BEFORE THE DELAWARE BOARD OF MEDICAL LICENSURE AND DISCIPLINE

IN THE MATTER OF:	)	
COMPLAINT AGAINST	)	**FINAL BOARD ORDER**
JAMES L. SCHALLER, M.D.	)	**Complaint No. 10-30-11**
	)	
License No. C1-0006114	)	

PUBLIC ORDER

Pursuant to 29 *Del. C.* § 8735(v)(1)d a properly noticed hearing was conducted before a hearing officer to consider the above referenced complaints filed by the State of Delaware against James L. Schaller, M.D. with the Board of Medical Licensure and Discipline. The hearing officer has submitted the attached Recommendation in which the hearing officer found as a matter of fact and recommended the Board conclude as a matter of law that the that the above-captioned complaint number 10-30-11 has been shown by a preponderance of the evidence presented to establish unprofessional conduct by James L. Schaller, M.D. in violation of the Medical Practice Act.

The Board is bound by the findings of fact made by the hearing officer. 29 *Del. C.* § 8735(v)(1)d. However, the Board may affirm or modify the hearing officer's conclusions of law and recommended penalty.

The parties were given twenty days from the date of the hearing officer's proposed order to submit written exceptions, comments and arguments concerning the conclusions of law and recommended penalty. No written exceptions, comments or arguments concerning the conclusions of law and recommended penalty were submitted by either of the parties within the twenty days, however, on August 23, 2013, counsel for Dr. Schaller submitted exceptions to counsel for the Board, who shared the same with the Board, despite the fact that they were submitted outside of the statutory time period. The Board deliberated on the hearing officer's

conclusions of law and recommendations on November 5, 2013, and moved to affirm the conclusions of law and implement the recommended penalty findings, with modification. The Board wholly disagrees with Dr. Schaller's contention that Board Rule 15[1] was overly inclusive and illegally enacted.

It should be noted that subsequent to the time Dr. Schaller offered these contentions, the Board's regulations were overhauled such that it is now Board regulation 15 which lists the crimes which are substantially related to the practice of medicine. Dr. Schaller, through counsel, argued that Board Rule 28 was overly inclusive and that the Board violated Delaware law when it enacted the regulation in 2005. Dr. Schaller argued that the process by which the Board adopted regulation 28 was legally insufficient under the Administrative Procedures Act, 29 *Del. C.* §§ 10101, *et. seq.*, because the Board failed to call witnesses, take testimony or make specific findings based on evidence submitted when it held a hearing to formally adopt the regulation.

Dr. Schaller's argument that the Board's rules were improperly adopted demonstrates a fundamental misunderstanding of the Delaware Administrative Procedures Act requirements for promulgating regulations and the Federal system's dual processes for adopting regulations. That is, while the Federal Administrative Procedures Act contemplates both formal rulemaking—rulemaking for which the enabling statute requires that rules be supported by substantial evidence produced at an adjudicatory hearing—and informal rulemaking—rulemaking for which no procedural requirements are prescribed in the organic statute, and for which the Federal Administrative Procedures Act requires only notice and comment, the Delaware Administrative Procedures Act contemplates only informal—or, notice and comment—rulemaking. *See* 5 U.S.C. § 553(c) (1994); *Cf.* 5 U.S.C. §§ 556, 557 (1994); *see also* 29 *Del. C.* § 10118. There is

[1] Formerly Bd. Rule 28 and Bd. Rule 29.

no requirement under Delaware law that any agency, such as the Board, call witnesses or take testimony in order to comply with the Delaware Administrative Procedure Act's requirements for rule promulgation. Dr. Schaller's reliance on the cases of *Bernie's Conchs, LLC* and *National Paint* for his proposition that promulgation of a regulation requires a formal hearing with witnesses and testimony is similarly misplaced as in each of these cases, the State agency under review—the Delaware Department of Natural Resources and Environmental Control—has a specific enabling statute ***requiring*** formal rulemaking, including a hearing. *See Bernie's Conchs, LLC v. Del. Dep't of Natural Res. and Envtl. Control*, 2007 WL 1732833 (Del. Super. June 8, 2007); *Nat'l Paint and Coatings Ass'n v. Del. Dep't of Natural Res. and Envtl. Control*, 2004 WL 440410 (Del. Super. Feb. 26, 2004); 7 *Del. C.* §§ 6008, 6009, 6010.

Dr. Schaller further argued that the State's Complaint was unduly vague for failing to describe his specific conduct or actions which constituted dishonorable or unethical conduct. The Board finds that the Complaint was not unduly vague as the Complaint put Dr. Schaller on notice that the operative facts giving rise to the allegations against him consisted of his conviction in the state of Florida.

In this case, the hearing officer found that on September 21, 2011, Dr. Schaller pled no contest or *nolo contender* in the state of Florida to a charge of "Aggravated Assault with Deadly Weapon without Intent to Kill." As a result of this conviction, Dr. Schaller was sentenced to criminal probation for a period of four years and ordered to undergo a mental health evaluation. The hearing officer further found that the Florida Department of Health did not assess professional discipline against Dr. Schaller as a result of this conviction. With regard to Dr. Schaller's argument that his *nolo contender* plea insulates him from discipline, the Board finds that Dr. Schaller's conviction of "Aggravated Assault with Deadly Weapon without Intent to

Kill" is sufficient substantial evidence to find that Dr. Schaller engaged in conduct that constitutes a crime substantially related to the practice of medicine in Delaware. Under Board Rule 15[2], aggravated menacing is a crime substantially related to the practice of medicine, and the Board concludes that the crime Dr. Schaller was convicted of in Florida is equivalent to the Delaware crime of aggravated menacing. Under 11 *Del. C.* § 602(b), "A person is guilty of aggravated menacing when by displaying what appears to be a deadly weapon that person intentionally places another person in fear of imminent physical injury." As a result of these findings of fact, the hearing officer recommended the Board conclude as a matter of law that Dr. Schaller violated 24 *Del. C.* § 1731(b)(2) which finds that a licensee commits unprofessional conduct when he commits a crime substantially related to the practice of medicine. The Board accepts this recommended conclusion of law.

The hearing officer recommended that Dr. Schaller's license be placed on probation for a period of eighteen months; that Dr. Schaller provide to the Board, copies of the mental health evaluations he was required to submit to the state of Florida; that Dr. Schaller complete six continuing education credits, three each in the areas of ethics and anger management; and finally, that Dr. Schaller pay a monetary fine of $2,500 to the state of Delaware. The Board modifies this recommended discipline as it finds that the mental health evaluation conducted in Florida need not be provided to it. Rather, pursuant to 24 *Del. C.* § 1732(d), the Board hereby determines that a formal assessment of professional competency is warranted to protect the health and safety of present or prospective patients. Such assessment must address the issues that contributed to or gave rise to the incident in Florida and address Dr. Schaller's current ability to safely practice medicine.

[2] Formerly Bd. Rule 28 and Bd. Rule 29.

NOW THEREFORE, by unanimous vote of the undersigned members of the Board of Medical Licensure and Discipline, the Board enters the following disciplinary Order:

1. The medical license issued by the Board of Medical Licensure and Discipline to James L. Schaller, M.D. is hereby placed on probation for a period of eighteen months commencing on the date of this Order;

2. Within 90 days of the date of this Order, Dr. Schaller must undergo a formal assessment, pursuant to 24 *Del. C.* § 1732(d). This assessment must address Dr. Schaller's professional competency, and the issues that contributed to or gave rise to the incident in Florida, and address Dr. Schaller's current ability to safely practice medicine. The Board reserves the right to institute additional disciplinary proceedings if the professional assessment indicates that Dr. Schaller cannot safely practice medicine;

3. During the probation period, Dr. Schaller must complete three continuing education credits in the subject of ethics and three continuing education credits in the subject of anger management. Dr. Schaller must provide documentary proof of completion of the continuing education credits to the Executive Director of the Board. These continuing education credits shall be in addition to and not in lieu of any continuing education credits which he is required to complete in conjunction with his next medical license renewal;

4. Upon expiration of the eighteen month probation period, Dr. Schaller may petition the Board to lift the probationary status from his license upon a showing that he has fulfilled all of the conditions set forth in this Order; and

5. Pursuant to 24 *Del. C.* § 1735 a copy of this Order shall be served personally or by certified mail, return receipt requested, upon James L. Schaller, M.D.. This is a public disciplinary action reportable to the national practitioner databank pursuant to 24 *Del. C.* § 1734(i). A copy of the Hearing Officer's recommendation is attached hereto and incorporated herein.

IT IS SO ORDERED this 7th day of January, 2014.

BY THE BOARD OF MEDICAL LICENSURE AND DISCIPLINE:

Gregory D. Adams, M.D., President
Pursuant to 29 *Del. C.* § 10128(g)

Date Mailed: 1.13.2014

BEFORE THE DELAWARE BOARD OF MEDICAL LICENSURE AND DISCIPLINE

In the Matter of:	)	
	)	Case No. 10-30-11
James L. Schaller, M.D.	)	
Lic. No. C1-0006114	)	

RECOMMENDATION OF CHIEF HEARING OFFICER

Nature of the Proceedings

The State of Delaware, by and through the Department of Justice, has filed a professional licensure complaint against James L. Schaller, M.D., a licensee of the Board of Medical Licensure and Discipline. In brief, the complaint alleges that in January 2011 Dr. Schaller was arrested in Florida on two charges of felony aggravated assault with a deadly weapon without intent to kill. The complaint further alleges that in September 2011 Dr. Schaller was convicted on a single count of felony aggravated assault with a deadly weapon and was sentenced to four years on probation and was ordered to undergo a mental health evaluation.

An open administrative hearing was convened on due notice on May 10, 2013 at 10:15 a.m. in the State Office Building, 820 N. French St., Wilmington DE. The case was prosecuted by Stacey X. Stewart and Katisha Fortune, Deputy Attorneys General. Dr. Schaller attended the hearing with his legal counsel, Victor F. Battaglia, Esq. A registered court reporter was present who made a stenographic record of the proceedings. Witnesses testified under oath or affirmation. This is the recommendation of the undersigned hearing officer to the Board after due consideration of all relevant evidence.

Pre-Hearing Matters

In a letter dated April 3, 2013, Mr. Battaglia, on behalf of Dr. Schaller, raised the issue of the legal validity of Bd. Reg. 28 (formerly Bd. Reg. 29). That is the regulation adopted by the Board pursuant to the legislative mandate of Senate Bill 229 enacted in 2004 and now a part of the Act at 24 *Del. C.* Sec. 1713(e). That provision in the Medical Practice Act states, in relevant part, that "(t)he Board shall promulgate rules and regulations specifically identifying those crimes which are substantially related to the practice of medicine...." The General Assembly has deemed the conviction of any crime so identified by the Board as "unprofessional conduct" which may expose a licensee to professional discipline. 24 *Del. C.* Sec. 1731(b)(2).

In his April 3 letter, counsel for Dr. Schaller argued that when the Board formally adopted then-Bd. Reg. 29, it violated the Delaware Administrative Procedures Act, 29 *Del. C.* Ch. 101 (the "APA"). Summarizing, Mr. Battaglia argued in his letter that the Board failed to follow required procedures when the regulation was promulgated, and was unduly overinclusive in listing a large number of crimes which it deemed "substantially related to" the practice of medicine. Mr. Battaglia requested leave to exchange legal memoranda on those points prior to the hearing.

A hearing officer acting in my capacity has the legal authority to consider and decide "prehearing matters" in cases pending before professional licensing boards. 29 *Del. C.* Sec. 8735(v)(1)c. The legislature has not otherwise defined what is a "prehearing matter" subject to such review. In the absence of clearer guidance on the point, I accepted Dr. Schaller's legal claim as a "prehearing matter", and directed the parties to file legal memoranda on the points raised. Dr. Schaller filed an opening memorandum; the State filed an answering

memorandum; Dr. Schaller then filed a reply. Prior to the commencement of this evidentiary hearing, additional oral argument on the points raised was permitted.

I will summarize the arguments here, and my rulings on them. Since decisions on prehearing matters by a hearing officer have the same authority as a decision of a board, the Board is entitled to be informed of the claims and defenses. *Id.* In order that the record be made complete, I have informed the parties that their legal submissions would be marked and admitted as exhibits. The April 3, 2013 letter and its exhibits from Mr. Battaglia is hereby admitted as Respondent Exhibit 1 ("RX 1"). Dr. Schaller's opening legal memorandum dated April 18, 2013 is admitted as RX 2. His reply memorandum dated May 3, 2013 is admitted as RX 3. The State's answering memorandum dated April 26, 2013 is admitted as State Exhibit 6 ("SX 6").

The Board formally adopted a proposed list of "substantially related" crimes at a hearing on January 4, 2005. A copy of that relatively brief hearing transcript is attached to RX 1. Dr. Schaller argues that during that hearing the Board failed to call witnesses, to take testimony and to make specific findings based on evidence submitted. He further argues that the Board then adopted a list of crimes in Bd. Reg. 28 which includes "almost every known state and federal penal act or offense", and that such action was arbitrary and capricious because the list did not specifically identify substantially related crimes.

Dr. Schaller further argues that the complaint in this case does not describe specific conduct by him in Florida which constitutes dishonorable or unethical conduct, or conduct "tending to bring discredit to the profession". It is a violation of due process to force a respondent to wait until a hearing in order to be apprised of what conduct the State contends is dishonorable, unethical or likely to discredit the profession. He contends that SB 229 was

meant to change prior law which held that *any* felony conviction constituted "unprofessional" conduct.

Dr. Schaller notes that the General Assembly has now defined a "substantially related" crime thusly: "...the nature of criminal conduct for which a person was convicted has a direct bearing on the person's fitness or ability to...practice medicine...." 24 *Del. C.* Sec. 1702(11). Dr. Schaller contends that on January 4, 2005 the Board took no testimony and made no factual findings regarding the issues of "substantial relationship" and "direct bearing on the person's fitness". Dr. Schaller notes that the only input received by the Board on January 4, 2005 was a "written protest" by the State Council for Persons with Disabilities contending that the proposed list of crimes under consideration was over-inclusive and contrary to the intent of SB 229.

In his opening memorandum, and by way of example, Dr. Schaller cites certain crimes listed in Bd. Reg. 28 whose inclusion, he argues, constitutes arbitrary and capricious action. They include assault on a sports official, livestock larceny, home improvement fraud and transfer of recorded sounds. Dr. Schaller contends that the inclusion of such crimes (and the exclusion of some other crimes) constitutes abdication of the Board's authority. He argues that the vague allegations in the complaint and the application of Bd. Reg. 29 (28) in this case violate his right to due process.

In response to an argument made by the State, Dr. Schaller contends that raising a challenge to Bd. Reg. 28 is timely in the context of this case. The 30-day period normally set aside for challenges to new regulations in 29 *Del. C.* Sec. 10141(d) does not apply when unlawful adoption of a regulation is raised in defense of a case such as this one.

In response to Dr. Schaller's contentions, the State argues that consideration of the legality of adoption of a Board regulation is beyond the scope of a hearing officer's charge under 29 *Del. C.* Sec. 8735(v). The State argues that my jurisdiction in prehearing matters is circumscribed by 24 *Del. C.* Sec. 1713(16). In other words, the State contends that a hearing officer sitting in my capacity is without statutory authority to grant Dr. Schaller's request that this case be dismissed based on the alleged faulty adoption of Bd. Reg. 28.

The State further contends that Sec. 10141(a) of the APA grants exclusive jurisdiction to the Superior Court to void an agency or board regulation in a declaratory judgment action. The State adds that any such action at this stage would be untimely as beyond the 30 day filing requirement in Sec. 10141(d).

With regard to the claim by Dr. Schaller that the complaint in this case is unduly vague, the State argues that the complaint does put the reasonable person on notice of "conduct and professional responsibilities" at issue in this case. The State contends that reference to Dr. Schaller's Florida conviction and the cited sections of the Medical Practice Act and Board regulations provide adequate notice in this case. The State cites case law which holds that in a case such as this one a complaint need not enumerate "each precise piece of evidence embraced within an obvious and well defined subject of investigation." *In re Green,* 464 A.2d 881, 886 (Del. 1983).

Finally, the State contends that the sections of the Act allegedly violated by Dr. Schaller in this case are separate and not duplicative. The State demands an opportunity to present its evidence to permit a determination as to whether it has met its burden of proof on any of those sections.

At the request of counsel, oral argument on these points was permitted at the beginning of the proceedings on May 10, 2013. On behalf of Dr. Schaller, Mr. Battaglia argued that the Board violated the APA "in every conceivable way" when it adopted Bd. Reg. 28. There was no actual hearing on January 4, 2005; no witnesses were subpoenaed to appear at the hearing; no questions were asked of them; no testimony or evidence was introduced. Hence, there was no substantial evidence on which the Board acted in adopting the rule. If the Board does not properly adopt regulations, it will lose valuable control over the profession.

Mr. Battaglia continued. On January 4 no findings were made as to the connection between the crimes listed in Bd. Reg. 28 and a person's fitness to practice medicine. By way of example, Mr. Battaglia questioned any connection between practicing medicine and loitering, engaging in a crap game, obstructing a public passage, or driving recklessly. The Board called no expert witness to testify on these issues. Bd. Reg. 28 was "carelessly" adopted. It is a nullity. The complaint in this case should be dismissed.

On behalf of the State, Ms. Fortune argued that this is not the proper forum to challenge the lawful adoption of a Board regulation. She noted that neither she nor Ms. Stewart sit with nor provide legal representation for the Board. Neither is prepared to address some of the contentions in Dr. Schaller's application. She added that under 24 *Del. C.* Sec. 1731(b)(19) the Delaware Board may consider and rely on the decisions of regulatory boards and other authorities in sister states. If a Board regulation is challenged in the context of defending disciplinary charges, the Superior Court is in a position to review the arguments. In this case the State has the authority and the duty to prosecute.

In reply Mr. Battaglia argued that, unlike the McCarthy hearings of the 1950's, the rule can not be that one may not object to the application of a rule. With regard to the 30-day rule regarding a challenge to a regulation in Superior Court, that deadline applies to the regulatory process. This is a case decision under the APA. There are no limits here on what defenses may be raised. A prosecutor who claims that Dr. Schaller may not challenge Bd. Reg. 28 "should be fired". The State must make a valid charge under a legal regulation.

In response to a question from the hearing officer, Ms. Stewart noted that there were other proceedings or meetings of the Board on Bd. Reg. 28 before the January 2005 hearing. She added that the detail sought in that question is proof that this is the wrong forum to litigate the legality of the regulation. She further argued that under Delaware law there is a legal presumption that such regulations are valid.

At the conclusion of these arguments, and having reviewed the written submissions of the parties and conducted independent research on the points raised, this hearing officer denied the request by Dr. Schaller that the complaint in this case be dismissed. Initially, I find that the reliance by the State on 24 *Del. C.* Sec. 1713(a)(16) is misplaced. Based on a close reading of that section of the Medical Practice Act, it appears that the designation of an "examiner" is reserved for situations in which the ability of a person to practice medicine is in question, or in which the Board or Executive Director must find facts in the case of a physician whose privileges have been temporarily suspended.

However, I further find that 29 *Del. C.* Sec. 8735(v)(1)c provides somewhat broader authority to a hearing officer to hear any "prehearing matter" which may arise in the context of a disciplinary case. As noted above, that is why I permitted briefing of the issues which Dr. Schaller has raised.

I further reject the State's argument that Dr. Schaller should have raised his challenge to Bd. Reg. 28 within 30 days of its adoption in January 2005 under 29 *Del. C.* Sec. 10141(d). I agree with Dr. Schaller that the 30-day rule pertains to "review of regulations" and was perhaps imposed in order to bring promptness and finality to the adoption of new agency regulations. Regardless, this matter is a "case decision" under the APA. A challenge to the adoption of a regulation which now provides a vehicle whereby the State may seek to discipline an individual medical license is timely if brought within the context of such proceedings.

I further find that Dr. Schaller has not provided a compelling reason for a hearing officer acting in my capacity under Sec. 8735(v) of the Act to declare a regulation of the Board null and void. I therefore choose no to do so.

First, I note that both appeals challenging the adoption of regulations as well as appeals of disciplinary orders of licensing boards are taken to the Superior Court. Hence, it is public policy in Delaware that the Superior Court be vested with the authority to hear such challenges.

Perhaps more importantly, in the context of this case Dr. Schaller is essentially asking that I preempt the legislative or regulatory prerogatives and responsibilities of the Board of Medical Licensure and Discipline though I serve here as a quasi-judicial officer or an administrative law judge at this stage of the case. As noted above, decisions made by hearing officers under Sec. 8735(v) in pre-hearing matters have the "same authority as a decision of the board or commission and is subject to judicial review on the same basis as a decision of the board or commission." Sec. 8735(v)(1)c. Presumably that means that the Board would be bound by any such prehearing ruling even if it encroached on the Board's regulatory

prerogatives within the profession and even if a majority of the Board disagreed with such a conclusion.

To assume the authority to declare a board regulation null and void based on an argument that it was improperly promulgated would, in my view, essentially place legislative authority in the hands of a mere administrative hearing officer. I find that the General Assembly did not contemplate such authority when it created the position of hearing officer. Placing the authority to consider challenges to board regulations within the sole jurisdiction of the Superior Court is compelling evidence that the legislature did not intend to vest a hearing officer with such power. By refusing to make the prehearing determination that Respondent has requested, and by applying Bd. Reg. 28 (29) below, the Board is, of course, free to examine the adoption and particulars of Bd. Reg. 28 and to affirm or modify my legal conclusions on the point. 29 *Del. C.* Sec. 8735(v)(1)d.

Nor do I agree with Dr. Schaller that the professional complaint against him is fatally vague. It is clear on the face of the complaint that the State relies in this case wholly on the Florida conviction in seeking professional discipline in Delaware. Neither Bd. Reg. 28 nor SB 229 requires that a crime listed in Bd. Reg. 28 be committed in Delaware. Nor does either of those authorities require that the foreign conviction result in foreign discipline.

Dr. Schaller argues that the terms "dishonorable" and "unethical" are unduly vague and do not place him on notice of the misconduct with which he is charged in the complaint. The two quoted terms are specifically used in the cited section of the Medical Practice Act. 24 *Del. C.* Sec. 1731(b)(3). The complaint appears to clearly allege that the Florida conviction constitutes "unprofessional conduct" as delineated in that section of the Act. If a term in a statute is not specifically defined by the legislature, the interpreter is instructed to

read the term within its context, and to construe it according to the common and approved usage of the English language. 1 *Del. C.* Sec. 303. I find that Dr. Schaller has been placed on sufficient notice of the State's professional allegations in this case to satisfy the requirements of constitutional due process.

Objections and exceptions to these legal conclusions are noted on the record, and have been preserved for purposes of challenge before the Board, or on judicial appeal from any final order of the Board.

The Evidentiary Hearing

The evidentiary portion of the hearing commenced after the above legal conclusions were announced. Ms. Stewart made an opening statement. She noted that the State's entire case is based upon Dr. Schaller's Florida conviction. That conviction is not in dispute. She added that Dr. Schaller does not have a right in these proceedings to testify as to the underlying factual circumstances of the Florida conviction. The State of Delaware is not presently prosecuting or presenting the Florida case. Witnesses to the Florida offense are not available to be called by the State in this proceeding.

On behalf of Dr. Schaller, Mr. Battaglia stated the plea entered by Dr. Schaller in Florida was *nolo contendere*. Dr. Schaller will be called to discuss why he entered that plea. Such testimony would be admitted in any court. The acts which provoked Dr. Schaller's reactions in Florida are relevant.

In the Florida matter Dr. Schaller was confronted with a sudden emergency situation. He acted to protect the life of Zachary, a child. Protecting the life of another is not unprofessional conduct. Zachary was threatened by his mother. She was hitting him with a stick. No one was injured or hurt in the incident. At this point Ms. Stewart interjected that

Mr. Battaglia's comments about the incident are argument and not facts. If Dr. Schaller committed no offense in Florida, he should have challenged the criminal charges there. In this case the State need only prove the foreign conviction.

Mr. Battaglia continued. He stated that the Florida Medical Board has found no unprofessional conduct in this case. Ms. Stewart responded that whether or not the Florida Board took action against Dr. Schaller is irrelevant. Had the Florida Board imposed discipline stemming from the event, that would have provided an additional basis on which to seek discipline against Dr. Schaller.

This hearing officer then ruled that Dr. Schaller would be permitted to explain or provide testimony about the criminal matter in Florida. It was noted that the Board is permitted to apply administrative discretion in such cases by considering mitigating and aggravating circumstances. The Board is entitled to some factual information on those issues in order to properly exercise its discretion and fairly apply its disciplinary matrix in a case such as this one. Bd. Regs. 30.14 and 30.15.

After a discussion between counsel regarding the admission of exhibits, the State's complaint was admitted as SX 1. Dr. Schaller's formal answer to the complaint was admitted as SX 2. A "Judgment" entered in the Circuit Court for the Twentieth Judicial Circuit in and for Collier County FL and dated September 21, 2011 was admitted as SX 3. Ms. Stewart then advised that the State is withdrawing para. 4(b) of the complaint. The State rested.

Dr. Schaller then testified on his own behalf. He has been a Delaware licensed physician since approximately 2001, though he has never actively practiced medicine here.

Mr. Battaglia questioned Dr. Schaller regarding the incident on January 2, 2011 which resulted in the Florida conviction. His son Justin had called him. Justin asked him to help persuade Dr. Schaller's wife that she should permit friends to stay over at their house.

Dr. Schaller approached a group of people. There was much yelling. Zachary and his mother were nearby. Dr. Schaller looked around. Yelling continued. Dr. Schaller was personally excited that Justin was speaking with him, as there had been a level of estrangement between them. Justin was yelling. Justin had damaged some personal property, including a mailbox in front of the house. He may have struck it with a stick.

Dr. Schaller reviewed the scene. He observed a small, frail woman. She was using a baseball bat to hit Zachary's shins. Zachary is not his son. He was a guest at their home contrary to his wife's instructions. Dr. Schaller observed the woman striking Zachary on the shins. His hands were flailing, and he was getting madder. Dr. Schaller tried to understand the situation. Zachary was enraged. He weighs about 180 lbs. He is a "known fighter".

Zachary pulled back his fist. Dr. Schaller thought that the lady was at risk of a "catastrophic" injury from Zachary, who was known to use anabolic steroids. Zachary retreated. The blows to his shins had enraged him. He pulled back his fist and Dr. Schaller thought the woman was in danger. He went into his house and secured a pistol. Dr. Schaller has had police training in the use of firearms. He pulled out the gun while he was screaming. He tried to stop Zachary's fist from going forward. Both Zachary and the woman stopped and looked at Dr. Schaller. Dr. Schaller then reholstered his gun.

He told Zachary to get in the car. Zachary complied. The woman thanked Dr. Schaller. Approximately 30 minutes later Dr. Schaller was arrested. The incident had been reported. He did not display the gun for a "selfish motive". He was able to protect himself

from Zachary. He displayed the gun because he thought that the older woman was at risk of being "put in a wheelchair". He acted to protect her.

In court he entered a plea of *nolo contendere*, or "no contest" to a charge of aggravated assault without intent to kill. He entered that plea because he wanted to avoid risk. He had been informed that he would or could be sentenced to six years in prison if a jury did not believe his testimony. He is not a "gambler". He did not want to risk his career or his freedom. He reiterated that no one was injured in the incident.

Ms. Stewart cross-examined. The Florida court sentenced Dr. Schaller to four years' probation commencing in September 2011. He testified that a probation officer is now recommending that his probation end after two years. He will file for that relief in September 2013.

Dr. Schaller retains his Delaware license because the staff of the Board of Medical Licensure is "gracious and personable". Dr. Schaller is a "small town person". When he applied for a Delaware license, he considered opening a practice here. He does not presently know if he will renew his Delaware license.

With regard to the January 2011 incident, Zachary's fist was cocked. Force was "cranked into his body". Dr. Schaller stopped him from going forward. The older woman would have been "blind to the blow". Zachary was about to hit her.

At this point Ms. Stewart read a letter from an attorney which stated that Dr. Schaller was pushing the woman at the time. Mr. Battaglia objected to use of the letter by the State, and began to make comments about it. Ms. Stewart asked that he limit his comments to the objection, and not comment on the content of the letter. The objection was overruled.

The reporter read back the pending question. Dr. Schaller stated that the attorney's letter is not completely factual. It is possible that there was touching between Zachary and his mother, who was frail.

Dr. Schaller stated that he had seen a police report of the incident previously, and then questioned whether he had. He knows that police responded. They did not speak with him. They approached him and pointed guns at him. Dr. Schaller stated, "Don't shoot. I don't want to go."

Page 3 of the police report states that Zachary had pushed his mother, and that Dr. Schaller had gone into his house to get the gun. The report further states that Zachary had reported that Dr. Schaller had put the gun to his (Zachary's) head. Dr. Schaller denied those facts. That "didn't happen". Justin later apologized. Zachary, then 14 years old, later corrected his comments. In the report Zachary told police that Dr. Schaller had said, "get in the car or I'll blow your head off."

The State offered the police report. Dr. Schaller objected on the basis that the report is hearsay. The objection was overruled. The report was admitted as SX 4. The report stated that Dr. Schaller held the gun to his son also. Dr. Schaller stated he is aware the report says that. He added that on the night after the incident Zachary informed Dr. Schaller that he had lied because he had been "defrauded of overnight privileges." Dr. Schaller stated that, therefore, Zachary's story is fictitious.

Dr. Schaller is aware that Zachary gave the Sheriff a sworn statement while Dr. Schaller was not present. Zachary admitted pushing his mother. Dr. Schaller stated that Zachary's story is "entirely false".

Dr. Schaller did not call 911. Police intervention was unnecessary. There was only property damage at the scene. He believed that getting his gun was his only option. The State offered Zachary's sworn statement into evidence. Mr. Battaglia noted that Dr. Schaller had said it is fabricated. Ms. Stewart added that the statement is sworn, and that it had been ruled that evidence could be introduced regarding the incident. The statement was admitted as SX 5.

Dr. Schaller reiterated that he did enter a plea. He is not a gambler. He did not want to go to trial unless there was a 100% guarantee of acquittal. His criminal defense attorney could not give him such assurance. He testified that Zachary later signed a notarized statement retracting his earlier statement. He was "partially truthful".

There was in fact pushing during the incident. It is "fantastic" to say that Dr. Schaller put a gun to anyone's head. Zachary never said that Dr. Schaller had acted for "selfish purpose". Justin signed an affidavit stating that he and Zachary concocted a story. Zachary never said he was hurt. At times on that date Dr. Schaller's wife was present.

Joyce Morelli Schaller, Dr. Schaller's spouse of 18 years, then testified. She had not been sequestered during the hearing, and was present to hear her husband's testimony. She stated that her husband intervened in the incident because of fear for the woman's safety. He was successful in protecting her. No one was hurt. Justin was 15 years old at the time.

Zachary's mother sent her a text asking if her son could stay over at the Schaller home. Ms. Schaller denied the request because Zachary had brought beer into their home previously, and then the two boys stayed out from 2:30-6:30 a.m.

Dr. Schaller did not hold a gun to anyone's head. Justin agrees with that statement. At one point she returned to her home because Dr. Schaller was speaking calmly to the boys.

That night Justin had destroyed property with a baseball bat. Justin had an attorney. He had been in trouble many times. His attorney kept him out of jail. He has been expelled from three schools. In 2012 he was incarcerated on a marijuana charge. Justin is now applying for admission to college. He has stopped consuming alcohol and drugs.

Dr. Schaller has never threatened Zachary or Justin with a gun. Justin and Jeremy are the Schallers' sons. They wrote out their own thoughts because they believe their father was treated unfairly. Ms. Schaller has never known her husband to be violent toward anyone. At this point Dr. Schaller rested. There was no rebuttal evidence from the State.

Counsel then summed up. Ms. Stewart argued that any evidence regarding the particulars of the January 2, 2011 go only to mitigation or aggravation. In this case the State need only prove the felony conviction in Florida. The crime for which Dr. Schaller entered a *nolo contendere* plea there is a "substantially related" crime under Bd. Reg. 28 (29). One need not commit such a crime in Delaware in order to be sanctioned for such conduct. Bd. Reg. 28(29) covers all crimes of physical force or violence. Bd. Reg. 29.2. The list of crimes in Bd. Reg 28 is not exhaustive.

The Florida conviction was for aggravated assault. The equivalent Delaware crime is Aggravated Menacing. That is a Class E felony in Delaware. Menacing is a crime in Delaware, 11 *Del. C.* Sec. 602, and is listed at Bd. Reg. 29.2.2.

The State alleges that under 24 *Del. C.* Sec. 1731(b)(7) and Bd. Reg. 15.1.10 Dr. Schaller has committed an act which tends to bring discredit upon the medical profession. Felony aggravated assault tends to do so.

The State concedes that Dr. Schaller's record does not contain evidence of prior professional discipline. In mitigation of his conduct in this case, this was an isolated act by

him. Nonetheless, in aggravation, Dr. Schaller has failed to acknowledge his wrongdoing in this case, and the offense constituted intentional and illegal conduct.

Dr. Schaller's testimony is inconsistent with statements by an attorney and statements in police reports. His testimony now is self-serving. He is now trying to put the events of January 2011 in the best light. Though the State does not allege that he physically harmed others in the incident, he drew a handgun on a 14-year old child. That is troubling for the State. The case warrants "significant" discipline.

The referenced affidavit of Justin is not in evidence. Justin is under the control of his parents. The State requests that this hearing officer recommend to the Board of Medical Licensure and Discipline a probationary period of two years and a $5,000 fine.

Mr. Battaglia then closed. He reiterated his prehearing argument that the adoption of Bd. Reg. 28(29) was an arbitrary and capricious act. The Board has included the "entire Delaware and U.S. penal codes". SB 229 instructed that licensing boards should include only those crimes related to the practice of medicine.

Dr. Schaller entered his plea in Florida to avoid the risk of jail. Had a Florida court or jury found that Dr. Schaller had put a gun to someone's head, the punishment would have been more than probation.

Important facts in this case are: (1) The woman Dr. Schaller sought to protect was not injured by Zachary; (2) the threat to her was imminent; and (3) Dr. Schaller acted spontaneously. Two years have passed since the incident. Dr. Schaller was faced with a woman being punched versus doing something. Mr. Battaglia referred to the recent incident in Cleveland in which a neighbor decided to act and saved three women who had been

kidnapped and held hostage in a home against their will. As in that case, the State in this case has not proved any selfish motive in Dr. Schaller.

Justin and Jeremy have signed affidavits which state that Justin and Zachary had fabricated a story in this case. Mr. Battaglia asked what is the basis for the State's request that a monetary fine be imposed. The real question here is whether Dr. Schaller had acted unprofessionally. A problem in this case is that it threatens any physician who intervenes to help another person. This case should be dismissed. Since the Florida Board did not discipline Dr. Schaller, the Delaware Board should also decline to do so.

In rebuttal Ms. Stewart argued that the crimes listed in Bd. Reg. 28(29) are substantially related to the practice of medicine because they go to fitness and character. The Florida felony conviction should subject Dr. Schaller to discipline in Delaware. The evidence in this case demonstrates Dr. Schaller's recklessness. The State has considered the mitigating factors noted earlier, and is therefore not recommending any period of license suspension.

Mr. Battaglia responded. He argued that SB 229 requires that crimes listed by the Board in Bd. Reg. 28 have a direct bearing on fitness.

Findings of Fact

The notice of this hearing provided Dr. Schaller and his counsel with the date, time, place and subject matter of this hearing. It was in fact received by them.

James L. Schaller, M.D., is an active licensee of the Delaware Board of Medical Licensure and Discipline. He is a resident of Florida and a licensee of the Florida Medical Board, and is not currently engaged in the practice of medicine in Delaware.

On or about September 21, 2011, with the advice of legal counsel, Dr. Schaller entered a plea of "no contest" or *nolo contendere* to a charge of "Aggravated Assault with Deadly Weapon without Intent to Kill" in open court in the Circuit Court, Twentieth Judicial Circuit in and for Collier County FL. SX 3. The plea resulted in an adjudication of "Guilty" on the stated charge.

As a result of acceptance of Dr. Schaller's plea by the Florida Court, he was sentenced to a period of four years of state probation, to commence immediately upon such sentencing. *Id.* Dr. Schaller was further ordered to undergo a mental health evaluation, or to submit to the Court any prior mental health evaluation. *Id.*

He was also ordered to have no contact with "Z.K.", the identified "victim". (Presumably "Z.K." is Zachary, whose full name is identified in a police report regarding the incident. SX 4 at 3.) According to Dr. Schaller's sentencing document, he was also ordered to pay certain prosecution, court and investigation costs incurred in the prosecution of the case. SX 3.

Since the criminal case was disposed of in Florida by plea, no sworn record was made of the facts of the January 2, 2011 incident through the testimony of witnesses. The facts of the underlying crime are somewhat unclear. Because those facts may (or may not) have a bearing on the Board's assessment of aggravating or mitigating factors in this case, the parties were permitted to present evidence as to those underlying facts, but were not permitted to collaterally attack the plea and adjudication of guilt by the Florida Court.

The facts of the January 2 incident remain clouded, and it is not possible to make findings on them. Though he was charged criminally for his actions on that day, and though

he was adjudicated guilty of a significant felony assault, Dr. Schaller nonetheless offers his own explanation for his conduct.

He testified that he saw an altercation near his home in which the "frail" mother of Zachary was striking the boy with a stick or a bat around the shins. He further testified that he saw Zachary, a large boy apparently trained in fighting, cock his fist as if to strike his mother. He testified that such a blow could have "catastrophic" consequences for the woman. However, rather than call police or intervene to talk the two down from a physical confrontation or try another approach, as I understand it Dr. Schaller went into his house, secured a pistol, returned to the scene of the altercation and in some fashion displayed the weapon to successfully get the mother and son to end their confrontation.

Dr. Schaller testified that though he believes he was "in the right" to use the gun in that fashion, and though he was acting in defense of another person, nonetheless his criminal defense attorney in Florida could not give him a 100% guarantee that he would be found not guilty were the case to go to trial. (As an aside, in all my years of practice, I have never known an attorney to give his client such an airtight assurance. To do so, and then to be proved wrong by a jury who saw things otherwise, could be characterized as legal malpractice.)

Regardless, the State was also permitted to present evidence on the underlying facts. The day after the incident Zachary, then 14 years of age, gave a sworn statement to a Detective in the Collier County Sheriff's Office. SX 5. He confirmed that his mother was hitting him in the leg or the buttocks with a stick. He ultimately pushed her away on the arm with one hand and took the stick from her. At that point, according to Zachary, Dr. Schaller came out of his house with a gun, stated that he had photographed the incident, put the gun to

Zachary's head, and said "get in the car mother f---er." Zachary stated that he was fearful but did not believe Dr. Schaller intended to shoot him. Justin was sitting nearby and when he would not stop talking, Zachary stated that Dr. Schaller threatened to shoot him. Dr. Schaller pointed the gun at both boys.

The State also introduced a Sheriff's Office report which summarized the events of the evening after they arrived. SX 4. A police officer was told by Justin that Dr. Schaller had threatened to "blow his head off" with a gun and had held the gun to Zachary's head and threatened to kill him for pushing his mother. Justin also confirmed to police that Zachary's mother had struck Zachary with a "switch" when he would not get in her car. Dr. Schaller went into his house, secured a pistol, and returned. He pointed the gun at Zachary's head. Justin told police that when he attempted to get between them, Dr. Schaller also threatened to blow Justin's head off. Justin told police that Dr. Schaller did not point the gun at Justin, but did aim it at Zachary's head. Toward the end of SX 4, the reporting officer records that both Zachary and his mother later provided similar accounts.

During the hearing Dr. Schaller testified that both Justin and Zachary later recounted their stories either in taped or written statements, or in affidavits. No record of any such recantations was offered during the hearing. Nor did Dr. Schaller offer an explanation or motive as to why either boy (and perhaps Zachary's mother) would make such serious allegations to police about his conduct.

The factual record is therefore muddled. Police reports and sworn statements prepared at or near the time of the incident are contradicted by Dr. Schaller. Though he characterized the version of events by Justin and Zachary as "fabrications" and "fantastic", and though he testified that the two boys later retracted their versions of the events, no

further evidence was offered regarding their retractions when Dr. Schaller was granted leave to provide evidence regarding the Florida incident.

I am unable to make findings of fact regarding the incident. The version of events provided to police or a sheriff by Zachary and Justin is solely hearsay. On the other hand, Dr. Schaller's version claiming pure motive and a lack of criminal intent is belied by the "no contest" plea he entered in court in September 2011. That plea was entered with the advice of legal counsel. By his plea he gave up his right to trial and an opportunity to convince a judge or jury of his intent to play peacekeeper on January 2, 2011 and his lack of malice toward either of the two boys.

I do find that the Florida Department of Health has apparently determined that no professional discipline would be assessed against Dr. Schaller as a result of his involvement in the January 2 incident, and as a result of his plea in the Collier County Circuit Court. Though it was not formally admitted into evidence during this hearing, Dr. Schaller had attached to his opening legal memorandum (RX 2) a copy of a letter dated March 8, 2012 to Dr. Schaller's Florida counsel from the Assistant General Counsel of the Florida Department of Health. That letter states that "...after careful consideration of all information and evidence obtained in this case, the Department of Health determined that no violation has occurred and directed this case be closed." The letter further states that the case was being dismissed "without the finding of probable cause". *Id.*

Conclusions of Law

The notice of this hearing provided Dr. Schaller and his counsel with the date, time, place and subject matter of this hearing. It otherwise comported with requirements for notices of hearings before the Board.

It is public policy in Delaware that, in order to protect the public health, safety and welfare, the legislature has determined that the practice of medicine shall be governed by laws pertaining to that privilege. In order to ensure that medical practice is not conducted unprofessionally, improperly, without authorization, or without proper qualifications, the General Assembly has chartered the Board of Medical Licensure and Discipline. 24 *Del. C.* Sec. 1710.

The Board has been empowered to promulgate rules and regulations to carry out its duties. 24 *Del. C.* Sec. 1713(a)(12). The Board has also been authorized to conduct hearings and to take appropriate disciplinary action against licensees when circumstances warrant. *Id.* at Sec. 1713(a)(9). These are valid means and ends rationally related to the legitimate state purpose of protecting the public from the unprofessional or incompetent practice of medicine.

During the hearing the State withdrew the legal claims in para. 4(b) of its complaint. SX 1. That paragraph alleged that Dr. Schaller, by his conduct in this case, had acted dishonorably and/or unethically contrary to 24 *Del. C.* Sec. 1731(b)(3). Since a portion of Dr. Schaller's prehearing arguments claimed that those terms are unduly vague and that the specific behavior which the State contends was "unethical" or "dishonorable" has not been specified, it will not be necessary to address those contentions.

There remains in this case the State's allegation that Dr. Schaller's Florida conviction is a crime "substantially related" to the practice of medicine under Bd. Reg. 28 (29) and exposes him to potential discipline here under 24 *Del. C.* Sec. 1731(b)(2) as the conviction constitutes "unprofessional conduct". As noted above, Dr. Schaller has raised certain legal challenges to the adoption and content of Bd. Reg. 28. I have addressed those arguments in

pre-hearing legal findings which will not be repeated here. Dr. Schaller's disagreement with my legal findings on Bd. Reg. 28 are again noted and the record is protected as to his position.

SB 229 has been codified at 24 *Del. C.* Sec. 1713(e). That section provides that the Board "shall promulgate regulations specifically identifying those crimes which are substantially related to the practice of medicine...." In 2005 the Board complied with that mandate and adopted Bd. Reg. 28.0 (now Bd. Reg. 29.0) *et seq.*

Featured prominently at the beginning of Bd. Reg. 29 is the inclusion "assaults and related offenses" as set for the in the Delaware Criminal Code, 11 *Del. C.* Ch. 5. The regulation states that it is the intention of the Board to include "(a)ny crime which involves the use of physical force or violence toward or upon the person of another and shall include by way of example and not of limitation the following crimes set forth in Title 11 of the Delaware Code Annotated". Bd. Reg. 29.2.

The regulation then lists a series of "assaults and related offenses" which the Board has deemed "substantially related to the practice of medicine." Bd. Reg. 29.2.1 *et seq.* According to the document containing the Judgment and Sentence and adjudication of guilt of the Florida court in this case, Dr. Schaller entered his plea of *nolo contendere* to the charge of "Aggravated Assault with Deadly Weapon without Intent to Kill" in violation of Section 784.021(1)(a) of the Florida Statutes. SX 3. That section of the Florida criminal code states, "An 'aggravated assault' is an assault: (a) with a deadly weapon without intent to kill." The crime is a third degree felony under Florida law.

The Board has stated that the list of crimes in Bd. Reg. 29 is not exhaustive and is provided "by way of example". Bd. Reg. 29 lists the crime of Menacing. 11 *Del. C.* Sec.

602. The crime of Menacing in Delaware is elevated from an unclassified misdemeanor to a Class E felony when a deadly weapon is displayed. *Id.* at Sec. 602(b). That section of the Delaware Criminal Code states as follows: "A person is guilty of aggravated menacing when by displaying what appears to be a deadly weapon that person intentionally places another person in fear of imminent physical injury." Whether Dr. Schaller pointed the pistol at the head of either boy or simply approached the group holding handgun, Zachary informed police shortly after the January 2011 incident that, not surprisingly, he was fearful of injury

I find that Florida Statute Sec. 784.021(1)(a) is substantially similar, if not identical, to the operative language of 11 *Del. C.* Sec. 602(b). Put another way, had Dr. Schaller committed the same act in Delaware as he committed in January 2011, it is more likely so than not so that he would have been charged with Aggravated Menacing here. Even if the elements of the Florida and Delaware offenses are not on all fours, Bd. Reg. 29 is not an exhaustive list, and there was a clear intent in Bd. Reg. 29.2 that offenses such as committed by Dr. Schaller in Florida were to be included in the scope of the Delaware regulation.

As noted before, Bd. Reg. 29.1 requires that criminal charges must have resulted in a conviction. That requirement is satisfied in this case. SX 3. Further, there is no requirement that a crime listed under Bd. Reg. 29 must have occurred in Delaware.

I therefore find that, as a matter of law, the State has proved by a preponderance of the evidence that when Dr. Schaller entered his "no contest" plea in Florida, and when the Florida Court adjudged him guilty of the crime of aggravated assault with a deadly weapon without the intent to kill, he stood convicted of a crime substantially related to the practice of medicine as the Delaware Board has defined that term.

The State finally alleges in this case that Dr. Schaller, by his conduct, has committed a violation of 24 *Del. C.* Sec. 1731(b)(17) and Bd. Reg. 15.1.10 in that his conduct tends to bring discredit upon the profession.

Section 1731(b)(17) provides that it is "unprofessional" conduct if a licensee violates, *inter alia,* a "regulation of the Board related to medical procedures or to the procedures of other professional or occupations regulated under this chapter, the violation of which more probably than not will harm or injure the public or an individual." Based on a literal reading of the operative language of this section of the Medical Practice Act, I find that the State has not proved its applicability to this case by a preponderance of the evidence. Any regulation "related to medical procedures" most likely does not cover the criminal conduct of Dr. Schaller in Florida. Even if it can be shown that Dr. Schaller's conduct was likely to harm or injure the public or an individual either physically or emotional, the conduct in which he was engaged was not the performance of a "medical procedure."

The State alleges that Dr. Schaller's conduct violated Bd. Reg. 15.1.10. That section provides that it is "dishonorable or unethical" under Sec. 1731(b)(3) to commit an "act tending to bring discredit upon the profession. I also find that this regulation does not apply in the context of this complaint as it is presently structured, but for a different reason. During the hearing State voluntarily dismissed its claims under Sec. 1731(b)(3). Hence, when it so amended the complaint, it removed the "dishonorable or unethical" allegation from the proceedings. Since an allegation under that section of the Medical Practice Act appears to be a predicate for the operation of Bd. Reg. 15.1.10, I find that the "bringing discredit upon the profession" charge must also be dismissed as it no longer comports with the pleadings in this case.

The Board has adopted certain disciplinary guidelines which place the profession on notice of the range of disciplines which may be imposed by the Board on account of certain conduct, unless there is reason to depart from those ranges. Bd. Reg. 30.0 *et seq.* If a licensee is convicted of a crime substantially related to the practice of medicine, disciplines in the guidelines range from 90 days' probation to suspension, with reinstatement only after the board is satisfied that there has been practice improvement, and which discipline shall not be less than any court-ordered sanctions.. Bd. Reg. 30.6.1.

In order to determine whether there should be departure from a range of disciplines in the guidelines, the Board has adopted lists of aggravating and mitigating factors which will guide its discretion. The aggravating factors are found at Bd. Reg. 30.14. I have carefully reviewed those factors and find the following to be present in this case: nature and gravity of the allegation (30.14.4.); refusal to acknowledge wrongful nature of conduct (30.14.10); vulnerability of victim (30.14.10); intentional act (30.14.11); age or vulnerability of victim of misconduct (30.14.15); potential for injury ensuing from act (30.14.17); illegal conduct (30.14.20).

Mitigating factors are listed at Bd. Reg. 30.15. After careful review, I find these mitigators present in this case: absence of prior disciplinary record (30.15.1): single act (30.15.2); length of time that has elapsed since misconduct (30.15.10); isolated incident unlikely to reoccur (30.15.24). Though a lack of professional discipline in the state where a "substantially related" offense occurred is not listed as a mitigator under Bd. Reg. 30.15, the State of Florida declined to assess discipline after "careful consideration of all information and evidence." After balancing the aggravating with the mitigating factors in this case, I find that the aggravating factors outweigh the mitigators here.

Due process has been afforded in these proceedings.

Recommendation

Based on the relevant evidence in this case and the findings of fact and conclusions of law set forth above, the following is recommended to the Board of Medical Licensure and Discipline in this case:

1. That the Delaware medical license held by James L. Schaller, M.D. be placed on probation for a period not less than eighteen (18) months effective upon the date when a majority of the Board deliberating shall so vote in the affirmative, and that all copies of the current and valid Delaware medical license presently held by Dr. Schaller at the time of such vote be returned to the Executive Director of the Board so that they may be marked "Probation";

2. That a copy of any mental health evaluation or evaluations submitted to the Circuit Court, Twentieth Judicial Circuit in and for Collier County FL in partial fulfillment of the Sentencing Order of that Court dated September 21, 2011 be provided to the Executive Director of the Board of Medical Licensure and Discipline within 90 days of the disposition of this case by the Board for review;

3. That during the period of his license probation Dr. Schaller be ordered to complete three (3) acceptable continuing education credits in the subject of ethics and three (3) acceptable continuing education credits in the subject of anger management and show documentary proof to the Executive Director of the Board that he has done so, and that such continuing education credits shall be in addition to and not in lieu of any continuing education credits which he may be required to complete in conjunction with his next medical license renewal;

4. That Dr. Schaller be ordered to pay a monetary fine in the amount of $2,500 within 90 days of the final action of the Board in this case by way of a draft made payable to the "State of Delaware" and submitted to the Executive Director of the Board;

5. That upon the expiration of, but not earlier than, a period of 18 months following the final order of the Board in this case, Dr. Schaller be permitted to petition the Board for unrestricted reinstatement of his medical practice privileges upon a showing that he has fulfilled all of the conditions imposed upon his license by the Board and upon a showing that he is otherwise fit to practice medicine in the State of Delaware without condition or restriction, and that his probationary period shall continue from time to time after the conclusion of 18 months until he has successfully so petitioned the Board;

6. That the final disposition in this case be entered as a public disciplinary order of the Board reportable to all relevant practitioner data bases.

Roger A. Akin
Chief Hearing Officer

Dated: May 30, 2013

Any party to this proceeding shall have twenty (20) days from the date on which this recommendation was signed by the hearing officer in which to submit in writing to the Board of Medical Licensure and Discipline any exceptions, comments, or arguments concerning the conclusions of law and recommended penalty stated herein. 29 *Del.C.* §8735(v)(1)d.