



Oregon

Kate Brown, Governor

503-612-4311 - JM
Office of Administrative Hearings

4600 25th Ave NE Suite #140

PO Box 14020

Salem, OR 97309-4020

(503) 947-1918

(503) 947-1920 facsimile

June 1, 2015

Eric Dover, M.D.
1615 Cloverleaf Road
Lake Oswego, OR 97034

Re: Office of Administrative Hearings Case #1001461

Dear Dr. Dover:

As you requested, I reviewed your letter outlining some serious concerns you have with regard to an administrative hearing you were a party to in September of 2010. The Office of Administrative Hearings (OAH) takes these kinds of concerns very seriously. Our practice when presented with a complaint regarding the conduct of an administrative law judge (ALJ), is to review the hearing record including any transcript or audio recording of the hearing itself. In our phone conversation several months ago, I told you that the OAH likely has a copy of an audio recording of this hearing. I subsequently learned that this was incorrect. While the OAH audio records most hearings, we do not always do so in cases where there is an official court reporter. Because there was a court reporter present at your hearing, the reporter's transcript would be the official record of the proceedings and an audio recording would be unnecessary.

However, as we discussed in a subsequent conversation, I later learned that an audio recording was made and I was able to secure a copy from the Oregon Medical Board. The recording covers two days of hearing and is more than 10 hours long. I have listened to the recording in light of the concerns expressed in your letter. I have also read ALJ Rick Barber's Proposed Order and have addressed each of your concerns separately below.

As we discussed, I do not have the authority to change the outcome of your case. Nor do I have the authority to correct any alleged misconduct by attorneys, agency representatives, or witnesses in your case. My review is limited solely to the actions taken by ALJ Barber who presided over your hearing. In my review I have focused on the specific concerns outlined in your letter to determine if Judge Barber's actions were professional and consistent with OAH standards.

I apologize for the length of this letter, but you have raised a number of serious concerns that warrant a thorough discussion.

1. Allowing Perjury

You contend that ALJ Barber allowed perjury during the hearing by:

- Allowing a witness to testify repeatedly that he had provided you with 1 ½ inches of medical records in January 2008.
- Allowing the same witness to testify that you ordered an x-ray of the wrong foot.
- Allowing the same witness to testify that you prescribed Allopurinol to him despite a prior allergic reaction.
- Allowing a Board witness to present himself as an expert.

Obviously a charge of perjury is a very serious matter. Judges do not independently investigate matters before them, but must rely on the parties to present evidence (in the form of documents or testimony) which the judge can rely upon to decide the issues in dispute. A person who knowingly lies while under oath not only commits a crime, but seriously undermines the fact-finding process and the ability of the judge to make a reasoned decision. It is for that very reason that judges need to consider both the direct testimony of a witness, and any inconsistencies developed through cross-examination, when evaluating whether a witness is telling the truth. In this case, you were represented by an attorney. To the extent that you believed that the witness was not telling the truth, your attorney had the opportunity to try to demonstrate that through cross-examination.

Unfortunately, even the most skilled attorneys and judges are not always able to detect when a witness is being untruthful. When two witnesses to the same event give conflicting details as to what occurred, it is often extremely difficult to determine which of the witnesses is telling the truth. I know that can be frustrating, particularly if you have direct knowledge of the events and do not believe the witness is being truthful. Judge Barber did not have direct knowledge of the events and thus had to make his own assessment of the evidence based on what was presented.

In listening to the testimony of the witness identified as Patient A, it was apparent that there was some confusion about which documents he provided to you on January 4, 2008, the documents he took home from the clinic on that same day, and documents that were allegedly shredded on January 6, 2008. There was very little testimony regarding the actual thickness of the set of documents that the witness claimed to have provided to you, other than a few questions asked by your attorney. To the extent that the witness had previously alleged that he had presented 1 ½ inches of documents to you, I did not hear him repeat that estimate at the hearing. Rather, he asserted that the medical records that were in the Board's exhibit were the same records that he had shown you, along with a copy of an x ray he claimed to have provided to you.

While you are correct that Judge Barber did not mention any allegation concerning 1 ½ inches of medical records in his Proposed Order, it is clear from his findings that he did not believe that to be the case. Rather, he made a finding that the witness provided you "approximately 24 pages of documents" including the medical marijuana card application forms. (Finding of Fact No. 12.) In reviewing this matter, I stacked 24 pieces of paper together and can verify that 24 pages are less than a quarter of an inch thick. So to the extent that the witness alleged that the documents were 1 ½ inches thick, it is apparent that Judge Barber did not believe that was true.

As to the testimony regarding the foot x-ray, it is true that Judge Barber believed the witness's testimony on this issue (Finding of Fact No. 9.) While Judge Barber did not directly address why he found this particular testimony to be accurate, his order does contain a discussion as to why he found the witness's testimony to be more reliable than yours. Judge Barber found the witness's testimony to be direct and consistent (Proposed Order, page 15.) In contrast, Judge Barber found that portions of your testimony were seemingly contradicted by a letter you wrote in 2008. He also found that your memory was not reliable given the number of patients that you saw at the clinic and a lack of detailed chart notes.

While I know that you disagree with Judge Barber's findings, the order does show that he noted that there were discrepancies between your testimony and that of the witness. His order explains how he resolved those discrepancies.

You also assert that the witness falsely testified that you told him to take Allopurinol; a medication which he claimed had previously caused an allergic reaction. However, while the proposed order finds that the witness was prescribed Allopurinol by a previous physician, and that he had claimed an allergic reaction, the order does not find that you specifically advised the witness to take the medication.

Finally, you allege that Judge Barber allowed the Board's witness, Dr. James Calvert, to commit perjury by presenting himself as an expert. However, whether a witness qualifies as an expert is a determination that must be made by the judge. The fact that a person may believe that he or she is an expert, even if that is not the case, would not be the basis for a finding of perjury. Nevertheless, Judge Barber in this case found that Dr. Calvert qualified as an expert to testify in your case. Judge Barber wrote a fairly lengthy explanation of why he believed Dr. Calvert met the legal criteria to testify as an expert (Proposed Order pages 12-14). In his analysis, he specifically addressed your attorney's contention that Dr. Calvert was not qualified as an expert because, unlike you, he did not practice as an independent contractor in a medical marijuana clinic. Judge Barber rejected that contention for reasons set forth in the order.

I do not expect you to accept Judge Barber's findings or resolution of these issues as correct. Obviously you have a different point of view which you expressed at the hearing. Also, unlike Judge Barber, you have direct personal knowledge of many of the events to which the witnesses testified. However, nothing in the audio recording or in the Proposed Order suggests that Judge Barber was aware that a witness committed perjury or was indifferent to the discrepancies in the evidence.

2. Expert Testimony

You raise other concerns about Dr. Calvert's expertise, including testimony elicited by your attorney that may have shown a lack of familiarity with the diagnosis and treatment of gout. In particular, you note that Judge Barber was presented with chapters from authoritative textbooks, as well as information from Boston University's website, that directly contradicted portions of Dr. Calvert's testimony.

It appears that the testimony at issue concerns a dispute over the proper method for diagnosing gout. Specifically, Dr. Calvert testified that gout can be diagnosed either through a joint fluid test for the presence of crystals in the blood, or can be diagnosed clinically based on the presence of the appropriate symptoms of gout. During cross-examination, your attorney read passages from the sources you identified, all of which supported the use of a joint fluid test for the diagnosis rather than relying on the presence of clinical symptoms. Dr. Calvert testified that while he agreed that a joint fluid test was necessary for a *definitive* diagnosis of gout, he asserted that the American College of Rheumatology supported a clinical diagnosis without performing a joint fluid test.

You also noted that Dr. Calvert was not familiar with the drug Uloric, a drug that had been introduced to treat gout approximately 18 months prior to your hearing. You testified that this new drug had received substantial publicity and was well known in the medical community.

You are correct that Judge Barber's Proposed Order does not note Dr. Calvert's lack of familiarity with this drug, nor does it note the Dr. Calvert's disagreement with the medical sources identified by your lawyer. It is also true that Judge Barber's Proposed Order specifically found that the patient at issue had been diagnosed with gout (Finding of Fact Nos. 3 and 9). However, in finding that the Board had proven its allegations against you, Judge Barber did not focus on the accuracy of the diagnosis. Rather, the focus of the order was on your review of the patient's medical records and the alleged lack of a physical exam. Notably, in Finding of Fact No. 20, Judge Barber quotes directly from Dr. Calvert's report which criticized your chart notes as lacking in detail and medical history. Dr. Calvert is also quoted as faulting you for saying that you had no "evidence" that the patient had gout, when Dr. Calvert says that you did have such evidence in the form of medical records that referenced such a diagnosis.

However, nothing in the Proposed Order faults you for either failing to diagnose gout, or for misdiagnosing gout. Rather, Dr. Calvert contended that the medical records that he believed that you had available at the time that you met with Patient A were sufficient to demonstrate that the patient had a valid diagnosis of gout. Dr. Calvert did not assert that the records included the result of a joint fluid test. However, he believed that the records were sufficient to show that the patient had a long-standing diagnosis of gout.

In the opinion section of the Proposed Order, Judge Barber noted that you discussed gout with the patient. He does not, however, find that you failed to confirm the diagnosis. Rather, based on his view of the evidence, Judge Barber concluded that you violated the standard of care through poor documentation in your chart notes. In particular, Judge Barber was concerned that many of the notes were cursory and lacking in detail. He also concluded that you had filled out a chart for the wrong patient by failing to notice that the name filled out on the top of the form was not the same as the patient you were examining.

I know that you disagree with those conclusions. However, Judge Barber's order relied on Dr. Calvert's expertise primarily with regard to the adequacy of documentation and record keeping with regard to your work with five patients at the Voter Power clinic. It is not readily apparent that the issues that you raised in your letter, which relate to the diagnosis and treatment of gout,

would necessarily have detracted from Dr. Calvert's ability to render a professional opinion on the standard of care regarding proper documentation and record keeping.

You also assert that Dr. Calvert was the subject of subsequent complaints in the weeks following the hearing. While I have no independent knowledge of any such complaints, it is clear that Judge Barber could not have been aware of complaints that had not yet been filed. It would therefore have been impossible for him to take such complaints into account when evaluating Dr. Calvert's testimony.

3. Hearsay

You note that Judge Barber allowed hearsay testimony to be admitted in your hearing; an act that you believe violates the constitution. However, as noted in ALJ Barber's proposed order, the Oregon Supreme Court has specifically upheld the admissibility of hearsay in administrative hearings and has held that hearsay may be relied upon as substantial evidence. *Reguero v. Teacher Standards and Practices*, 312 Or 402, 417-21 (1991). The court also cited to several cases from other states and federal jurisdictions that have allowed agencies to rely on hearsay in administrative hearings.

That does not mean that all hearsay is admissible, or that it is entitled to equal weight with other testimony. Rather, as noted by the court in *Reguero*, an ALJ is required to consider, among other things, the reliability of the hearsay testimony, the importance of the facts sought to be proved, and the consequences of either choosing to rely or not rely on the testimony. *Reguero* at 418. Judge Barber's proposed order quoted from *Reguero* and applied the legally required analysis to assess the reliability of hearsay statements from Patient A's wife and from another patient concerning an alleged mix-up in patient records.

While I can understand your concerns regarding the constitutionality of allowing hearsay as evidence in administrative hearings, the practice has specifically been allowed by the Oregon Supreme Court. The United States Supreme Court has also upheld the admissibility of some types of hearsay in administrative hearings. *Richardson v. Perales*, 402 US 389 (1971). I am not aware of any court finding that Oregon's practice is unconstitutional.

4. Mix-Up of Patient Records

Your letter states that Judge Barber held you primarily responsible for an alleged mix-up of forms provided by two patients. As a result of this alleged error, Patient A had the forms of Patient B, and vice versa.

While Judge Barber found that such an error occurred, his finding does not specifically attribute the cause to you. Instead, Finding of Fact No. 8 says "[e]ither the staff or Licensee switched the files." Thus, Judge Barber did not make any findings with regard to who caused the error. However, he did hold you at fault for failing to verify the accuracy of the records that you had when you examined patient A. (Proposed Order at page 16.) I know that you disagree with that conclusion, but it appears to have been based on Judge Barber's evaluation of the evidence on that point. To the extent that you believed his findings were not supported by substantial

evidence in the case, you had the opportunity to raise that issue on appeal. It is my understanding, however, that you did not appeal the Board's final order to the Oregon Court of Appeals. As we discussed in our phone conversation, I do not have the authority to change the Board's final order, or to alter any of Judge Barber's findings.

5. Alcohol Consumption

In your letter you note that Judge Barber was made aware of Patient A's excessive beer consumption, and the fact that such consumption can trigger episodes of gout, but failed to note this in his Proposed Order.

At the hearing, Patient A testified that he drank at least two bottles of beer every day, and sometimes consumed a full six pack. When your attorney asked him if he was aware that drinking beer could trigger gout, the patient said that he was aware of that fact and that he tries to cut back on the amount of beer he consumes. When questioned by your attorney, Dr. Calvert acknowledged that it would be problematic for a patient to drink beer while also consuming medical marijuana.

You are correct that this testimony is not discussed in the Proposed Order. However, as noted previously, the focus of Judge Barber's order was on allegations related to your charting of your examination of this patient and not on the validity of the diagnosis. Notably, the Proposed Order does not comment on the wisdom or appropriateness of this patient (or any other patient) using marijuana as a medication. Rather, the Proposed Order found that you failed to properly document your examination of the patient and failed to include on the chart an adequate explanation for your medical judgment that Patient A did not meet the criteria to allow him to qualify for a medical marijuana card.

6. Examination by Dr. George

In your letter you raise a number of concerns regarding the actions of Dr. Daryl George, the physician who examined Patient A in late January 2008. Specifically, you take issue with Dr. George's charting of the examination, the lack of any reference to Patient A's beer consumption, and his finding that Patient A had a diagnosis of gout. You also allege that Dr. George had engaged in serious misconduct in connection with his medical practice but was not disciplined by the Board. You also note, correctly, that Judge Barber did not mention these issues in his Proposed Order.

While I can understand your concerns, the issues in your hearing were limited to matters raised in the Board's notice. Those issues concerned your examination of patients, including Patient A, at a clinic for patients who intended to apply for a medical marijuana card. Judge Barber did not have the authority, in the context of the hearing, to inquire into any alleged improprieties by other physicians.

7. Bullying and Name Calling

Your letter states that ALJ Barber allowed and joined in name calling and bullying of you during your hearing. Such conduct would of course be unacceptable. However, the only specific example that you provided was your assertion that Senior Assistant Attorney General Warren Foote called you a “scofflaw” during the hearing and Judge Barber did not intervene.

The audio recording of the hearing confirms that Mr. Foote referred to you as a “scofflaw” in his closing statement. He did so while addressing a letter that you wrote to the Board stating that you would not comply with the Board’s order that you attend an evaluation with The Center for Personalized Education for Physicians (CPEP). Mr. Foote argued that the contents of that letter, and comments that you made in the hearing, demonstrated that you viewed yourself as a “scofflaw” who was “accountable to no one.”

It is true that Judge Barber did not intervene when those comments were made. However, it is notable that your attorney also did not object to Mr. Foote’s comments. Although I can certainly appreciate that the use of such strong rhetoric can be difficult to hear, it is not unusual for attorneys to use fairly strong language in closing arguments, nor would it always be appropriate for a judge to intervene in such circumstances. While I can understand why you would be offended by the comments, I do not agree that they amounted to bullying or name calling.

You also allege that Judge Barber made “open verbal statements of his opinions” and “unsubstantiated allegations about a witness’s credibility.” However, you did not provide any specific examples of when this occurred. Statements of personal opinions, or gratuitous comments, are generally not appropriate. But there are times during the course of a hearing, in response to objections or to motions, that a judge may be called upon to make rulings or credibility assessments on the record. Again, without specific examples, and without knowing the context of the alleged statements, I cannot determine whether Judge Barber acted appropriately. In listening to the recording, I did note that there were a few occasions when Judge Barber asked questions of witnesses, or made comments to attorneys when responding to objections, that reflected Judge Barber’s understanding of the testimony. However, I did not find any instances where Judge Barber made any allegations about a witness’s credibility.

You also assert that in his proposed order, Judge Barber “chose to castigate and assassinate the character” of you, your witness and your lawyer. I have read the proposed order and, respectfully, I do not believe that it amounted to character assassination. Obviously, Judge Barber ruled against you and found the testimony of the complaining witness to be more reliable than yours. However, I did not find his comments to be rude or unprofessional. Rather, they reflected his view of the evidence, the law, and the respective credibility of the witnesses. In his order, Judge Barber also had to resolve several motions and legal arguments made by the attorneys in the case. However, the tone of the order is, in general, respectful and appropriate. In one paragraph of the Proposed Order, Judge Barber does use fairly strong language in discussing whether you would comply with his proposed sanction, including describing you as “arrogant” and “angry at the Board.” However, it is important to note that those comments prefaced a section in which Judge Barber proposed a sanction that included a suspension and a path that would allow you to return to the practice of medicine. In his closing argument, Mr. Foote

asserted that a sanction less than revocation would not be appropriate because, he contended, it would be difficult to manage compliance with any conditions imposed upon you due to your past refusal to comply with the Board's order. Judge Barber's comments appear to be responsive to that argument, while still proposing that the Board provide a path to reinstatement. His characterization of you, in this context, did not appear to be gratuitous, but reflected his own assessment of whether you would be able to comply with the terms of his proposed sanction which, if accepted, could have allowed you to regain your license.

While you obviously disagree with Judge Barber's conclusions, I do not believe that the comments in the order were intended as castigation or character assassination.

8. Confidentiality Breaches by OMB

You assert that the Oregon Medical Board violated your confidentiality on three occasions by mailing confidential letters to the wrong address. As I am sure you are aware, I have no authority to investigate the Board or to sanction them for any alleged breaches. However, in your letter you assert that Judge Barber was aware of the breaches but did not mention them in his Proposed Order.

While I can appreciate your concerns, Judge Barber's authority in this case was limited to addressing the accusations that the Board made against you in its disciplinary notice. Judge Barber did not have the authority to address issues related to Board breaches of confidentiality except to the extent that they directly related to the issues raised in the Board's notice. Based on what is set forth in your letter, it is not clear to me how such breaches would have been an issue that should have been addressed by the judge.

This is not to minimize your concern. Obviously a breach of confidentiality is a very serious matter. But it does not appear to be a matter which Judge Barber had authority to address.

9. Ignoring Medical Marijuana Laws

In your letter you assert that Mr. Foote repeatedly stated that you had prescribed medical cannabis to patients. You note that this is not an accurate statement. Rather, you point out that the role of a physician under the Oregon Medical Marijuana Program (OMMP) is to determine whether the patient has a qualifying medical condition for which marijuana may be helpful. You note that the OMMP form itself explicitly states that it is not a prescription for marijuana. In reviewing your concerns, I found a copy of the current version the Attending Physician's Statement on the Oregon Health Authority's website.¹ That form is consistent with your explanation and actually states in two places that the form is *not* a prescription for marijuana.

In listening to the recording of the hearing, there were several times when Mr. Foote, individual witnesses, and, Judge Barber, made comments about the physician's role in the OMMP process that were not strictly accurate. On several occasions there were comments to the effect that a

¹ <http://public.health.oregon.gov/DiseasesConditions/ChronicDisease/MedicalMarijuanaProgram/Documents/ommp-attending-physicians-statement.pdf>

physician either authorized the use of medical marijuana or certified a patient as eligible for a card. The role of the physician, as you correctly observe, is more limited. The physician is required to certify that the patient has been diagnosed with a qualifying condition and that marijuana may be helpful in mitigating the symptoms or effects of that condition. The OMMP, and not the physician, is responsible for determining eligibility for the program and for issuing a medical marijuana card.

However, despite the confusion in the language used, it did not appear to me that that statements at issue detracted from the fairness of the proceedings. On several occasions, your attorney noted the misstatements and they were corrected. It also appeared, in context, that the misstatements were not intentional. Notably, none of the hearing participants appeared to take issue with the more limited role of the physician when such statements were corrected. In addition, nothing in the Proposed Order suggests that you were prescribing marijuana or somehow directly engaged in issuing medical marijuana cards.

10. Private Conversation between ALJ Barber and Assistant Attorney General

You allege that directly after your hearing, Judge Barber and Mr. Foote “walked together by themselves to a private room and had a face to face meeting alone.” You also wrote that it is “unknown” whether they were later joined in that conversation by the Board’s Executive Director and by Board members.

A private conversation between an ALJ and an attorney for one side of a contested case would, at the very least, create the appearance of a conflict of interest. In addition, to the extent that such a conversation concerned legal or factual matters in the contested case, such communications would amount to improper ex parte communication which would need to be disclosed pursuant to ORS 183.685. As I am sure you are aware, the Proposed Oder does not refer to any such private conversation.

It is unclear from your letter why you believe that Judge Barber and Mr. Foote were meeting, as opposed to having exited the hearing room trough a common door. As you note, the hearing took place at the Board’s offices. The hearing was over and presumably people were walking out of the room, including Mr. Foote and Mr. Barber. The fact that they walked out of the room at the same time, at the conclusion of the hearing, does not, by itself, indicate that any private meeting took place.

Given that the hearing was over four years ago, it would be very difficult to determine precisely what occurred. Without additional information, there is an insufficient basis for me to conclude that Judge Barber engaged in any inappropriate private conversations with Mr. Foote.

11. Lack of Discovery

You assert that Judge Barber “condoned the complete absence of discovery” in the case. Discovery in contested case hearings is governed by OAR 137-003-0566 through 137-003-0572. Although discovery is generally more limited than would be the case in a trial court, parties are entitled to seek discovery that is “reasonably likely to produce information that is generally

relevant and necessary to the case, or is likely to facilitate resolution of the case.” OAR 137-003-0567. If an agency denies discovery to a party, the party can seek an order from the administrative law judge ordering that the discovery be produced. OAR 137-003-0568. It does not appear that such a motion was filed in this case. In the absence of such a motion, an administrative law judge will generally not intervene and order discovery.

I know that you believe that discovery was unnecessarily slow and may have been incomplete. However, it does not appear from the record that Judge Barber implicitly condoned or agreed with the Board’s actions with regard to discovery. Rather, it appears from the record that discovery was handled informally between the attorneys with neither party requesting a discovery order from Judge Barber.

12. General Concerns about the Hearings Process

In your letter, you assert that Oregon Medical Board hearings are “shams” in which the ALJ is present only “to give the illusion of fairness and justice.” You also claim that Judge Barber “does nothing more in his Proposed Order than repeat what the OMB had already written about me prior to my ‘hearing,’ except he added a large helping of subjective character assassination.”

While it is true that Judge Barber’s Proposed Order found primarily in favor of the Board, it is not the case that his order merely repeated the Board’s allegations. For example, on page 16 of the Proposed Order, Judge Barber found that the Board had proven only four of the five allegations of unprofessional conduct alleged by the Board that related to charting deficiencies. More significantly, Judge Barber recommended a lesser sanction than what was sought by the Board. The Board was seeking to revoke your license. In his Proposed Order, however, Judge Barber recommended an alternative sanction that included a two-year suspension, a CPEP evaluation, and further training as designated by the Board. According to the Proposed Order, Judge Barber recommended this alternative sanction as a way for you to rebuild your relationship with the Board and reenter the practice of medicine.

As you know, in its Final Order the Board rejected Judge Barber’s recommended sanction and elected to revoke your license. I know you disagree with that action, and that you likely disagree with Judge Barber’s recommended alternative. However, the difference between the two orders demonstrates that Judge Barber was not simply parroting the Board’s proposals.

You also note your concern with the hearing process overall, and the conduct of the Oregon Medical Board in their regulation of physicians in Oregon. Specifically, you write that you no longer have faith in our system of government and in the willingness and ability of public officials and judges to address the problems with the Board as you see them. While I cannot endorse your view of the Board, I would call to your attention a recent case from the Oregon Court of Appeals which reversed a final order issued by the Oregon Medical Board on the basis of improper notice. The case is *Murphy v. Oregon Medical Board*, 270 Or App 621 (2015). I note the case not to comment on its merits, but as evidence that Oregon courts do take these matters seriously and do not simply affirm any and all Board actions. Based on my own conversations with judges in our office, I can also assure you that ALJs working for the Office of Administrative Hearings do not view themselves as rubber stamps and do not hesitate to rule

against an agency, including the Oregon Medical Board, when they believe that the evidence does not support the allegations in the notice on appeal.

13. Constitutional Concerns

You contend that Judge Barber violated several provisions of the federal and state constitutions during the hearing process including:

- Violation of the due process clause of the 5th Amendment to the Constitution of the United States;
- Violation of the right to a jury trial in suits at common law under the 7th Amendment to the Constitution of the United States;
- Violation of the excessive fines provision of the 8th Amendment to the Constitution of the United States;
- Violation of the due process and equal protection provisions of the 14th Amendment to the Constitution of the United States;
- Violation of the prohibition against secret courts in Article I, Section 10 of the Constitution of Oregon;
- Violation of the prohibition against excessive fines in Article I, Section 16 of the Constitution of Oregon; and
- Violation of the oath of office provision of Article XV, Section 3 of the Constitution of Oregon;

In my review of the hearing record, and in looking into the specific issues identified in your letter, I did not find anything that would amount to a violation of due process or equal protection. You were informed of the allegations against you. You were provided a right to a hearing in which you participated with the assistance of counsel. You were also given the right to appeal the Board's Final Order to the Oregon Court of Appeals. Although the outcome of the hearing was not in your favor, the procedures were consistent with due process.

It is true that you were not granted a jury trial and your hearing was not open to the public. However, because this was an administrative hearing, and not a judicial proceeding at common law, the requirements for a jury trial and a public hearing do not apply. While I can understand why you may believe that those protections should extend to such hearings, I am aware of no legal authority that would impose those requirements.

The sanction in your case included the loss of a valuable professional license, a \$10,000 civil penalty, and assessment of the costs of the proceeding. While these sanctions are unquestionably severe, I know of no authority that would find them to be in violation of constitutional safeguards against excessive fines. To the extent that you believe the sanctions were unduly harsh relative to the alleged misconduct, you could have raised that issue on appeal. However, I do not believe that the sanction recommended by Judge Barber in his Proposed Order violated constitutional prohibitions on excessive fines.

Your reference to the oath of office provision of the Oregon Constitution appears to refer to the obligation of public officials to support the state and federal constitutions. As explained above, I

do not believe that Judge Barber's conduct in this case violated the constitutional provisions you identified.

14. ALJ Code of Ethics

You contend that Judge Barber violated several provision of the ALJ Code of Ethics which is published on the OAH website.² You specifically cite the following provisions:

1-101 (A) An Administrative Law Judge shall observe high standards of conduct so that the integrity, impartiality and independence of Oregon's administrative hearings system is preserved, and shall act at all times in a manner that promotes public confidence in the conduct of administrative hearings as a part of state government. Public confidence is promoted when an Administrative Law Judge conducts hearings in a dignified and respectful manner, and arrives at decisions in which facts have been found fairly and the law has been applied accurately.

(B) An Administrative Law Judge shall not engage in conduct that reflects adversely on the officer's character, competence, temperament or fitness to serve as an Administrative Law Judge. An Administrative Law Judge shall not engage in conduct involving misrepresentation, fraud, dishonesty, deceit or felonious criminal behavior.

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(D) An Administrative Law Judge shall not allow family, social or other relationships to influence official conduct or judgment.

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IMPARTIAL AND DILIGENT PERFORMANCE OF OFFICIAL DUTIES

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2-102 (A) An Administrative Law Judge shall provide to all parties or participants in a proceeding, and to their legal representatives, the right to be heard according to law.

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(D) An Administrative Law Judge shall promptly disclose to the parties any communication not otherwise prohibited by this rule that will or reasonably may influence the outcome of an adversary proceeding. At a minimum, the disclosure shall identify the person with whom the communication occurred and the

² http://www.oregon.gov/OAH/pages/Code_of_Ethics.aspx

substance of the communication and the Administrative Law Judge shall give the parties a reasonable opportunity to respond to the information disclosed.

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2-103 An Administrative Law Judge shall not, while a proceeding is pending in any forum within the officer's jurisdiction, make any public comment that might reasonably be expected to affect the outcome or impair the fairness of the proceeding. This rule shall not prohibit an Administrative Law Judge from making public statements in the course of official duties, from explaining for public information the procedures of the forum, from establishing a defense to a criminal charge or civil claim against the ALJ, or from otherwise responding to allegations concerning the ALJ's conduct in the proceeding.

2-104 (A) Except as provided in (B) herein, the Administrative Law Judge shall disqualify himself or herself in a proceeding in which the ALJ's impartiality reasonably may be questioned, including but not limited to instances when:

(1) the Administrative Law Judge has a bias or prejudice concerning a party, a representative, or any other participant in the proceeding before the ALJ, or has knowledge, obtained from sources outside the proceeding, of disputed evidentiary facts concerning the proceeding;

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2-105 An Administrative Law Judge shall be faithful to the law and shall decide matters on the basis of the facts and applicable law.

2-106 An Administrative Law Judge shall not be swayed by partisan interests, public clamor or fear of criticism.

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2-108 An Administrative Law Judge shall not act in a way that the officer knows, or reasonably should know, would be perceived by a reasonable person as biased or prejudiced toward any of the litigants, witnesses, lawyers or members of the public.

I have reviewed the above provisions in light of the specific concerns set forth in your letter and I do not believe that Judge Barber's conduct violated the ALJ Code of Ethics. In reviewing the order, and in listening to the hearing recording, I did not find any evidence that Judge Barber had any bias or prejudice against you or your attorney. He was courteous to all parties during the course of the hearing and it appears that his resolution of the case was based upon his own sincere assessment of the law and the facts in your case. I have no reason to believe that Judge Barber had any family, social or other relationship with any of the hearing participants that would have affected his decision in this case.

I am not aware of any public comment from Judge Barber with regard to this case at any stage of the proceedings. It does not appear that Judge Barber had any personal knowledge of the facts in this case or that there was any basis on which his impartiality could reasonably be questioned.

The Code of Ethics reiterates the ALJ's obligation to disclose any ex parte communication. Although you have asserted your belief that Judge Barber had a private conversation with Mr. Foote, at this time I have insufficient evidence that such a conversation occurred.

Conclusion

Dr. Dover, I can appreciate the toll that the circumstances of this case, and the resulting loss of your license, have had on you and your family. I can also understand why you would be upset by the outcome of the hearing, and by decisions made by the Oregon Medical Board and by Judge Barber. However, in reviewing the record, I did not find that Judge Barber fell short of his professional obligations. In making this assessment, I am not endorsing any particular decision made by Judge Barber or the outcome of the case. Judges are expected to exercise a fair amount of discretion, within the bounds of the law, when presiding over an administrative hearing. Another judge hearing the same case may have handled the hearing differently or may have reached different conclusions. But ultimately, the judge is required to be fair and impartial in applying the law.

I believe that Judge Barber met those requirements. While he found against you, he was courteous to you and your attorney, as well as to all other hearing participants at the hearing. His Proposed Order explains why he reached his conclusions and resolved a number of legal and factual issues in dispute. Ultimately, while he found that the Board had proven most of its allegations, Judge Barber recommended a sanction that would have allowed you to return to the practice of medicine.

Once again, I understand that this case has had significant consequences for you and your family. However, it does not appear from the record that Judge Barber violated his professional obligations in this case.

Sincerely,

A handwritten signature in black ink, appearing to read "John Mann", with a horizontal line extending from the end of the name.

John Mann
Presiding Administrative Law Judge
Office of Administrative Hearings