COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BEFORE THE STATE BOARD OF MEDICINE

Commonwealth of Pennsylvania,	:	
Bureau of Professional and	:	**File No. 11-49-08052**
Occupational Affairs	:	
v.	:	**Docket No. 1123-49-12**
Joseph J. Dambrauskas, M.D.,	:	
Respondent	:	

FINAL ORDER ADOPTING HEARING EXAMINER'S ADJUDICATION AND ORDER

AND NOW, this 31st day of January, 2013, noting that neither party filed an application for review and that the State Board of Medicine (Board) did not issue a Notice of Intent to Review, in accordance with 1 Pa. Code § 35.226(a)(3) December 43, 2012, attached to this order as **Appendix A**, is now the **FINAL ORDER** of the Board in this proceeding.

This order shall be effective immediately. The sanction provided herein shall take effect 30 days from the date of mailing of this order.

BUREAU OF PROFESSIONAL & OCCUPATIONAL AFFAIRS

Katie True

KATIE TRUE
COMMISSIONER

STATE BOARD OF MEDICINE

James W. Freeman MD

JAMES W. FREEMAN, M.D.
CHAIR

Hearing Examiner: Ruth D. Dunnwold Esquire

Respondent: Roger E. Michner, Esquire
Michner Law Firm
PO Box 400
Placitas, NM 87043

Prosecuting Attorney: Keith E. Bashore, Esquire

Board counsel: Wesley J. Rish, Esquire

Date of mailing: Jan. 31. 2013

APPENDIX "A"

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BEFORE THE STATE BOARD OF MEDICINE

Commonwealth of Pennsylvania, Bureau of Professional and Occupational Affairs	:	
	:	**Docket No. 1123-49-12**
v.	:	**File No. 11-49-08052**
Joseph J. Dambrauskas, M.D., Respondent	:	

ADJUDICATION AND ORDER

Ruth D. Dunnewold
Hearing Examiner

Commonwealth of Pennsylvania
GOVERNOR'S OFFICE OF GENERAL COUNSEL
Department of State
P.O. Box 2649
Harrisburg, PA 17105-2649
(717) 772-2686

DATE DISTRIBUTED 12/4/12
PROSECUTION
COUNSEL
HEARING EXAMINER
OTHER

HISTORY

This matter comes before a hearing examiner for the Department of State on a single count order to show cause filed June 21, 2012, in which the Commonwealth alleges that Joseph J. Dambrauskas, M.D. (Respondent), is subject to disciplinary action by the State Board of Medicine ("Board") under the Medical Practice Act (Act), Act of December 20, 1985, P.L. 457, No. 112, *as amended*, 63 P.S. § 422.1 *et seq.*, at § 41(4), 63 P.S. § 422.41(4), as a result of having had a license or other authorization to practice the profession revoked by the New York State Board for Professional Medical Conduct ("New York Board").

On July 20, 2012, Respondent, through his counsel, filed an answer to the order to show cause and a request for administrative hearing. Thereafter, by Notice of Hearing dated July 31, 2012, the matter was scheduled for hearing on September 18, 2012. On August 31, 2012, Respondent filed his Motion to Dismiss Proceeding and Memorandum of Law in Support Thereof, arguing that the order to show cause fails to state a cause of action on which relief can be granted. The Commonwealth filed its Reply to Respondent's Motion to Dismiss Proceedings on August 28, 2012. Because Respondent's Motion is one which would involve or constitute a final determination of the proceeding, the undersigned hearing examiner is authorized to rule on it only as part of the proposed report submitted after the conclusion of the hearing. Accordingly, Respondent's Motion to Dismiss Proceedings has not yet been decided.

The hearing occurred as scheduled. Respondent appeared and was represented by Roger E. Michener, Esquire. The Commonwealth was represented by Prosecuting Attorney Keith E. Bashore. At the conclusion of the hearing, the Commonwealth indicated the desire to incorporate its closing argument into a post-hearing brief. Therefore, after the filing of the hearing transcript on October 2, 2012, an Order Establishing Briefing Schedule was filed October 3, 2012. That

Order directed the Commonwealth to file its post-hearing brief no later than close of business on November 1, 2012 and Respondent to file his post-hearing brief no later than close of business on November 21, 2012. The Commonwealth filed its brief on October 19, 2012, and Respondent filed his post-hearing brief on November 21, 2012. The deadline for the Commonwealth to file a reply brief, December 3, 2012, passed without any such filing, so the record is now closed.

FINDINGS OF FACT

1. Respondent holds a license to practice medicine and surgery in the Commonwealth of Pennsylvania, license number MD027571E. Official Notice of Board records;[1] Notes of Testimony ("NT") at 8.

2. Respondent's license is active through December 31, 2012, and may be renewed thereafter upon the filing of the appropriate documentation and payment of the necessary fees. Board records.

3. At all times pertinent to the factual allegations, Respondent held a license to practice medicine and surgery in the Commonwealth of Pennsylvania. *Id.*

4. Respondent's last known address on file with the Board is P.O. Box 917, Champaign, IL 61824. *Id.*

5. On or about October 19, 2009, a Statement of Charges was filed against Respondent before the New York Board, *In the Matter of Joseph Dambrauskas, M.D.*, BPMC No. 09-196 ("New York Board action"), charging him with five specifications of professional misconduct. Exhibit C-1 (Statement of Charges).

6. The facts alleged in support of the Statement of Charges included the allegation that Respondent undertook to perform a human research project related to the possible clinical manifestation of Lyme Disease in psychiatric patients without oversight of a human research review committee as required by the New York Public Health Law. Exhibit C-1 (Statement of Charges at paragraph A).

[1]At the hearing, the parties agreed that the hearing examiner could take official of Department of state licensure records pertaining to Respondent. Notes of Testimony at 8 – 9. All subsequent such references will be cited as "Board records."

7. The facts alleged in support of the Statement of Charges also included the following:

a. Respondent, on or about October of 2006, indicated to Patient A's mother that he was interested in doing research on tick borne effects on kids and that "he (Patient A) will be the first child studied." Exhibit C-1 (Statement of Charges at paragraph A.1).

b. Respondent, when he visited the residence of Patient A on or about January 21, 2007, requested that Patient A's mother consent to more Lyme Disease testing of Patient A, and told her that he was doing "a study", or words to that effect. Exhibit C-1 (Statement of Charges at paragraph A.2).

c. Respondent, on or about November, 2006, requested Patient B's mother to videotape Patient B's activity while he was home on furlough from SLPC so Respondent could use the video tape in "a paper" that he was writing, or words to that effect. Exhibit C-1 (Statement of Charges at paragraph A.3).

d. Respondent, on or about January of 21007, told Patient C's mother that he was doing research involving Lyme Disease, or words to that effect. Exhibit C-1 (Statement of Charges at paragraph A.4).

e. Respondent, on or about March of 2007 asked Patient C's mother if she and Patient C would be willing to participate in a study on the correlation between Lyme Disease and behavior problems in children. Exhibit C-1 (Statement of Charges at paragraph A.5).

8. The Fifth Specification in the Statement of Charges charged Respondent with committing professional misconduct by willfully or negligently failing to comply with

substantial provisions of federal, state, or local laws, rules or regulations governing the practice of medicine, and based that allegation on the facts alleged in support of the Statement of Charges at paragraphs A and A.1, A and A.2, A and A.3, A and A.4, A and A.5 and/or A and A.6.[2] Exhibit C-1 (Statement of Charges, Fifth Specification, numbered paragraph 5).

9. On or about November 2, 2009, the New York Board by Consent Order adopted a Consent Agreement in the New York Board action in which Respondent agreed not to contest the Fifth Specification of professional misconduct, agreed that his New York license would be suspended until the expiration of his current registration period, January 31, 2010, and agreed that, upon the expiration of his current registration on that date, he would be precluded from any future registration or issuance of a medical license in New York State. Exhibit C-1 (Consent Order).

10. At least one of the patients who were the subject of the New York Board action improved with Respondent's research of the cause of his symptoms and Respondent's treatment of those symptoms. NT at 13, 15, 17, 29, 30 – 31.

11. There is no evidence that any of the patients who were the subject of the New York Board action were harmed by Respondent's actions. NT, *passim.*

12. Respondent received the order to show cause and all subsequent notices, documents and pleadings filed in this matter, appeared and testified at the hearing, and was represented by counsel. Docket No. 1123-49-12; NT at 5.

[2]N.B. Although the Fifth Specification refers to paragraph A.6, the Statement of Charges does not contain a paragraph A.6, an unexplained discrepancy that is immaterial to this matter.

CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter. Findings of Fact 1 – 3.

2. Respondent has been afforded reasonable notice of the charges against him and an opportunity to be heard in this proceeding, in accordance with the Administrative Agency Law, 2 Pa. C.S. § 504. Finding of Fact 12.

3. Respondent is subject to discipline under section 41(4) of the Act, 63 P.S. § 422.41(4), in that the proper licensing authority of another state, New York, disciplined Respondent's license or other authorization to practice medicine in that state. Findings of Fact 5 – 9.

DISCUSSION

Preliminary issue: Respondent's submission of exhibits and other potential evidence in his post-hearing brief

To his Post-Hearing Brief, Respondent attached six additional exhibits which were never introduced or referenced in any way at the hearing. He also engaged in a lengthy discussion, in the brief, of facts which were not placed in evidence at the hearing. However, it is erroneous for the finder of fact in a matter to rely on evidence outside, or *dehors*, the record in making its findings of fact or other determinations. *See, for example, Commonwealth ex rel. Valentine v. Strongel*, 371 A.2d 931 (1977). The proper time for submission of those documents and other evidence was during the course of the hearing, when the Commonwealth would have had the opportunity to review the proposed evidence and state any objections to its admission into the record. As it is, the Commonwealth had no such opportunity and the additional exhibits are not a part of the record. For that reason, none of the findings of fact or determinations in this matter can rely on or refer in any way to the additional exhibits and other evidence found in Respondent's Post-Hearing Brief. The hearing examiner has, instead, disregarded the additional exhibits, any references in Respondent's Post-Hearing Brief to the contents of those additional exhibits, and any other "fact" set forth in the brief which were not introduced into the record at the hearing.

The portions of Respondent's post-hearing brief which reference the additional exhibits and "facts" have not been stricken. There is no jury here which might be unable to disregard evidence outside the record. Rather, the hearing examiner simply disregards it, emphasizing that any facts not provided through testimony or documentary evidence at the hearing have not been subjected to cross-examination, cannot be, and therefore, were not, considered in making a

proposed decision. *Strongel*, *supra*, 371 A.2d at 933. Certainly the Board is capable of disregarding such information as well if it should review this matter.

Motion to Dismiss Proceedings

As mentioned above, Respondent's Motion to Dismiss Proceedings ("Motion") remains undecided because it is one which would involve or constitute a final determination of the proceeding, something on which the hearing examiner is authorized to rule only as part of this proposed report. In his Motion, Respondent argues that this proceeding should be dismissed because the Respondent's unprofessional act in New York, on which the New York Board action was based, is special and peculiar to New York, with no analogue in Pennsylvania's unprofessional conduct code.

The act of unprofessional conduct which Respondent did not contest in the New York Board action was that of willfully or negligently failing to comply with substantial provisions of federal, state or local laws, rules or regulations governing the practice of medicine. The facts alleged in support of that charge included the allegation that Respondent undertook to perform a human research project related to the possible clinical manifestation of Lyme Disease in psychiatric patients without oversight of a human research review committee as required by the New York Public Health Law. Respondent argues that Pennsylvania law does not recognize his New York acts as unprofessional, and what is not improper in Pennsylvania should not be disciplined in Pennsylvania, so this matter should be dismissed.

This argument must be rejected for several reasons. First, although Respondent argues that the better statutory provision for understanding and judging this matter is section 41(8) of the Act, 63 P.S. § 422.41(8), and its companion regulation at 49 Pa. Code § 16.61(a)(1) through (19), which define 19 varieties of professional misconduct in the Commonwealth, his argument

completely disregards the fact that the Commonwealth did not charge Respondent with unprofessional conduct under those provisions or any other. Rather, the Commonwealth charged Respondent with having his license in another jurisdiction disciplined by the proper licensing authority in that other jurisdiction, in violation of section 41(4) of the Act, 63 P.S. § 422.41(4).

When a licensee is charged with violating section 41(4) of the Act, 63 P.S. § 422.41(4), the Board acts on the *fact* of disciplinary action in another state, without regard to the underlying events leading to that disciplinary action. The substance of the charges in the other jurisdiction and the procedure utilized in their resolution are immaterial for the purposes of section 41(4). *Johnston v. Com., State Board of Medical Education and Licensure*, 410 A.2d 103, 106 (Pa. Cmwlth. 1980); *see also Khan v. State Board of Auctioneer Examiners*, 842 A.2d 936, 950 (Pa. 2004) ("The focus of [the statutory reciprocal discipline provision] centers on the mere fact that a measure of discipline has been imposed on the licensee and does not concentrate on how or why it was imposed"); *Tandon v. State Board of Medicine*, 705 A.2d 1338, 1345 (Pa. Cmwlth. 1997) ("the only evidence which was required to support the board's actions in this case was evidence that Doctor was disciplined by the Board in Tennessee. *Johnston.* The substance of the charges underlying the actions which took place in Tennessee, and the procedure utilized in their resolution, were completely immaterial to the proceedings before the Pennsylvania Board"). Under these precedents, it is completely immaterial to the finding of a violation in this case – and to the Board's authority to discipline Respondent – whether the unprofessional conduct found in New York would also constitute unprofessional conduct in the Commonwealth.

Also, citing the legal principle of *expressio unius est exclusio alterius* (the express mention of one thing excludes all others), Respondent asserts that the Board's regulations, by specifically enumerating 19 circumstances which constitute "unprofessional conduct," exclude

all other possible actions which might constitute unprofessional conduct but which are not specifically enumerated. Based on this assertion, Respondent argues that since his actions underlying the New York Board action are not specifically enumerated in Pennsylvania law to be "unprofessional conduct," he cannot be disciplined for the New York Board action. However, leaving aside for a moment the fact that Respondent has not been charged here with unprofessional conduct, when Respondent argues for application of the principle of *expressio unius*, he disregards the Pennsylvania Supreme Court's treatment of the principle, disregards the plain language of the Board's regulation defining "unprofessional misconduct," disregards relevant case law, and disregards the rules of statutory construction.

The Pennsylvania Supreme Court has warned against automatic application of the *expression unius* maxim because it results in a failure to consider other means of construction. *St. Elizabeth's Child Care Center v. Dep't of Pub. Welfare*, 963 A.2d 1274, 1278 (Pa. 2009), *citing Consumers Education and Protective Association v. Nolan*, 368 A.2d 675, 684 (Pa. 1977) (warning automatic application of maxim may thwart legislative intent). The Supreme Court in *St. Elizabeth's Child Care Center* also pointed out that other courts and commentators have recognized limits on the maxim. *St. Elizabeth's Child Care Center,* 963 A.2d at 1278, *citing Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 372, 93 S. Ct. 1652, 36 L. Ed. 2d 318 (1973) (not reasonable to interpret acts delegating agency powers as including specific consideration of every evil to be corrected); *Texas Rural Legal Aid v. Legal Services Corporation*, 291 U.S. App. D.C. 254, 940 F.2d 685, 694 (D.C. Cir. 1991) ("this canon [*expressio unius*] has little force in the administrative setting"); Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 455-56 (1989) (warning against

mechanical application of *expressio unius*). Therefore, this principle cannot be mechanically applied here when there are other rules of statutory construction to be considered.

Indeed, the Board's regulation defining "unprofessional conduct" provides that "[u]nprofessional conduct includes, *but is not limited to*, the following [19 specifically enumerated instances of conduct]." 49 Pa. Code § 16.61(a)(emphasis added). The phrase "but is not limited to" plainly indicates that the 19 specifically enumerated instances of conduct are not the only ways a licensee may engage in unprofessional conduct; there may be more which the regulation does not specifically contemplate. Furthermore, *Marrero v. Bureau of Professional and Occupational Affairs*, 892 A.2d 854 (Pa. Cmwlth. 2005), a Pennsylvania case which Respondent himself cited, makes it plain that the Board "is entitled to deference in its determination of what constitutes "unprofessional conduct." *Marrero,* 892 A.2d at 858. That means the Board can decide in each individual case whether the facts constitute some unique brand of unprofessional conduct. That language of *Marrero* also supports the interpretation that the specification of 19 instances of unprofessional conduct does not mean that there are *only* 19 types of unprofessional conduct. *See Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, *supra*. Clearly, because it is not reasonable to interpret acts delegating agency powers as including specific consideration of every evil to be corrected, the *expressio unius* maxim cannot serve a purpose here.

Respondent's argument also disregards two fundamental Pennsylvania rules of statutory construction. The first is the rule that prohibits a court from inserting words into a statutory provision where the legislature has failed to supply them. *C.f. Key Sav. and Loan Ass'n v. Louis John, Inc.*, 549 A.2d 988, *appeal denied* 564 A.2d 1260, *appeal dismissed* 605 A.2d 1223 (Pa. 1988). While the Statutory Construction Act of 1972, 1 Pa. C.S. § 1501 *et seq.*, at § 1923(c),

allows the addition of "[w]ords and phrases which may be necessary to the proper interpretation of a statute **which do not conflict with the obvious purpose and intent, nor in any way affect its scope and operation"** (emphasis added), this is not such a case. When Respondent argues that the Board must find facts evidencing unprofessional conduct in Pennsylvania in order to proceed against Respondent based on the New York Board action, *see* Respondent's Motion at 6, he essentially argues that the Act authorizes reciprocal disciplinary action by the Pennsylvania Board only when the offense in the other jurisdiction would be an offense in the Commonwealth. Such an interpretation requires reading section 41(4) as if it restricts the Board's ability to impose reciprocal discipline on a licensee to offenses in that other jurisdiction which would also be offenses in the Commonwealth. But section 41(4) contains no such restrictive language, the addition of such language is not necessary to the proper interpretation of the statute, the addition of such language would restrict the scope of the provision, and the rule of *Key Sav. and Loan Ass'n v. Louis John, Inc., supra,* prohibits the addition of such language in construing the meaning of the provision.

The second rule of construction which Respondent disregards is the rule that, where a statute contains a given provision, omission of that provision from similar statutory provisions elsewhere is significant to demonstrate a different legislative intent. *C.f. Com. v. Bigelow*, 399 A.2d 392 (Pa. 1979). In the case of reciprocal disciplinary actions and Respondent's argument that the Act authorizes reciprocal disciplinary action by this Board only when the offense in the other jurisdiction would be an offense in the Commonwealth, the legislature has included such language in other licensing acts. For example, the Veterinary Medicine Practice Act, Act of December 27, 1974, P.L. 995, No. 326 ("VMPA"), *as amended*, 63 P.S. § 485.1 *et seq.*, at section 21(13), 63 P.S. § 485.21(13), authorizes the State Board of Veterinary Medicine to

impose discipline in a reciprocal matter if the discipline in the other state is based "on grounds similar to those which in this State allow disciplinary proceedings."[3] Under the rule of statutory construction enunciated in *Bigelow, supra*, the absence of similar language in the Medical Practice Act demonstrates a different legislative intent. In light of that different legislative intent and the prohibition on adding nonexistent language to a provision when construing it, Respondent cannot succeed in arguing that the actions for which he was disciplined in New York must constitute unprofessional conduct in the Commonwealth before the Pennsylvania Board can discipline him based on the New York Board action. Therefore, Respondent's Motion has no support in law or fact, and it is hereby **DENIED**.

Violations

This action is brought under subsection 41(4) of the Act, 63 P.S. § 422.41(4), which provides as follows:

> **§ 422.41. Reasons for refusal, revocation, or suspension of license**
>
> The board shall have authority to impose disciplinary or corrective measures on a board-regulated practitioner for any or all of the following reasons:
>
> * * *
>
> (4) Having a license or other authorization to practice the profession revoked or suspended or having other disciplinary action taken...by a proper

[3]The relevant portions of the VMPA reciprocal disciplinary provision read as follows:

> **§ 21. Grounds for disciplinary proceedings**
>
> The [State Board of Veterinary Medicine] shall suspend or revoke any license or certificate or otherwise discipline an applicant, licensee or certificate holder who is found guilty by the board or by a court of competent jurisdiction of one or more of the following:
>
> * * *
>
> (13) Revocation, suspension or other disciplinary action by another state of a license to practice veterinary medicine or veterinary technology in that state on grounds similar to those which in this State allow disciplinary proceedings, in which case the record of such revocation, suspension or other disciplinary action shall be conclusive evidence.
>
> * * *

63 P.S. § 485.21(13).

licensing authority of another state, territory or country, or a branch of the Federal Government.

* * *

The Commonwealth's evidence consists of a certified copy of the documents evidencing the Consent Order by which the New York Board adopted a Consent Agreement in which Respondent agreed that his New York license would be suspended until the expiration of his current registration period and that, upon the expiration of his current registration, he would be precluded from any future registration or issuance of a medical license in New York State. Additionally, Respondent admitted in testimony that he signed the subject Consent Agreement in New York, agreeing to those terms. This evidence demonstrates conclusively that the New York Board suspended Respondent's license in New York and precluded him from renewing it. Therefore, the Commonwealth has met its burden of proof[4] as to the charge set forth in the order to show cause.

In his Post-Hearing Brief, in the Discussion at parts A and B, Respondent makes the same arguments, in opposition to the finding that Respondent is subject to reciprocal discipline in this matter, that he made in his Motion. Since those arguments have been addressed above, in discussion of the Motion, there is no need to reiterate the discussion here. Respondent was charged with being disciplined in another state; the Commonwealth has proven that he was disciplined in New York. All of the elements of the offense have been demonstrated.

[4]The degree of proof required to establish a case before an administrative tribunal in an action of this nature is a preponderance of the evidence. *Lansberry v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). A preponderance of the evidence is generally understood to mean that the evidence demonstrates a fact is more likely to be true than not to be true, or if the burden were viewed as a balance scale, the evidence in support of the Commonwealth's case must weigh slightly more than the opposing evidence. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854, 856 (Pa. 1949). The Commonwealth therefore has the burden of proving the charges against Respondent with evidence that is substantial and legally credible, not by mere "suspicion" or by only a "scintilla" of evidence. *Lansberry*, 578 A.2d at 602.

Sanction

Respondent adds the argument, in part C of the Discussion in his Post-Hearing Brief, that section 41(4) of the Act, 63 P.S. § 422.41(4), comes into play in cases with "remarkable and shocking facts," Respondent's Post-Hearing Brief at 10, and that an "un-differentiated, un-nuanced, mechanical application" of section 41(4) does not serve the interests of the Commonwealth. Respondent's Post-Hearing Brief at 11. Respondent also argues, in part D, that other states where Respondent is licensed have inquired into his discipline in New York and have either imposed a lesser sanction or have not sanctioned Respondent at all. Because these latter two arguments go to the level of sanction to be imposed, rather than to the question of whether Respondent is in violation of the Act as charged in the order to show cause, which has already been decided above, they are most properly addressed in the context of determining the appropriate sanction to be imposed in this matter.

For a violation of the Act, the Board is authorized to impose disciplinary or corrective measures or a civil penalty pursuant to section 42(a), 63 P.S. § 422.42(a), which provides as follows:

> **§ 422.42. Types of corrective action.**
>
> (a) **Authorized actions.**—When the board is empowered to take disciplinary or corrective action against a board-regulated practitioner under the provisions of this act or pursuant to other statutory authority, the board may:
>
> (1) Deny the application for a license, certificate or any other privilege granted by the board.
>
> (2) Administer a public reprimand with or without probation.
>
> (3) Revoke, suspend, limit or otherwise restrict a license or certificate.

(4) Require the board-regulated practitioner to submit to the care, counseling or treatment of a physician or a psychologist designated by the board.

(5) Require the board-regulated practitioner to take refresher educational courses.

(6) Stay enforcement of any suspension, other than that imposed in accordance with section 40, and place a board-regulated practitioner on probation with the right to vacate the probationary order for noncompliance.

(7) Impose a monetary penalty in accordance with this act.

The Board has a duty to protect the health and safety of the public. Under professional licensing statutes such as the Act, the Board is charged with the responsibility and authority to oversee the profession and to regulate and license professionals to protect the public health and safety. *Barran v. State Board of Medicine,* 670 A.2d 765, 767 (Pa. Cmwlth. 1996), *appeal denied* 679 A.2d 230 (Pa. 1996). When a state licensing board confers a professional license, it represents the opinion of that State that the license holder has met the enumerated qualifications for that license, in terms of education, experience, honesty and integrity. *Khan v. State Board of Auctioneer Examiners*, 842 A.2d 936, 944 (Pa. 2004). It follows that, when a licensing board takes away a license, it represents the opinion of that State that the license holder is no longer qualified for the license due to a lack of education, experience, honesty or integrity. For that reason, it is very common in a reciprocal disciplinary action like this one to impose a disciplinary sanction which mirrors the sanction imposed in the other state unless the licensee presents mitigating evidence which would warrant a lesser sanction.

Respondent's argument that section 41(4) of the Act, 63 P.S. § 422.41(4), comes into play in Pennsylvania primarily in cases with "remarkable and shocking facts," Respondent's Post-Hearing Brief at 10, and that an "un-differentiated, un-nuanced, mechanical application" of

section 41(4) does not serve the interests of the Commonwealth, Respondent's Post-Hearing Brief at 11, is essentially an argument that this is not a remarkable or shocking case, and that mitigation should be considered. In fact, it is appropriate to consider mitigating factors in this matter, which refutes any accusation of an "un-differentiated, un-nuanced, mechanical application" of section 41(4). Each disciplinary case is considered on its own facts, and the type of discipline imposed is shaped to those facts.

Respondent's last argument, that other states where he is licensed have inquired into his discipline in New York and have either imposed a lesser sanction or have not sanctioned Respondent at all, is an argument in favor of finding mitigation. However, Respondent references New Mexico's action without there being any evidence of record as to what went on in that State, so statements Respondent makes in the post-hearing brief pertaining to New Mexico cannot be considered as evidence. See the discussion, above, under "Preliminary issue," which concluded that it is erroneous for the finder of fact in a matter to rely on evidence outside, or *dehors*, the record in making its findings of fact or other determinations. *Strongel, supra*, 371 A.2d at 933. Therefore, only the action imposed in Illinois may be considered, based on Respondent's testimony at the hearing that he received an 18-month suspension in that State.

In this case, there is both mitigation and aggravation to be found in that Illinois disciplinary action. The fact that the Illinois licensing authority imposed only an 18-month suspension, which is less than the sanction imposed in New York, is a mitigating factor. On the other hand, the fact that discipline was imposed on Respondent in Illinois at all is an aggravating factor, because it is an additional disciplinary action on his record. On the whole, then, those two factors balance each other out.

The New York Board action represents the opinion of that State that Respondent is no longer qualified for to hold a license due to some deficiency in Respondent's education, experience, honesty or integrity. *Khan, supra,* 842 A.2d at 944. Respondent testified, and argues, that he did not conduct research improperly in New York. However, that testimony and argument fly in the face of the Factual Allegations in the Statement of Charges against Respondent in the New York Board's action, the Factual Allegations specifically referenced in the Fifth Specification, which Respondent did not contest. Testifying to contrary facts in this proceeding challenges the basis for the New York Board's action, essentially arguing that no basis for the discipline existed. In effect, the testimony and argument combine to constitute a collateral attack on the New York Board's action, rather than mitigation. Such an attack is not properly made in this forum. *Johnston, supra,* 410 A.2d at 106. Therefore, the argument cannot be countenanced and no mitigation can come of it.

There is mitigation to be found, however, in the fact that Respondent's actions in New York, according to his credible testimony, helped at least one patient, and in the lack of evidence in the record demonstrating harm to any other patient. For that reason, a lesser sanction than that imposed in New York is warranted. The Commonwealth recommended that Respondent's license in the Commonwealth be actively suspended for 18 months. This sanction would mirror the Illinois disciplinary action, rather than the New York action, and in being something less than what the New York Board imposed, would reflect the mitigation that is present in this case. Accordingly, the Commonwealth's recommendation is a sound one, and the following order shall issue:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BEFORE THE STATE BOARD OF MEDICINE

Commonwealth of Pennsylvania, Bureau of Professional and Occupational Affairs	:	
	:	**Docket No. 1123-49-12**
v.	:	**File No. 11-49-08052**
Joseph J. Dambrauskas, M.D., Respondent	:	

ORDER

AND NOW, this 4th day of **December, 2012,** upon consideration of the foregoing findings of fact, conclusions of law and discussion, it is **ORDERED** that the license to practice medicine and surgery issued to Respondent, **Joseph J. Dambrauskas, M.D.**, license no. MD027571E, shall be **SUSPENDED** for a period of **18 MONTHS**.

Respondent shall relinquish his wall certificate, registration certificate, wallet card, and other licensure documents by the effective date of this order, by forwarding them to the following address: State Board of Medicine, Attn: Board Counsel, P.O. Box 2649, Harrisburg, PA 17105-2649.

Upon expiration of the 18-month suspension, Respondent may petition the Board to reinstate Respondent's license in the Commonwealth to unrestricted, non-probationary status. At the time of Respondent's petition for reinstatement, it shall be within the Board's discretion to hold a hearing or to approve Respondent's reinstatement request without a hearing.

This order shall take effect 20 days from the date of mailing unless otherwise ordered by the State Board of Medicine.

BY ORDER:

Ruth D. Dunnewold

Ruth D. Dunnewold
Hearing Examiner

For the Commonwealth: Keith E. Bashore, Esquire
GOVERNOR'S OFFICE OF GENERAL COUNSEL
DEPARTMENT OF STATE OFFICE OF CHIEF COUNSEL
PROSECUTION DIVISION
P.O. Box 2649
Harrisburg, PA 17105-2649

For Respondent: Roger E. Michener, Esquire
MICHENER LAW FIRM, LLC
P.O. Box 400
Placitas, NM 87043

Date of mailing: 12/4/12

(Medicine)

NOTICE

REHEARING AND/OR RECONSIDERATION BY HEARING EXAMINER

A party may file an application to the hearing examiner for rehearing or reconsideration **within 15 days of the mailing date** of this adjudication and order. The application must be captioned *"Application for Rehearing"*, *"Application for Reconsideration"*, or *"Application for Rehearing or Reconsideration"*. It must state specifically and concisely, in numbered paragraphs, the grounds relied upon in seeking rehearing or reconsideration, including any alleged error in the adjudication. If the adjudication is sought to be vacated, reversed, or modified by reason of matters that have arisen since the hearing and decision, the matters relied upon by the petitioner must be set forth in the application.

APPEAL TO BOARD

An application to the State Board of Medicine for review of the hearing examiner's adjudication and order must be filed by a party **within 20 days of the date of mailing** of this adjudication and order. The application must be captioned *"Application for Review"*. It must state specifically and concisely, in numbered paragraphs, the grounds relied upon in seeking the Board's review of the hearing examiner's decision, including any alleged error in the adjudication. Within an application for review a party may request that the Board hear additional argument and take additional evidence.

An application to the Board to review the hearing examiner's decision may be filed irrespective of whether an application to the hearing examiner for rehearing or reconsideration is filed.

STAY OF HEARING EXAMINER'S ORDER

Neither the filing of an application for rehearing and/or reconsideration nor the filing of an application for review operates as a stay of the hearing examiner's order. To seek a stay of the hearing examiner's order, the party must file an application for stay directed to the Board.

FILING AND SERVICE

An original and three (3) copies of all applications shall be filed with:

Prothonotary
P.O. Box 2649
Harrisburg, PA 17105-2649

A copy of all applications must also be served on all parties.

Applications must be received for filing by the Prothonotary within the time limits specified. The date of receipt at the office of Prothonotary, and not the date of deposit in the mail, is determinative. The filing of an application for rehearing and/or reconsideration does not extend, or in any other manner affect, the time period in which an application for review may be filed.

NOTICE

The attached Final Order represents the final agency decision in this matter. It may be appealed to the Commonwealth Court of Pennsylvania by the filing of a Petition for Review with that Court within 30 days after the entry of the order in accordance with the Pennsylvania Rules of Appellate Procedure. See Chapter 15 of the Pennsylvania Rules of Appellate Procedure entitled "Judicial Review of Governmental Determinations," Pa. R.A.P 1501 – 1561. Please note: An order is entered on the date it is mailed. If you take an appeal to the Commonwealth Court, you must serve the Board with a copy of your Petition for Review. The agency contact for receiving service of such an appeal is:

Board Counsel
P.O. Box 2649
Harrisburg, PA 17105-2649

The name of the individual Board Counsel is identified on the Final Order.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

Wesley J. Rish.
Assistant Counsel

wrish@pa.gov

January 31, 2013

VIA CERTIFIED AND FIRST CLASS MAIL
Roger E. Michner, Esquire.
Michner Law Firm.
P.O. Box 400
Placitas, NM 87043

VIA INTEROFFICE MAIL
Keith E. Bashore, Esquire
P.O. Box 2649
Harrisburg, PA 17105

RE: Final Order Adopting Hearing Examiner's Adjudication and Order:
Commonwealth of Pennsylvania, Bureau of Professional and Occupational Affairs v. Joseph J. Dambrauskas, M.D.
Docket No. 1123-49-12
File No. 11-49-08052

Dear Mr. Michner and Mr. Bashore:

Enclosed please find a final order issued by the State Board of Medicine in the above-referenced matter.

Sincerely,

Wesley J. Rish

Wesley J. Rish, Counsel
State Board of Medicine

Enclosure

cc: Tammy Dougherty, Board Administrator
State Board of Medicine