and distress at an AA meeting. Following that meeting, he said, an attendee "who also happened to be a patient" had approached him and volunteered to take the test for him, and that he had "regrettably agreed to have him do that,

56 Ex. K; Skipper testimony.
57 Ex. K, p. 8.
58 Ex. K, p. 9.
59 Ex. K, p. 10.
60 Ex. S.

because I was desperate at that time."[61] This story – repeated several times to the Division investigator and probation monitor *after* completing a month of inpatient substance abuse treatment – was false.[62]

In the course of the September 2019 interview, Dr. Pappenheim denied having solicited U.Q. to take the test, denied having offered him any benefit for taking the test, and denied having told U.Q. that taking the test was in his best interest over having his doctor lose his license, instead saying that U.Q. was motivated to "offer" to take the test based on his observations of Dr. Pappenheim's "distress over this situation."[63]

Dr. Pappenheim did acknowledge having committed a boundary violation, and expressed shame for having done so (although he continued to be dishonest about his role in these events and, consequently, the extent of the boundary violation). He stated this these events had occurred because he had been struggling with his alcoholism, but that "at this point I feel as though I've turned a corner," having just completed treatment. He opined that his struggle, including his recent violations, would allow him to be a better practitioner in understanding what his patients struggle with. He expressed his hope of being able to continue practicing and being able to share – constructively – his knowledge and experience.

Dr. Pappenheim followed this interview with an email, sent four days later, expressing shame and regret for his "deceptive and dishonest behavior." He described his optimism, having now completed the "transformative" CPR program, engaging in recovery-focused meditation and yoga, and enrolling in "a course on professional boundaries as recommended by CPR."[64] He also described steps he had now taken "to fashion a recovery program that includes accountability through a monitoring schedule that leaves no room for deceit." He asked that the Board "find a way to penalize me without further disrupting the care that I provide for the citizens of Southeast Alaska."[65] He did not, however, acknowledge having lied to investigators

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61 Ex. S.

62 Dr. Pappenheim also said that although this patient "had offered and I accepted" to take the test in Dr. Pappenheim's place, "that never actually happened, but I understand it was discovered by the testing agency at BRH and reported to the Medical board." On the advice of counsel, he declined to answer questions about whether he had ever had U.Q. meet him at the hospital to take the test with him.

63 Indeed, contrary to his current claims of a need to lift the suspension due to a provider shortage, Dr. Pappenheim told Division investigators in September 2019 that U.Q. "certainly could see somebody else if he wanted to." Ex. S.

64 Dr. Pappenheim has since completed a 3-day professional boundaries and ethics course. Ex. W, p. 117.

65 Ex. M.

four days earlier about the circumstances under which he solicited a patient to take a drug test for him.

L. License suspension

As noted, paragraph B of the 2017 Consent Agreement provides that if Dr. Pappenheim failed to comply "with any term or condition" of the agreement, "the Division may enforce this agreement by immediately suspending respondent's license, without an additional order from the Board or without a prior hearing, for a violation of this agreement."[66] On October 24, 2019, the Division sent Dr. Pappenheim a letter suspending his license under this provision.[67]

The suspension letter explained that Dr. Pappenheim had violated the consent agreement both by consuming alcohol and by soliciting a patient to complete the PEth test, which, the Division averred, violated of AS 08.64.326(a)(2), (a)(7), and (a)(11), and 12 AAC 40.967.[68] The letter then stated that:

> Prior to petitioning for reinstatement of your license, you must prove to the Board that you are currently in compliance with all conditions imposed by your 2017-000838 Consent Agreement and other statutes and regulations governed by the Board, and fit to practice in a manner consistent with public safety. This does not mean that your Alaska license will automatically be reinstated, as the Board will consider your violation of your 2017-000838 Consent Agreement and other statutes and regulations governed by the Board and determine the appropriate action if any at that time.[69]

M. Evidentiary hearing

Paragraph B of the 2017 Consent Agreement provides that, "[i]f Respondent's license is suspended under this paragraph, as provided above, he will be entitled to a hearing on an expedited basis, regarding the issue of the suspension." Dr. Pappenheim requested a hearing on the issue of the suspension. At a case planning conference, the parties agreed that the issues for hearing on the Division's suspension were limited to three questions: (1) Did Dr. Pappenheim violate the consent agreement? (2) If so, is suspension warranted? (3) If so, what terms of suspension are appropriate? Then and subsequently, the Division declined to bring an accusation seeking direct disciplinary sanctions for violations of statutes, Board regulations, or Board

66 Ex. B, p. 6.
67 Ex. U.
68 Ex. U, p. 5.
69 Ex. U, pp. 5-6.

orders. Only the limited summary suspension was to be considered. The hearing was held on December 16, 18, and 19, 2020. Dr. Pappenheim was represented by counsel.

Among the evidence Dr. Pappenheim offered was testimony or affidavits from a number of patients, who were strongly supportive of Dr. Pappenheim and spoke of the value he has brought to their lives. They testified that he is a caring, helpful, and effective provider, and has succeeded in managing difficult situations where other providers have not. They did not observe or believe him to be impaired during treatment or their interactions with him. They value their therapeutic relationship with him, and fear for their treatment options if his license is not quickly reinstated.

Dr. Pappenheim also testified in his own defense. He was confronted about having continued to lie to investigators even after completing treatment – specifically, about the "AA meeting attendee" cover story he had invented. Dr. Pappenheim insisted during his testimony that he had stuck to this story with Division investigators – even after completing the "transformative" treatment at CPR – because he believed it was important to "maintain fidelity to what [he] understood the patient and [he] had agreed to."

Dr. Pappenheim appeared earnest in his concern for his patients, his desire to return to practice, and his belief that he was ready to do so. But he also continued to understate the impact of his incredible violation on his patient. When asked how his patients were harmed in his violating the consent agreement, the first harm he was able to identify was that, because his license was suspended, he could no longer treat them. (He did later acknowledge that his improper request of U.Q. was separately harmful to that patient).

He continued to display distorted thinking in having assessed as equally damaging the choices of getting caught drinking (through the PEth test) and having his license suspended, on the one hand, and coercing a psychiatric/substance abuse patient to impersonate him for a drug test, on the other. It was not clear, at the end of the hearing, that Dr. Pappenheim has truly come to grips with the enormity of the boundary violation he committed, or the profound impropriety of lying repeatedly to Division investigators—and thus indirectly to the Medical Board—both before and after he was caught, and even after completing treatment.

1. Expert testimony

a. Dr. Gregory Skipper

Dr. Skipper, who is Board-certified in internal medicine and addiction medicine, is the Medical Director for the Center for Professional Recovery. He was directly involved in Dr. Pappenheim's treatment at the CPR, and testified on Dr. Pappenheim's behalf.

Dr. Skipper acknowledged that Dr. Pappenheim's misconduct was "absolutely unacceptable and an extreme departure from ethical behavior for a physician." He described T.P.'s recorded phone call with Investigator Homestead as "spine chilling." However, he noted that "almost every addict or alcoholic has done despicable things," and explained that the treatment process requires patients to come to terms with having "violated their own moral and ethical standards."

Dr. Skipper testified favorably about Dr. Pappenheim's growth and progress during treatment. While Dr. Pappenheim was deceitful during the evaluation process, which is not atypical, Dr. Skipper believes he was honest during the treatment program. The treatment team felt that Dr. Pappenheim "had made tremendous progress in facing his addiction," and "had come to grips with and was very embarrassed and appropriately ashamed of what he'd done."

Dr. Skipper testified that Dr. Pappenheim's prognosis is "at least" good. He relied on several research studies of physicians treated for substance use disorders, and believes that this research supports a likely positive outcome for Dr. Pappenheim. Dr. Skipper noted that Dr. Pappenheim did not initially complete a residential treatment program at the time of his DUI arrest and substance use disorder diagnosis, and states that medical professionals who do complete such programs – as Dr. Pappenheim now has – have a positive prognosis.

Dr. Pappenheim sought to emphasize the CPR's discharge summary statement that he was clinically fit to return to practice. But Dr. Skipper explained that there is a difference between being clinically fit to practice and being fit to practice, writ large. Dr. Skipper took pains to not opine that the suspension of Dr. Pappenheim's license should be lifted. To the contrary, he noted that sometimes a punitive sanction is necessary to impress upon a practitioner the seriousness of their misconduct. In any event, he urged, the decision belongs to the Board, while his opinion is limited to the narrower issue of clinical fitness.

b. Dr. Aryeh Levenson

Dr. Levenson, testifying for the Division, is an Anchorage-based psychiatrist who is board certified in general, child, and adolescent psychiatry. He described Dr. Pappenheim's conduct as a gross violation of the standard of care, "a clear boundary crossing," and "an egregious violation." Dr. Levenson testified about the special fiduciary relationship between doctors and patients, and the ethical duties that comes with that relationship, including to do no harm, to act in the patient's best interests, and to avoid conflicts of interest. Dr. Levenson described trust as "the glue that holds the patient relationship together."

Dr. Levenson identified multiple American Medical Association ethics principles implicated in psychiatrist asking a patient to take a drug test for them, including the responsibility to patient privacy, as well as placing responsibility to the patient as the paramount concern. Dr. Levenson explained that the ethical boundaries of the profession preclude doctors from asking favors of their patients in general, let alone illegal favors, and was particularly concerned with the implications of asking this "favor" of a suboxone patient. These concerns include the vulnerability of suboxone patients, the inherently coercive and exploitative nature of the request, and the idea of asking a patient in a 12-step program to violate one of that program's most important principles – namely, honesty. The behavior, he concluded, wholly "undermines the sanctity of the patient relationship."

In terms of Dr. Pappenheim's prognosis, Dr. Levenson acknowledged that the CPR records show "some positive things," such as a general sense of remorse, gaining some insight, and expressing more willingness and ability to accept feedback. However, he expressed concerns about what he sees as a history of deceit, including manipulating the timing of UA and Soberlink testing so tests would be negative; trying to get the Board to reduce frequency of UAs, and lying to investigators even after treatment, as well as trying to manipulate the PEth test to achieve a negative result. Dr. Levenson conceded that manipulation and deceitful behavior tend to go hand-in-hand with addiction. However, he expressed grave concern about the boundary violation committed in this case, particularly in terms of its potentially devastating effect on the patient.

III. Discussion

A. Legal framework

The Medical Board has the authority to discipline licensees for violation of the statutes and regulations governing the practice of medicine. Typical discipline cases come to the Board through an accusation initiated by the Division.[70] Once an accusation is initiated and a hearing requested, the Board has a range of disciplinary options available depending on the severity of the violation(s).[71]

Here, however, the Division has not initiated the disciplinary accusation process. Rather, the Division elected to pursue this matter solely as in terms of the conduct violating the existing Consent Agreement. A suspension under Paragraph B is not disciplinary per se. By the Consent Agreement's terms, a Paragraph B suspension is the mechanism by which the agreement can be "enforced."

The threshold question arises then, what standards should the Board use to evaluate the suspension once a hearing has been requested?

This decision concludes the following: In agreeing to a probationary term, and the consequence of "enforcement" of the agreement through suspension, the presumption is that the suspension will be for the remainder of the probationary term. That presumption can be overcome, however, if the circumstances warrant. If the violation is merely technical, or if extenuating circumstances exist, the suspension could be for a lesser period. But if the suspension option exists as the means of enforcing the agreement, the default period of suspension is the probationary term.

The related question is then presented, as was discussed briefly at the start of the hearing, who has the burden of proof? The Division has the burden of proof that the agreement was violated and the suspension is proper. To the extent that the licensee contends the suspension should be shorter than the probationary term, the licensee would bear the burden to make that showing. Here, owing to the novelty of the procedural posture of this case, the Administrative Law Judge may have erred – in Dr. Pappenheim's favor – in instead placing the burden on the Division as to the terms of the suspension, rather than applying a presumption of the

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70 AS 08.64.326; AS 08.64.331; AS 64.62.330(a)(5); AS 64.62.360.

71 AS 08.64.331.

probationary term being the default length of suspension. Even with the burden placed on the Division, however, the evidence here strongly supported keeping the suspension in place through the end of the probationary term.

B. Did Dr. Pappenheim violate the consent agreement?

Dr. Pappenheim admits that he violated the consent agreement. First, Dr. Pappenheim violated the agreement by consuming alcohol. This was not a one-time violation; he admits he had been drinking on Friday nights for nearly five months before he was caught. Dr. Pappenheim also violated the agreement's requirement that he abide by the statutes and regulations governing the practice of medicine. His deceit in the events leading up to his suspension constituted multiple violations of this portion of the agreement.

Alaska Statute 08.64.326(a)(11) requires physicians to adhere to the Code of Ethics adopted by the Board. At 12 AAC 40.955(a), the Board adopts the 2016 edition of the AMA Code of Medical Ethics as the ethical standards applicable to physicians in this state. That Code begins with the Principles of Medical Ethics,[72] which include the following:

> II. A physician shall uphold the standards of professionalism, be honest in all professional interactions, and strive to report physicians deficient in character or competence, or engaging in fraud or deception, to appropriate entities.
>
> IV. A physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law.
>
> VIII. A physician shall, while caring for a patient, regard responsibility to the patient as paramount.

Dr. Pappenheim plainly violated the obligations of professionalism and honesty (Principle II) when he solicited his patient to help him deceive the BRH lab for purposes of deceiving the PHC and the Board. Likewise, his dishonesty with the Board's investigator's – even after completing treatment – violated his obligation of honesty in professional interactions.

Dr. Pappenheim also failed to protect the rights and privacy of his patient, U.Q., when asking U.Q. to engage in this fraud with him – including by asking U.Q. to submit to an intrusive medical test for his own benefit. And from the moment he first called U.Q. requesting his

[72] These are published on the AMA's website, available at https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/principles-of-medical-ethics.pdf (last accessed January 17, 2020).

participation in the PEth test scheme, he violated his obligation under Principle VIII to regard his responsibility to the patient as paramount.

Alaska Statute 08.64.326(a)(9) prohibits physicians from engaging in unprofessional conduct. Soliciting a patient to engage in fraud is a per se violation of this requirement. Both experts also noted the particular vulnerability of a suboxone patient dependent upon the physician to continue receiving that medication. The definition of unprofessional conduct also includes failing to cooperate with official investigations by the Board or its representative.[73] Dr. Pappenheim violated this requirement when he lied to Division investigators in the September 2019 interview. His continuing attempts to justify this dishonesty at hearing were very troubling.

Finally, Dr. Pappenheim also violated the agreement's requirement that he participate in the physician's health committee. Implicit in this requirement is a requirement that he participate in good faith. Deceiving the PHC by consuming alcohol, manipulating his testing schedule, and attempting to alter the outcome of PEth test was a violation of that agreement.

C. Do Dr. Pappenheim's violations of the consent agreement warrant suspension under Paragraph B of the agreement?

The consent agreement permits suspension for any violation of its requirements. The drinking alone would have warranted suspension. Dr. Pappenheim's behavior in this case – most notably, in soliciting a vulnerable patient to assist him in concealing his ongoing substance abuse – was egregious, and an egregious violation of the expectations of the Consent Agreement. Suspension as a means of enforcing the Consent Agreement, is wholly appropriate.

D. What consequences should be imposed for Dr. Pappenheim's violation of the Consent Agreement?

As noted above, the Division chose not to bring a disciplinary accusation against Dr. Pappenheim. The scope of this hearing is therefore limited to the suspension for violating the Consent Agreement. Dr. Pappenheim argues that the Board should lift the suspension because he has completed a 30-day residential treatment program and CPR has declared him clinically fit to return to practice. This argument is unpersuasive for multiple reasons.

First, Dr. Pappenheim conflates being clinically fit to practice with being fit to practice as a more general matter. Clinical fitness is a necessary but not sufficient component of fitness to

[73] 12 AAC 40.967(24).

practice. To limit the terms of a suspension to the number of days a practitioner is clinically unfit to practice would abdicate the board's broader and significant duty to protect the public by enforcing not just clinical standards but ethical ones as well. There are of course multiple reasons why the Board imposes discipline, and an inability to practice with clinical skill and safety is rarely the sole reason for a suspension or other sanction.

While the Board certainly could impose a brief suspension for a technical violation of a consent agreement, Dr. Pappenheim has failed to articulate any basis for such an outcome here. In seeking to limit his suspension to a few months, Dr. Pappenheim fails to acknowledge the scope of his violation. Not only did he violate his Consent Agreement repeatedly through a calculated scheme to deceive the testing requirements, but, having done so, he then attempted to cover it up with a further violation that was far more egregious than the initial violation. Dr. Pappenheim also fails to acknowledge that his continued duplicity with investigators even after completing treatment is cause for serious concern.

The Division's post-hearing brief notes that prior Board suspensions for violating a consent agreement by drinking have ranged from nine to eighteen months. Here, of course, the drinking is by far the least concerning part of this story. Had Dr. Pappenheim owned up to his use either by confessing it or by taking the PEth test as ordered, a suspension in that range may well have been warranted (although an upward departure may have been warranted due to the attempt to deceive the Board by decreasing the frequency of UA testing, as well as the overall deceptive scheme of drinking in a manner timed to beat the test).

But instead of allowing himself to be caught and face a relatively short suspension, Dr. Pappenheim instead abused a vulnerable patient's trust and violated multiple ethical principles with regard to his duty to that patient and others, all because he did not see any difference in the consequences between those two paths. There is and must be a difference in those consequences.

At least one other Board has determined that, where a consent agreement contains a provision allowing for suspension as an enforcement mechanism, that suspension may appropriately extend through the remainder of the Agreement's probationary term.[74] This

[74] *In re Kile*, OAH No. 19-0690-NUR (Board of Nursing 2019) (https://aws.state.ak.us/OAH/Decision/Display?rec=6587).

consequence is consistent with a view of the suspension as a mechanism for enforcing the original agreement. While a suspension through the end of the probationary term is a harsh sanction, the possibility of such an outcome motivates licensees to comply with their agreements, while the inability to impose such an enforcement mechanism renders the Consent Agreement toothless. Moreover, a suspension is the only mechanism that completely ensures that there will be no further violations. Where, as here, the physician has committed at least a dozen violations of his Consent Agreement, continuing to violate even after treatment, there could be no stronger case for simply ending the physician's opportunity for violations for the duration of the agreement's term.

This decision does not resolve whether additional disciplinary sanctions, including revocation, may be appropriate if pursued through a properly-commenced disciplinary proceeding.

IV. Conclusion

Dr. Pappenheim entered into an agreement with this Board in 2017, and agreed that the terms of the agreement could be enforced through a license suspension if he failed to comply. He then violated the agreement repeatedly, and attempted to conceal those violations through a course of egregiously unethical conduct. While Dr. Pappenheim is to be commended for now having begun the recovery process, this does not entitle him to avoid the consequences of his multiple violations of the consent agreement – particularly in light of the seriousness of those violations. Accordingly, his license will remain suspended through the probationary term.

The Board believes this Dr. Pappenheim's actions should be evaluated for discipline. The Division is directed to review the case for disciplinary sanctions, and, if warranted, to bring an Accusation as permitted by AS 08.54.326.

Dated: January 21, 2020

Signed
Cheryl Mandala
Administrative Law Judge

Adoption

The Alaska State Medical Board adopts this decision as final under the authority of AS 44.64.060(e)(1). 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 distribution of this decision.

DATED this 15th of June, 2020.

By: *Signed*
Signature
Richard Wein
Name
Chair of the Alaska State Medical Board
Title

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