State of Alaska
Ombudsman

INVESTIGATIVE REPORT

Ombudsman Complaint A2009-0919
(Finding of Record and Closure)

Public Report

July 16, 2010

This report has been redacted to remove the complainant's identifying information, as well as information made confidential and protected by law.

Summary of the Complaint

The complainant is a medical doctor who surrendered his Alaska license in the mid 1990s. Several years later he began seeking reinstatement of his license. After various proceedings, the complainant (Dr. X), met with the Alaska Medical Board during one of the Board's quarterly meetings, and believed that the Medical Board was about to enter into a consent agreement with him. The next day, however, the Board decided not to prepare a consent agreement until Dr. X satisfied further prerequisites.

Dr. X filed a complaint with the ombudsman in July 2009. Through his attorney, he alleged "failure of due process and communication failure."

The original complaint allegation, restated in terms consistent with AS 24.55.150 was:

> ***Allegation 1: Contrary to law: The Medical Board did not provide the complainant with due process.***

As discussed in this report, the ombudsman investigator did not find convincing evidence of a failure of constitutional due process. However, the Ombudsman Act, at AS 24.55.150, states in relevant part:

> (a) An appropriate subject for investigation by the ombudsman is an administrative act of an agency that the ombudsman has reason to believe might be
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> (1) contrary to law;

(2) unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law; [emphasis added]

Assistant Ombudsman Beth Leibowitz investigated the following allegation, restated in terms consistent with AS 24.55.150:

> ***Allegation 2: Unfair: The Medical Board did not provide the complainant with notice or a meaningful opportunity to be present before taking further action on the complainant's petition for license reinstatement, did not provide timely notice of the Medical Board's action, and refused to place the complainant's case on the agenda of the next meeting of the Medical Board after the complainant learned of the Medical Board's further action.***

Neither allegation addresses the substantive conditions placed on Dr. X as prerequisites to license reinstatement, because the available evidence indicated that the Medical Board acted within its discretion and chose conditions that were comparable to those placed on other physicians seeking license reinstatement after prolonged absence from practice.

Assistant Ombudsman Beth Leibowitz provided notice of the investigation to the Medical Board's executive administrator, Leslie Gallant, via e-mail on May 6, 2010. The ombudsman sent a preliminary investigative report to the agency on May 25, 2010, and received a response to the preliminary report on July 6, 2010. This final report incorporates the agency response, which was provided by Director Lynne Smith for the Division of Corporations, Business and Professional Licensing.[1]

Background

Dr. X was licensed to practice medicine in Alaska and one other state in the 1980s. He was subject to disciplinary action in the other state, entered into a stipulation with that state's medical board, failed to comply, and surrendered that license in the early 1990s. After that, the Alaska State Medical Board placed Dr. X's Alaska license on probation with terms set by a Memorandum of Agreement. Dr. X did not comply with the Memorandum of Agreement, and surrendered his Alaska license in the mid-1990s.

Several years later, Dr. X began seeking reinstatement of his Alaska license. He presented evidence that he had corrected the problems that led to his disciplinary action, which the Board apparently accepted. After an appeal involving the interpretation of regulations governing reinstatement, the Medical Board again considered Dr. X's application. Dr. X also appeared before the Board.

Proceedings related to the ombudsman complaint

According to the Board's minutes from the crucial meeting at which Dr. X appeared, the Board considered Dr. X's application on the first day of the meeting. Dr. X and his attorney were present. The minutes from that day state that the Board passed a motion to "craft a consent agreement for a conditional license agreement, license to be issued upon execution of the agreement." The minutes added, "The board's staff will work to draft a document for

[1] Executive Administrator Leslie Gallant retired from state service in June 2010. The division director responded to the ombudsman's preliminary report, as the executive administrator's position was vacant.

consideration at [the next quarterly meeting]." Dr. X and his attorney were present at that point and thus had actual notice of the decision on the first day of the meeting.

The Board's executive administrator, Leslie Gallant, researched some of Dr. X's assertions and also prepared a draft consent agreement, which she presented to the Board on the second day of the Board meeting, along with information that tended to refute some of Dr. X's statements from the day before. After discussion, the Board adopted a different course of action from the day before. The Board passed another motion, this one directing Dr. X to undergo assessment by a Board-approved program "within one year from the date of the order for the purpose of determining his fitness to re-enter the practice of medicine."

Neither Dr. X nor his attorney was present on the second day of that meeting. They did not have any reason to anticipate that the Board would further consider Dr. X's application before the next quarterly meeting. Dr. X's attorney wrote to Executive Administrator Gallant two weeks after the meeting, inquiring about the purported consent agreement, but did not receive a response. The attorney sent another letter approximately a week before the next quarterly Board meeting, and only then received a response from the then-executive-administrator. That letter, which the attorney received two days before the next scheduled Board meeting, read in relevant part:

> When Dr. [X] spoke with the board, they were reconsidering his application for an Alaska license…. The board passed a motion to write a consent agreement for a conditional license for him with the license to be issued upon execution of the agreement.
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> [The following day], the board continued its discussion of his case and considered a draft consent agreement…. The board determined that it could not draft a consent agreement until it has a report of Dr. [X's] status from CPEP[2] or a program similar to CPEP. Without that report, the board would not know the specific requirements to include in the consent agreement.

Dr. X's attorney demanded in writing that Dr. X's reinstatement application be placed on the agenda for the upcoming quarterly Board meeting. Dr. X was not on the agenda at that point, and the deadline for requesting agenda items had passed weeks before. The Board did not add Dr. X's case to the agenda. Dr. X and his attorney did telephone during the public comment segment at the end of that Board meeting, and stated their position to the Board.

Legal Issues: Allegation 1

> ***Allegation 1: Contrary to law: The Medical Board did not provide the complainant with due process.***

Dr. X complained about the Medical Board receiving additional advice from the executive administrator and taking further action in his absence on the second day of the Board meeting. He basically alleged a type of ex parte communication because the board received additional information and argument from staff, without allowing him an opportunity to hear and respond to the additional material.

The ombudsman investigator spoke with AAG Gayle Horetski, who advises the Medical Board. Ms. Horetski noted that the specific statutes and regulations governing the Medical Board do not

[2] Center for Personalized Education for Physicians.

require that the license applicant be present while the Board considers an application, nor do they require that the Board have the applicant or licensee present when consulting with the Board's executive administrator regarding a potential consent agreement. She was not convinced that any constitutional due process requirements had been violated.

The ombudsman investigator reviewed available case law, but did not find any material that would justify contradicting the opinion of the Board's experienced counsel. Given the lack of clear-cut precedent demonstrating a constitutional due process violation, and given the evaluation by an assistant attorney general experienced in advising licensing boards, the ombudsman concludes that there is insufficient evidence to support the ombudsman finding the Board's actions "contrary to law." Therefore this allegation is found to be ***not supported.***

Fairness: Allegation 2

> ***Allegation 2: Unfair: The Medical Board did not provide the complainant with notice or a meaningful opportunity to be present before taking further action on the complainant's petition for license reinstatement, did not provide timely notice of the Medical Board's action, and refused to place the complainant's case on the agenda of the next meeting of the Medical Board after the complainant learned of the Medical Board's further action.***

Although probably legal, the administrative actions in this case appear to meet two of the ombudsman's criteria for an unfair administrative act. The Office of the Ombudsman's policies and procedures manual at 4040(3) list the types of problems that the ombudsman generally classifies as "unfair," including agency actions in which:

> (A) adequate and reasonable notice of the matter was not provided to the complainant;
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> (B) adequate opportunity was not given for a person having an interest in a decision to be heard or, if applicable, to conduct an examination or cross-examination to secure full disclosure of the facts;

Unlike a court, the ombudsman's mandate includes the ability to criticize actions that fall short of good administrative practice without being so egregious as to be illegal, but, unlike a court, the ombudsman cannot issue binding orders. The ombudsman can look at matters more flexibly than a court, but can only recommend or suggest changes, not order them.

The Medical Board's problem here is threefold because it:

(1) Did not attempt to notify Dr. X that his application would be taken up by the Board again on the second day of the Board's meeting;
(2) Failed to promptly notify Dr. X that it had changed its earlier decision to his detriment;
(3) Did not allow Dr. X to appear on the Board's agenda at the next meeting, even though the original Board decision had contemplated that his application and a draft consent agreement would be considered at the next meeting.

Board changes its mind on the complainant's consent agreement

On the first day of the Board meeting in question, Dr. X left the meeting believing that he had a deal – that the Board had decided to offer him a consent agreement, as documented by the Board passing a motion to that effect. When the Board changed its mind the next day the situation

inevitably bore resemblance to a bait-and-switch. The appearance of unfairness was worsened by the fact that the first day's minutes indicate that the Board had intended not to take up Dr. X's case until the next quarter's meeting, so Dr. X had no reason to anticipate further deliberations and a change of course the following day.

License applicants are not necessarily present when the Board considers their applications, although the Board may request that an applicant appear to be interviewed pursuant to 12 AAC 40.055. This was not, however, the usual license application. First, Dr. X had been present the day before and was clearly interested in being present for the Board's decision, so would presumably have wanted to be notified that the Board was reconsidering his case on the second day of the Board meeting. Second, the Board had already acted on the first day of the meeting, so the complainant did not know that further action was pending. Third, the additional information offered to the Board on the following day tended to cast some doubt on Dr. X's credibility, and he was unable to respond to that information before the Board acted on it.

Board fails to notify complainant it changed its mind Once the Board took action (again) on the second day of its meeting, the fact that Dr. X was not aware of that action could have been mitigated by prompt notice informing him of the change in the Board's course and the information upon which the change was based.

The failure to give Dr. X prompt notice perpetuated the appearance of unfairness, because it extended the period during which he waited for a consent agreement that was not in fact forthcoming. This was not simply a delay in notifying the applicant of the outcome of the Board's deliberations; it was a delay in notifying him that the Board had drastically modified the outcome he had already witnessed when the Board passed a motion indicating that the Board would enter into a consent agreement to reinstate Dr. X's license.

During the three months that Dr. X remained ignorant of the Board's change of heart, his attorney inquired about the status of the purported consent agreement. The first inquiry came two weeks after the Board meeting – two weeks after the Board had long decided not to prepare a draft consent agreement until Dr. X underwent further assessment. Despite the fact that the Board had already changed course and decided not to prepare a consent agreement, Dr. X and his attorney were left in the dark. The attorney's further inquiry the week before the next scheduled Board meeting finally produced a response.

Dr. X alleged that the delay in notice (approximately three months) harmed him. Fortunately for the Board, Dr. X could not readily take action in reliance on the first day's decision, because the Board had merely decided to draft a consent agreement – it was closer to an "agreement to agree" than to a concrete agreement that could be acted upon. Originally, the Board apparently had planned to consider the terms of a consent agreement at the next quarterly meeting, so Dr. X could not have reasonably contemplated a license reinstatement sooner than the following quarter.

Further, it appears that Dr. X could have begun the process of enrolling in an assessment program for reentering physicians without waiting for the proposed consent agreement. Judging from the minutes of the earlier meeting, Dr. X expected to participate in such a program as an essential part of any forthcoming consent agreement. In short, Dr. X's three months of reliance on the defunct Board decision did not in fact hinder him from taking necessary action toward license reinstatement or cause him to act to his detriment.

Dr. X was harmed in one respect – by the time he learned of the Board's second-day decision to delay any consent agreement until after he obtained he satisfied more prerequisites, he had missed the deadline for agenda requests for the Board's next meeting. That deadline had passed three weeks before, so when Dr. X actually learned that the Board had changed its earlier decision, he could not make a timely request to appear before the Board at the upcoming meeting.

The chance to be heard: participation in the next Board meeting

Originally, the Board apparently intended to deliberate on a draft consent agreement at the next quarterly meeting. If the Board had continued as it originally planned, then Dr. X's application would presumably have been on the next meeting agenda for further consideration of a consent agreement. Until two days before that upcoming meeting, Dr. X and his attorney still had reason to believe that Dr. X's application would indeed be part of the agenda. Then, when they learned that there was no draft consent agreement on the table after all, and that Dr. X did not have a place on the agenda, it was far too late to make timely request to be placed on the Board's agenda for that meeting. Under the circumstances, courtesy would dictate allowing Dr. X a spot on the agenda, given that he had good reason to expect that the Board would be considering his application and given that he wished to present an argument to the Board regarding the Board's second decision, taken in his absence.

The ombudsman notes that Dr. X did in fact comment to the Board during the public comment section of that meeting, after the Board had covered its agenda items. The Board members responded to his comments. As a practical matter, this remedied the refusal to afford him a place on the meeting agenda; however, it did not entirely mitigate the impression that the Board had no interest in allowing the applicant to be heard.

Finding on Allegation 2

Under 21 AAC 20.210 the ombudsman evaluates evidence relating to a complaint against a state agency to determine whether criticism of the agency's actions is valid, and then makes a finding that the complaint is *justified*, *partially justified*, *not supported*, or *indeterminate*. A complaint is *justified* "if, on the basis of the evidence obtained during investigation, the ombudsman determines that the complainant's criticism of the administrative act is valid." Conversely, an allegation is *not supported* if the evidence shows that the administrative act was appropriate. If the ombudsman finds both that an allegation is *justified* and that the complainant's action or inaction materially affected the agency's action, the allegation may be found *partially justified*. An allegation is *indeterminate* if the evidence is insufficient "to determine conclusively" whether criticism of the administrative act is valid.

The initial problem here was that the Board appeared to have made a decision on Dr. X's case one day, but received further information and took new action to the applicant's detriment the next day, while Dr. X remained ignorant of events. The Board's staff unfortunately compounded the problem by delaying notice of the second-day decision. Finally, the Board's refusal to acknowledge Dr. X's request to be placed on the agenda added insult to injury, because the Board's earlier actions had implied that Dr. X's case would be on the agenda at the next meeting. When Dr. X learned otherwise, he could not make a timely request to be included on the agenda because he did not receive notice of that decision until three days before the meeting.

The ombudsman finds the allegation of unfairness ***justified***, because the license applicant did not receive prior notice that the Board was reconsidering its decision, nor prompt notice afterward that the Board had changed its position.

Agency response: Director Lynne Smith responded to the ombudsman's report on behalf of the Division of Corporations, Business and Professional Licensing. The director did not dispute the finding, and provided the following comments:

> We understand your conclusion that, from Dr. [X's] perspective, the procedure the Board followed when it reconsidered its earlier decision on his license reinstatement application was not fair to him. In retrospect, it certainly would have been preferable for the Board staff to have at least tried to contact Dr. [X] or his attorney to let them know that the Board intended to again consider the license reinstatement application on [the second day of the Board meeting]. If the staff had not been able to reach Dr. [X] or his attorney on short notice, at the very least Board staff should have notified them of the Board's new decision immediately after the Board meeting. The former executive administrator was very busy, and had only limited support staff to assist her in administrative tasks, but this should have been accorded a high priority over other routine Board business. It was unfortunate that, following the delayed notice of the Board's new decision, the Board declined to relax its deadline for agenda items and place the matter on the agenda for its next meeting….

The Board did not dispute the Ombudsman's proposed findings in either allegation. Under 21 AAC 20.210, investigation of a complaint with multiple allegations that results in some allegations being found *justified* and some *not supported* or *indeterminate* results in a finding of *partially justified* for the complaint taken as a whole. Therefore, the finding in this complaint will be ***partially justified.***

Recommendations and Agency Response

The Ombudsman Act (AS 24.55) contemplates that the ombudsman "may investigate to find an appropriate remedy." In this case, any appropriate remedy does not affect Dr. X directly, as the substance of the Board's decision is not at issue. If he is to obtain reinstatement of his Alaska license, he will have to meet the Board's prerequisites; although he was not treated particularly well procedurally, those events did not invalidate the necessity of demonstrating how he will gain competence to resume practice.

Naturally, problems with communication and timeliness would be more easily remedied by providing additional support staff for the Medical Board, as the executive administrator currently performs nearly all support functions alone. The executive administrator's time is clearly scarce, especially during the quarterly Board meetings.

Despite the scarcity of time, the Medical Board's reputation for fairness could only be enhanced by additional efforts to notify applicants and licensees when the Board acts on their cases.

> ***Recommendation 1: The Medical Board and Board staff should assign priority to informing an applicant or licensee when the Board may reconsider previous action,***

> ***thus changing the individual's circumstances. If prior notice is impossible, provide prompt notice of the new Board action***.

This recommendation is intended to avoid the perception of a bait-and-switch. The ombudsman suggests that informal notice by telephone or e-mail should be sufficient, and suggests that individuals with cases before the Board be encouraged to provide contact information and be told that they may be contacted on relatively short notice.

Agency response: Director Lynne Smith agreed with the recommendation, and stated that the Division of Corporations, Business and Professional Licensing "will convey it to current and future Board members and staff."

> ***Recommendation 2: The Medical Board and Board staff should contact an applicant or licensee whose case may come before the Board at a meeting so that the individual has an opportunity to be present, at least in cases when the applicant or licensee has asked to meet with the Board or has previously been present.***

Many license applicants do not need or want to appear before the Board. This recommendation is aimed at those who have demonstrated a desire to be present and involved.

Agency response: Director Lynne Smith responded on behalf of the Division of Corporations, Business and Professional Licensing:

> This recommendation is a little more problematic.
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> As you concluded in your discussion of the first allegation, neither state law nor principles of due process require that a license applicant be present while the Board considers an application or consults with its executive administrator.
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> As you know, the State Medical Board consists of five physicians, a physician assistant, and two members of the public, all of whom serve without compensation other than per diem and expenses; AS 08.64.010, 08.64.110. Except for special teleconference meetings convened to address specific urgent Board matters, the Board meets (face-to-face) only four times a year; AS 08.64.085. The Board reviews applications and issues licenses for physicians (M.D.'s, D.O.'s, and podiatrists), physician assistants, and mobile intensive care paramedics; AS 08.64.107, 08.64.170. It also issues temporary permits, residency and internship permits, and permits for locum tenens practice; AS 08.64.270—08.64.275.
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> The Board reviews an average of more than 500 license applications every year. Once a licensing examiner has reviewed the application for completeness, it is sent to the Board's executive administrator for final review. At that time a letter is sent to the license applicant informing him or her that, unless the executive administrator finds a problem with the application, the Board will consider the application at its next meeting on a specified date. So, in a routine application process, the applicant would know at which meeting the Board will likely consider his or her application.
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> It simply would not be administratively feasible to schedule a time for license applicants to address the Board at its four meetings a year. As you note at page 8 of your preliminary report: "Many license applicants do not need or want to

> appear before the Board. This recommendation is aimed at those who have demonstrated a desire to be present and involved."
>
> We don't know how many applicants would have "a desire to be present and involved." Some applicants might request to be present and address the Board out of concern that the Board might draw an inference adverse to the applicant if he or she did not attend the Board meeting. If even a small percentage of routine license applicants ask to appear before the Board, this could substantially lengthen Board meetings and increase costs, placing more demands on those who donate their time to serve as Board members.
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> If the second recommendation is interpreted to apply only to applicants or licensees who have unique special circumstances, such as Dr. [X], the number of persons whom the Board staff would have to notify and schedule would be greatly reduced, and the recommendation would be administratively feasible to implement. We will convey your second recommendation to the Board for its consideration at its next meeting, scheduled for July 29-30, 2010 in Nome.

Ombudsman comments: The ombudsman qualified the second recommendation, in an effort to direct the Board's energy toward notification of licensees and applicants who had already demonstrated their interest either by expressly asking to be present during the Board's consideration of their case, or by making the time to attend a previous meeting. The ombudsman presumes that this group would self-select for those who have the "unique special circumstances" referred to by the director.

Also, the ombudsman simply recommended that the Board notify individuals of plans to consider their cases, and it appears from the director's response that the Board already complies with this recommendation for most applications. According to the director, either the licensing examiner or the executive administrator sends the applicant a letter informing him or her of the meeting at which the application is scheduled for consideration. This is the essence of the ombudsman's recommendation. The ombudsman suggests that in cases of discipline, probation, and reinstatement, one would expect the same courtesy as the Board already extends to routine applicants – notification of the time and place at which the Board plans to consider and act on the matter.

The ombudsman does foresee a potential administrative burden in providing an option for telephonic attendance for applicants who cannot practically attend in person, but who still wish to hear the proceedings. However, a Web cast of the public portion of the meeting might address this logistical problem – interested parties could listen in via the Web.

The director also expressed concern that some applicants would feel a need to take up meeting time "out of concern that the Board might draw an inference adverse to the applicant if he or she did not attend the Board meeting." Given the director's statement that the Division routinely notifies the majority of applicants of when the Board will consider their applications, the ombudsman does not see why fully implementing the recommendation would substantially change the situation. Further, the Board's staff can discourage redundant or gratuitous commentary by explaining to applicants that the Board usually decides applications based on the paperwork alone, and that a presentation is not a normal part of the process.

If an applicant or licensee asks to address the Board, beyond simply being present, the Board retains the ability to limit the time allotted and control the meeting schedule. The Board already does this in numerous cases. The ombudsman simply recommends consistent notice, so that all licensees and applicants have the same opportunity to be present and to address the Board.

In summary, the ombudsman suggests that implementing this recommendation will not necessarily increase meeting time, but it will help ensure a minimum of fairness to professional licensees and applicants whose livelihoods are at stake.

Conclusion

The ombudsman has closed this complaint as ***justified*** and ***partially rectified***.

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