

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

In the Matter of the Automatic :
Suspension of the License to Practice :
Osteopathic Medicine and Surgery of :
Lawrence I. Miller, D.O., : Case No. 18-53-008576
License No. OS009548L :
:
:
:
:

**FINAL ORDER MAKING HEARING EXAMINER'S
ADJUDICATION AND ORDER FINAL**

AND NOW, this 12th day of March 2021, noting that neither party filed an *Application for Review* and that the State Board of Osteopathic Medicine (Board) did not issue a *Notice of Intent to Review*, in accordance with 1 Pa. Code § 35.226(a)(3) and 49 Pa. Code § 16.57, the hearing examiner's *Adjudication and Order*, dated November 13, 2020, appended to this order as **Attachment A**, is now the **FINAL ORDER** of the Board in this proceeding.

This order is retroactive to December 3, 2020, twenty days from the November 13, 2020 date of mailing of the hearing examiner's *Adjudication and Order*.

BY ORDER:

**BUREAU OF PROFESSIONAL AND
OCCUPATIONAL AFFAIRS**



**K. KALONJI JOHNSON
COMMISSIONER**

STATE BOARD OF MEDICINE



**RANDY G. LITMAN, D.O.
CHAIR**

Prothonotary Filed On:
Mar 12 2021 04:34 PM
Department of State

For Respondent:

Kerry E. Maloney, Esquire
Post & Schell, PC
17 North Second Street, 12th Floor
Harrisburg, PA 17101-1601

For the Commonwealth:

Adam L. Morris, Esquire

Board Counsel:

Dana M. Wucinski, Esquire

Date of Mailing:

March 16, 2021

Attachment A

HISTORY

This matter arises from a Notice and Order of Automatic Suspension issued August 31, 2020, by which the State Board of Osteopathic Medicine (“Board”) automatically suspended the license to practice as an osteopathic physician and surgeon of Lawrence I. Miller, DO (“Respondent”). The Board issued the Order of Automatic Suspension pursuant to section 14(b) of the Osteopathic Medical Practice Act¹ (“Act”), based on Respondent’s conviction for a felony offense under the Controlled Substance, Drug, Device and Cosmetic Act² (“Drug Act”).

On September 21, 2020, Respondent through counsel filed an answer to the Commonwealth’s Petition for Automatic Suspension. In new matter Respondent asserted that the inclusion of the full criminal complaint violated his rights to due process and that with his license already suspended this matter is a “piling on” of sanctions with no public purpose to be served.

By Notice of Hearing issued May 26, 2020, the hearing was scheduled for October 23, 2020, beginning at 9:30 a.m. at One Penn Center, 2601 North Third Street, Harrisburg, Pennsylvania before the undersigned hearing examiner. By order dated October 19, 2020, with agreement of the parties, the hearing was converted to video. The formal hearing was held as scheduled by video. Respondent did not attend but was represented by Kerry E. Maloney, Esquire. The Commonwealth was represented by prosecuting attorney Adam L. Morris, Esquire, who presented its case through documentary evidence. Respondent presented his answer to the petition but did not present any witness testimony. The parties made closing arguments and waived the filing of post-hearing briefs. The hearing transcript (N.T.) was filed on November 10, 2020, closing the record.

¹ Act of Oct. 5, 1978 (P.L. 1109, No. 261), *as amended*, 63 P.S. §§ 271.1 – 271.18.

² Act of April 14, 1972 (P.L. 233, No. 64), *as amended*, 35 P.S. §§ 780-101 – 780-144.

FINDINGS OF FACT

1. Respondent holds a license to practice as an osteopathic physician and surgeon in the Commonwealth of Pennsylvania, license no. OS009548L. (Exhibits C-1 and R-1 at ¶ 1, Official notice of Board records³)

2. Respondent's license was originally issued on August 14, 1997, expired on October 31, 2018, and unless otherwise ordered may be renewed, reactivated or reinstated thereafter upon the filing of the appropriate documentation and payment of the necessary fees. (Board records)

3. At all relevant times, Respondent held a license to practice as an osteopathic physician and surgeon in this Commonwealth. (Exhibits C-1 and R-1 at ¶ 4, Board records)

4. By order dated August 23, 2018 at case number 18-53-005429, the Board accepted a consent agreement by which Respondent's license was indefinitely suspended under section 15(a)(8) of the Act, 63 P.S. § 271.15(a)(8) (Board may suspend license of osteopathic physician who is guilty of unprofessional conduct – a departure from or failure to conform to the standards of acceptable and prevailing osteopathic medical practice); in order to have his license reinstated after successful completion of an individualized physical clinical competency assessment program through LIFEGUARD® or another skills assessment program approved by the Board and conclusion of any criminal proceedings against him, Respondent is required to demonstrate to the satisfaction of the Board that he is able to competently and safely practice as an osteopathic physician and surgeon and that he bears the requisite honesty, trustworthiness and integrity to be entrusted to hold a license to practice as an osteopathic physician and surgeon. (Exhibits C-1 and R-1 at ¶¶ 2-3, Board records)

³ Official notice of the Board's records may be taken pursuant to § 35.173 of the General Rules of Administrative Practice and Procedure (GRAPP), 1 Pa. Code §§ 31.1-35.251, which permits the presiding officer to take official notice of the Board's own records. *See Gleeson v. State Bd. of Medicine*, 900 A.2d 430, 440 (Pa. Cmwlth. 2006), *appeal denied*, 917 A.2d 316 (Pa. 2007). All citations to "Board records" are based on this taking of official notice.

5. On October 23, 2019, in the court of common pleas for Montgomery County, Pennsylvania at docket number CP-46-CR-0005736-2018, Respondent pled *nolo contendere* to one count of unlawful administration, dispensing, delivery or prescription of a controlled substance in violation of section 13(a)(14) of the Drug Act, 63 P.S. § 7801-113(a)(14) (unlawfully administer, dispense, deliver, gift or prescribe any controlled substance unless (i) in good faith in course of professional practice, (ii) within scope of patient relationship, and (iii) in accordance with treatment principles accepted by responsible segment of medical profession), concerning a Schedule II controlled substance and one count of violating section 13(a)(14) concerning a Schedule IV controlled substance; on January 28, 2020, Respondent was sentenced to nonreporting probation for an aggregate of 8 years and was ordered to complete 200 hours of community service, to forfeit his DEA registration for prescribing controlled substances, and not to practice as a physician or seek reinstatement of his physician license while on supervision. (Exhibit C-2 at *nolo contendere* plea, trial/plea/sentence, and information counts 2 and 3)

6. The Commonwealth filed its Petition on August 31, 2020. (Docket entries)

7. On August 31, 2020, the Board issued a Notice and Order of Automatic Suspension suspending Respondent's license upon his conviction for a felony offense under the Drug Act. (See, Notice and Order of Automatic Suspension issued August 31, 2020)

8. Respondent received service of the Petition for Automatic Suspension, as shown by his filing, through counsel, of a response thereto. (See, answer filed September 21, 2020)

9. Respondent received notice of the hearing on October 23, 2020, as shown by the attendance of legal counsel on his behalf. (N.T. 5)

10. Respondent did not attend the hearing. (N.T. 5)

CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter. (Findings of Fact Nos. 1–3)
2. Respondent received reasonable notice of the charge against him and was given an opportunity to be heard in accordance with the Administrative Agency Law, 2 Pa.C.S. §504. (Findings of Fact Nos. 1-3, 6-10)
3. Respondent’s license to practice as an osteopathic physician and surgeon is to be automatically suspended under section 14(b) of the Act, 63 P.S. § 271.14(b), because Respondent was convicted of unlawful administration, dispensing, delivery or prescription of a controlled substance, a felony offense under the Drug Act. (Findings of Fact Nos. 1-3, 5)

DISCUSSION

The Notice of Automatic Suspension suspended Respondent's license under section 14(b) of the Act, which provides as follows:

Section 14. Temporary and automatic suspensions.

* * *

(b) A license or certificate issued under this act shall automatically be suspended upon the legal commitment to an institution of a licensee because of mental incompetency from any cause upon filing with the board a certified copy of such commitment, conviction of a felony under the act of April 14, 1972 (P.L. 233, No. 64), known as "The Controlled Substance, Drug, Device and Cosmetic Act," or conviction of an offense under the laws of another jurisdiction which, if committed in Pennsylvania, would be a felony under "The Controlled Substance, Drug, Device and Cosmetic Act." As used in this section the term "conviction" shall include a judgment, an admission of guilt or a plea of *nolo contendere*. Automatic suspension under this subsection shall not be stayed pending any appeal of a conviction. Restoration of such license or certificate shall be made as hereinafter provided in the case of revocation or suspension of license or certificate.

63 P.S. § 271.14(b) (emphasis supplied).

As established by the findings of fact,⁴ on October 23, 2019 Respondent pled *nolo contendere* to one count of unlawful administration, dispensing, delivery or prescription of a controlled substance in violation of section 13(a)(14) of the Drug Act concerning a Schedule II controlled substance and one count of violating section 13(a)(14) concerning a Schedule IV controlled substance. Because he pled *nolo contendere* to these charges, Respondent was "convicted" of them under section 14(b) of the Act. Violation of this provision in the case of a controlled substance classified in Schedule I, II, III or IV is a felony. *See*, section 13(f) of the Drug Act, 35 P.S. § 780-113(f) (violation of section 13(a)(12), (14) or (30) with respect to a Schedule I

⁴The 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.

or II which is a narcotic is felony subject to 15 years imprisonment and fine; phencyclidine, methamphetamine, coca and derivatives or marijuana is felony subject to 10 years imprisonment and fine; other Schedule I, II or III is felony subject to 5 years imprisonment and fine; Schedule IV is felony subject to 3 years imprisonment and fine). Because he was convicted of these felony offenses under the Drug Act, Respondent's license to practice as an osteopathic physician and surgeon is subject to automatic suspension under section 14(b) of the Act.

Respondent argues that the automatic suspension of his license without prior notice and opportunity to be heard violated his due process rights as recognized in *Bhattacharjee v. Dept. of State, State Bd. of Medicine*, 808 A.2d 280 (Pa. Cmwlth. 2002). Because Dr. Bhattacharjee had been convicted in Federal Court under the Federal Drug Abuse Prevention and Control Act, the court could not conclude that the record was sufficient to establish that no likelihood existed of an erroneous deprivation of his property interest in his medical license in determining whether Dr. Bhattacharjee had been convicted of an offense under the laws of another jurisdiction which if committed in this Commonwealth, would be a felony under the Drug Act and thus grounds for automatic suspension of his license under the Medical Practice Act of 1985. *Bhattacharjee*, 808 A.2d at 283. As a medical doctor, Dr. Bhattacharjee was subjected to a statutory mandatory minimum period of 10 years of active suspension of his then in-force medical license, and he was currently practicing medicine. *Id.*

In *Khan v. BPOA, State Bd. of Medicine*, 2017 WL 5580062, *2 n. 5 (Pa. Cmwlth., no. 1047 C.D. 2016, issued Nov. 21, 2017) (memorandum opinion), the court rejected an argument that the State Board of Medicine erred by not holding an administrative hearing before automatically suspending the license of a medical doctor convicted of a felony under the Pennsylvania Drug Act and stated that the automatic suspension provisions of the Medical Practice

Act of 1985 and similar licensing acts that permit automatic suspension upon conviction for a felony under the Drug Act have consistently withstood due process challenges to suspension without a pre-deprivation hearing. By contrast to Dr. Bhattacharjee and like Dr. Khan, Respondent was convicted in a Pennsylvania court of violating the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act. And further in contrast to Dr. Bhattacharjee as well as Dr. Khan, as discussed below there is no mandatory minimum period of suspension for Respondent.

Because Respondent was convicted in a Pennsylvania court under Pennsylvania law, there is very little chance of an erroneous determination of whether Respondent was convicted of a felony offense under the Drug Act. Moreover, because Respondent's license was already suspended, he has very little property interest in his license that was deprived by the order of automatic suspension. The hearing examiner concludes that, because there was little chance of an erroneous deprivation and Respondent did not have a current right to practice, Respondent's procedural due process rights were not violated by failing to provide a pre-deprivation hearing and imposing the immediate automatic suspension of his license upon Respondent's conviction for a felony offense under the Drug Act.⁵

The Act provides the Board no discretion in automatically suspending a license upon conviction of a felony under the Drug Act or an offense in another jurisdiction that if committed in this Commonwealth would be a felony under the Drug Act. Section 14(b) of the Act simply mandates the automatic suspension yet provides that "restoration of such license shall be made as hereinafter provided." Automatic suspension under section 14(b) of the Act imposes no mandatory

⁵ Respondent also argues that the automatic suspension of his license for this Drug Act felony conviction while his license is already suspended is a "piling on" of sanctions for which there is no public purpose. The automatic suspension of Respondent's license is statutorily mandated and is in addition to disciplinary sanction authorized under the Act. No civil penalty is involved in this automatic suspension. The General Assembly recognized the public purpose in automatically suspending a physician's license upon a conviction under the Drug Act and neither imposed a requirement that the license otherwise be in good standing nor precluded other available disciplinary action.

waiting period⁶ prior to application for reinstatement; reinstatement is to be processed and reviewed under section 15(c)(6) of the Act. *Acri v. BPOA, State Bd. of Osteopathic Medicine*, 2018 WL 297087, *4 (Pa. Cmwlth., no. 856 C.D. 2017, issued Jan. 5, 2018) (memorandum opinion). Section 15(c)(6) provides that, alternative to denial of an application, imposition of a reprimand, revocation or suspension or other restriction of a license, placement on probation, or submission to care of a physician, whenever the Board finds that license may be refused, revoked or suspended under Act, it may restore or reissue a license to practice osteopathic medicine and surgery and impose any disciplinary or corrective measure which it might originally have imposed. 63 P.S. § 271.15(c)(6).

In this matter, it is not appropriate to consider reinstatement at this time. Counsel for Respondent acknowledged that the question of reinstatement is not before the hearing examiner. (N.T. 16). The consent order from 2018 provides conditions for reinstatement. Moreover, Respondent's criminal sentence precludes him from seeking reinstatement until completion of probation, which appears anticipated to be in 2028.

Accordingly, based upon the above findings of fact, conclusions of law and discussion, the following order will issue:

⁶ Section 6(c) of the Act prohibits the Board from licensing an applicant who has been convicted of a felonious act under the Drug Act or convicted of a felony relating to a controlled substance in a court of law of the United States or any other State, territory or country unless, (1) at least 10 years have elapsed from the date of conviction, (2) the applicant satisfactorily demonstrates to the Board that he has made significant progress in personal rehabilitation since the conviction such that licensure of the applicant should not be expected to create a substantial risk of harm to the health and safety of patients or the public or a substantial risk of further criminal violations, and (3) the applicant otherwise satisfies the qualifications contained in or authorized by the Act. Citing to *McGrath v. Bureau of Professional and Occupational Affairs*, 146 A.3d 310 (Pa. Cmwlth. 2016) (*en banc*), *aff'd* 173 A.2d 656 (Pa. 2017) which concerned application of similar provisions of the Professional Nurse Law, act of May 22, 1951 (P.L. 317, No. 69), *as amended*, 63 P.S. §§ 211 – 225.5, the *Acri* court rejected the Board's argument that section 6(c) of the Act imposed a 10 year waiting period or that section 14.1 of the Act (unless ordered to do so by appellate court, Board shall not reinstate revoked license unless after waiting for at least 5 years and meeting all qualifications for license) imposed a 5 year waiting period. *Acri*, at *3-4. In doing so, the court did not address whether the rehabilitation provisions of section 6(c)(2) of the Act could be applied in consideration of reinstatement following automatic suspension upon felony conviction under the Drug Act.

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

In the Matter of the Automatic :
Suspension of the License to Practice :
Medicine and Surgery of : **Case No. 18-53-008576**
Lawrence I. Miller, DO, :
License No. OS009548L :

ORDER

AND NOW, this 13th day of November, 2020, upon consideration of the foregoing findings of fact, conclusions of law and discussion, it is hereby ordered that the license to practice as an osteopathic physician and surgeon of **Lawrence I. Miller, DO**, license no. OS009548L, is indefinitely **SUSPENDED** retroactive to August 31, 2020, pursuant to section 14(b) of the Osteopathic Medical Practice Act, 63 P.S. § 271.14(b).

Respondent shall immediately CEASE the practice of osteopathic medicine and surgery in this Commonwealth. If he has not already done so, no later than 10 days after the mailing date of the final order of the State Board of Osteopathic Medicine, Respondent shall return all licensure documents, including wallet card and wall certificate, to:

Board Counsel
State Board of Osteopathic Medicine
P.O. Box 69523
Harrisburg, PA 17106-9523

Respondent may seek reinstatement of his license at any time. Respondent shall include with his request for reinstatement (i) an evaluation conducted by a treatment provider approved by the Professional Health Monitoring Program indicating that Respondent is capable of practicing as an osteopathic physician assistant with reasonable skill and safety, (ii) a current Criminal History Record Information (a/k/a "Criminal Record Check") from the governmental agency from all states where Respondent has resided since the suspension compiled no more than three months

prior to the request for reinstatement, and (iii) signed verification that Respondent has not practiced as an osteopathic physician assistant during the period of suspension. Respondent shall be required to demonstrate that, as provided in section 6(c)(2) of the Osteopathic Medicine Practice Act, Respondent has made significant progress in personal rehabilitation since the conviction such that his reinstatement should not be expected to create a substantial risk of harm to the health and safety of his patients or the public or a substantial risk of further criminal violations. In addition, Respondent shall comply with all reinstatement provisions of paragraph 5 of the consent agreement accepted by the Board by order dated August 23, 2018 at case number 18-53-005429.

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

BY ORDER:



Thomas A. Blackburn
Hearing Examiner

For the Commonwealth: Adam L. Morris, Prosecuting Attorney
GOVERNOR'S OFFICE OF GENERAL COUNSEL
DEPARTMENT OF STATE OFFICE OF CHIEF COUNSEL
PROSECUTION DIVISION
P.O. Box 69521
Harrisburg, PA 17106-9521

For the Respondent: Kerry E. Maloney, Esquire
Post & Schell, PC
17 North Second Street, 12th Floor
Harrisburg, PA 17101-1601

Date of mailing: *November 13, 2020*



NOTICE

REHEARING AND/OR RECONSIDERATION: A party may file an application 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 for rehearing or reconsideration is filed. However, 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.

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.

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 thirty (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 to contact for receiving service of such an appeal is:

Board Counsel
P.O. Box 69523
Harrisburg, PA 17106-9523

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