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Before The
State Of Wisconsin
MEDICAL EXAMINING BOARD

In the Matter of the Disciplinary Proceedings
Against **ROGER A. PELLMANN, M.D.**,
Respondent

FINAL DECISION AND ORDER
Order No. ~~ORDER 0002065~~

Division of Enforcement Case No. 09 MED 418

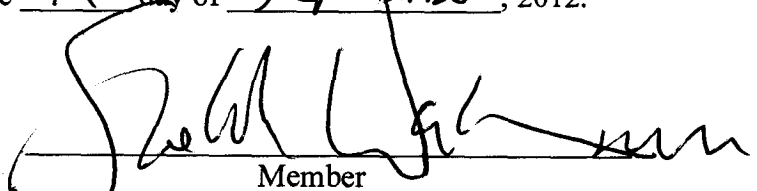
The State of Wisconsin, Medical Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, make the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Medical Examining Board.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated at Madison, Wisconsin on the 19 day of September, 2012.



Member
Medical Examining Board



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Disciplinary Proceedings
Against **ROGER A. PELLMAN, M.D.**,
Respondent

PROPOSED DECISION AND ORDER
DHA Case No. SPS-09-0131
ORDER 0002065

Division of Enforcement Case Nos. 09 MED 418

The parties to this proceeding for purposes of Wis. Stat §§ 227.47(1) and 227.53 are:

Roger A. Pellmann
FCI Morgantown
Federal Correctional Institution
Morgantown, WV 26507

Wisconsin Medical Examining Board
P.O. Box 8935
Madison, WI 53708-8935

Department of Safety and Professional Services, Division of Enforcement, by

Attorney Pamela M. Stach
Department of Safety and Professional Services
Division of Enforcement
P. O. Box 8935
Madison, WI 53708-8935

PROCEDURAL HISTORY

These proceedings were initiated when the Department of Safety and Professional Services, Division of Enforcement (the Division), filed a formal Complaint on December 17, 2009, against Respondent Roger A. Pellmann, M.D. An Amended Complaint was filed on August 20, 2010, and a Second Amended Complaint was filed on December 22, 2011, the latter of which alleged that Dr. Pellmann engaged in unprofessional conduct and that his license was therefore subject to disciplinary action pursuant to Wis. Stat. § 448.02 and Wis. Admin. Code § Med 10.02(2)(r).

Initially, the case was held in abeyance pending Dr. Pellmann's federal trial on the criminal charges stemming from the same conduct that is the subject of this disciplinary action. Following the criminal trial, the matter was then set for a hearing on September 1, 2010. However, on July 27, 2010, the hearing was cancelled at the request of the parties because they had entered into a signed stipulation, which the Division intended to present to the Wisconsin Medical Examining Board (the Board). On August 20, 2010, however, the Division's attorney, Jack Zwieg, sent an e-mail to the administrative law judge (ALJ) stating that Dr. Pellmann engaged in conduct which resulted in the Division withdrawing the agreement pursuant to Wis. Admin. Code § SPS (then RL) 2.12 and amending the Complaint to contain additional counts resulting from the new allegations. The Amended Complaint was filed on August 20, 2010. A new prehearing was set for September 20, 2010, three days after Dr. Pellmann's scheduled sentencing hearing in federal court. However, the federal court subsequently continued the sentencing date to October 12, 2010 and, at the request of Dr. Pellmann's attorney and with the consent of Division's counsel, the prehearing conference was rescheduled to October 18, 2010.

At the request of the parties, the prehearing conference was again postponed to November 1, 2010 to give the parties an opportunity to attempt to resolve the matter. On November 1, 2010, Dr. Pellmann's attorney filed a motion to withdraw as counsel, which was granted.

On November 29, 2010, the administrative law judge received an e-mail from Attorney Zwieg, stating that he had spoken with Dr. Pellmann, who was then in the Kenosha County Jail and that Dr. Pellmann would be moved to a federal facility the following day. Attorney Zwieg further stated that Dr. Pellmann informed him he would be appearing *pro se* in the disciplinary proceeding and that it appeared that the parties would be able to reach an agreement without a hearing. Attorney Zwieg stated that once Dr. Pellmann was at his new address, Attorney Zwieg would send him a settlement offer and that he did not believe a prehearing conference needed to

be set. No further update was received by the Division of Hearings and Appeals until September 28, 2011, when a paralegal from the Division informed the ALJ that the case had been reassigned from Attorney Zwiig to Attorney Pamela Stach. The ALJ requested an update and was informed by the paralegal on October 3, 2011, that the criminal conviction, which is the main basis of the complaint, was on appeal and that argument and briefing were completed. The paralegal stated that because the criminal case would directly affect the disciplinary proceeding, the Division was requesting an extension of the hearing until such time as a ruling is received. By Notice dated October 6, 2011, the matter was scheduled for a status conference for December 15, 2011. The Notice was sent to the Kenosha County Detention Center. By letter dated November 9, 2011, the parties were informed that the case had been reassigned to the undersigned ALJ.

Dr. Pellmann was not present at the telephone status conference on December 15, 2011. Attorney Stach informed the undersigned ALJ that Dr. Pellmann was no longer at the Kenosha County Detention Center, but was instead at a federal correctional institution in Morgantown, W.V. Attorney Stach provided a fax number for Dr. Pellmann and informed the ALJ that the matter was still pending in the United States Court of Appeals for the Seventh Circuit.

By Notice dated December 15, 2011, a status conference was scheduled for January 11, 2012. At the status conference, the Division stated that, despite the fact that the matter was still pending in the Seventh Circuit Court of Appeals, the disciplinary matter should nonetheless be set for hearing. Dr. Pellmann argued that a hearing should not occur until he was released from prison. The matter was set for a telephone hearing on February 21, 2012 and deadlines for discovery, and for the filing and exchange of exhibits and exhibit and witness lists were also set.

Prior to hearing, however, the Division filed a motion for summary judgment on February 2, 2012, with attached affidavit and exhibits. A briefing order was issued and a response brief, reply brief and rebuttal brief were subsequently filed.

UNDISPUTED MATERIAL FACTS

1. Respondent Roger A. Pellmann, M.D. (D.O.B. 8/16/54) is licensed to practice medicine and surgery in the State of Wisconsin (#25006-20) which was granted on October 22, 1982. Dr. Pellman's registration to practice under that license expired on October 31, 2011 and Dr. Pellmann holds the right to renew this registration through October 2016.

2. On December 11, 2009, the Division of Enforcement, received an informal complaint from the United States Drug Enforcement Administration in which the latter alleged questionable prescribing, drug use and improper recordkeeping by Dr. Pellmann. Division case file 09MED418 was subsequently opened for investigation. On December 16, 2009, the Board found probable cause to file a formal complaint against Dr. Pellmann, and on December 17, 2009, the Division filed a formal Complaint in this matter.

3. On June 4, 2010, the United States District Court for the Eastern District of Wisconsin found Dr. Pellmann guilty of ten counts of possessing with intent to distribute and distributing fentanyl outside of his medical practice and not for a legitimate purpose, in violation of § 21 U.S.C. 841(a)(1), and six counts of obtaining morphine sulfate by fraud and deception, in violation of § 21 U.S.C. 843(a)(3), and sentenced Dr. Pellmann to forty-eight (48) months on each count to run concurrently. (Judgment of Conviction: Division's Memorandum in Support of Motion for Summary Judgment, Affidavit of Paralegal Beth Cramton, Exhibit A.)

4. Based on this information, an Amended Complaint was filed on August 20, 2010. On December 22, 2011, a Second Amended Complaint was filed narrowing the issues in the matter to the conviction and its substantial relationship to the practice of medicine.

5. The convictions were upheld by the Court of Appeals for the Seventh Circuit on February 10, 2012. *See United States v. Pellmann*, 668 F.3d 918 (7th Cir. 2012).

DISCUSSION AND CONCLUSIONS OF LAW

I. Standards Governing Summary Judgment

“The summary judgment procedure as provided in s. 802.08, Stats., shall be available to the parties upon approval by the division or the administrative law judge.” Wis. Admin. Code § HA 1.10(2).

Pursuant to Wis. Stat. § 802.08, summary judgment “shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Wis. Stat. § 802.08(2). “When a motion for summary judgment is made and supported as provided in this section [§ 802.08], an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial.” Wis. Stat. § 802.08(3). “If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.” *Id.*

“A motion for summary judgment may be made on the basis of the pleadings or other portions of the record in the case or it may be supported by affidavits and a variety of outside material.” *Tews v. NHI, LLC*, 2010 WI 137, ¶ 49, 330 Wis. 2d 389, 793 N.W.2d 860 (citation omitted). On a motion for summary judgment, the facts are construed in favor of the non-moving party. *DeHart v. Wis. Mut. Ins. Co.*, 2007 WI 91, ¶ 7, 302 Wis. 2d 564, 734 N.W.2d 394.

II. Burden of Proof

The burden of proof in disciplinary proceedings is on the Division to show by a preponderance of the evidence that the events constituting the alleged violations occurred. Wis. Stat. § 440.20(3). To prove by a preponderance of the evidence means that it is “more likely than not” that the examined action occurred. *See State v. Rodriguez*, 2007 WI App. 252, ¶ 18,

306 Wis. 2d. 129, 743 N.W.2d 460, citing *United States v. Saulter*, 60 F.3d 270, 280 (7th Cir. 1995).

III. Violations of Wisconsin Statutes and Administrative Code

Following an investigation and disciplinary hearing, if the Board determines that a medical doctor is guilty of unprofessional conduct, it may “warn or reprimand that person, or limit, suspend or revoke any license, certificate or limited permit granted by the board to that person. . . .” Wis. Stat. § 448.02(3)(c). The phrase “unprofessional conduct” as used in Wis. Stat. § 448.02(3)(c) includes “[t]hose acts or attempted acts of commission or omission defined as unprofessional conduct by the board under the authority delegated to the board by s. 15.08(5)(b).” Wis. Stat. § 448.015(4)(am)1.

Pursuant to Wis. Admin. Code § MED 10.02(2)(r), the Board has defined “unprofessional conduct” to include: “Conviction of any crime which may relate to practice under any license, or of violation of any federal or state law regulating the possession, distribution, or use of controlled substances as defined in s. 961.01(4), Stats. A certified copy of a judgment of a court of record showing such conviction, within this state or without, shall be presumptive evidence thereof.”

Thus, under § MED 10.02(2)(r), unprofessional conduct may be conducted in two distinct ways, either: (1) by being convicted of a crime that “may relate” to the practice under any license, or (2) by violating a federal or state law regulating the possession, distribution, or use of controlled substances as defined in Wis. Stat. § 961.01(4). These two methods of engaging in unprofessional conduct are examined below.

A. Summary Judgment is Warranted Because Dr. Pellmann’s Conviction May Relate to the Practice of Medicine and Surgery.

As stated, Wis. Admin. Code § MED 10.02(2) (r) defines unprofessional conduct, in part, as: “conviction of a crime which may relate to practice under any license...”

The Division has provided a certified copy of the conviction which establishes that on June 4, 2010, The United States District Court for the Eastern District of Wisconsin found Dr. Pellmann guilty of ten counts of possession with intent to distribute and distributing fentanyl outside of his medical practice and not for a legitimate purpose in violation of 21 U.S.C. § 841(a)(1), and six counts of knowingly obtaining morphine sulfate by misrepresentation, fraud and deception in violation of 21 U.S.C. § 843(1)(3). Both of those United States Code sections govern the access to and distribution of controlled substances. The convictions were upheld in *United States v. Pellmann*, 668 F.3d 918 (7th Cir. 2012).

These crimes for which Dr. Pellmann was convicted “may relate to” the practice of medicine and surgery. Dr. Pellmann is licensed to practice medicine and surgery in the State of Wisconsin. The practice of medicine and surgery is defined in part as: “... (a) to examine into the fact, condition, or cause of human health or disease, or to treat, operate, prescribe or advise for the same, by any means or instrumentality.” Wis. Stat. § 448.01(9). As part of this practice, physicians licensed in the State of Wisconsin may obtain controlled substances, including fentanyl and morphine sulfate, for use in their practice for treatment of their patients. *See Pellmann*, 668 F.3d at 920 (“As a practicing physician, Pellmann was also registered with the DEA, which authorized him to order, prescribe and administer controlled substances under appropriate circumstances. As part of his practice at his medical clinics, Pellmann administered fentanyl to his patients to treat pain.”)

“Like morphine, fentanyl is a Schedule II narcotic pain reliever, but more effective because it is short-acting and has 100 times the potency.” *Id.* at 920. Fentanyl is a Schedule II Controlled Substance pursuant to Wis. Stat. § 961.16(3)(f). Morphine is a Schedule II Controlled Substance pursuant to Wis. Stat. § 961.16(2)(a)10.

While licensed, physicians may obtain and dispense controlled substances as part of their legitimate medical practice; however, they may do so only as part of that medical practice and

not in an unlawful manner. Conviction of a crime which involves possessing controlled substances with the intent to distribute or distributing them in an unlawful manner, is on its face, directly related to the practice of medicine and surgery. Accordingly, the Division is entitled to summary judgment as a matter of law.

B. Dr. Pellmann's Conviction is Uncontroverted Evidence of Violation of A Federal or State Law Regulating the Possession, Distribution or Use of Controlled Substances as Defined in § 961.01 (4).

“Unprofessional conduct” also includes: “Conviction . . . of violation of any federal or state law regulating the possession, distribution, or use of controlled substances as defined in s. 961.01(4), Stats.” Wis. Admin. Code § MED 10.02(2)(r). In addition, “[a] certified copy of a judgment of a court of record showing such conviction, within this state or without, shall be presumptive evidence thereof.” *Id.*

Dr. Pellmann was convicted of ten counts of possession with intent to distribute and distributing fentanyl outside of his medical practice and not for a legitimate purpose in violation of 21 U.S.C. § 841(a)(1), and six counts of knowingly obtaining morphine sulfate by misrepresentation, fraud and deception in violation of 21 U.S.C. § 843(1)(3). Both of those United States Code sections govern the possession of, distribution and use of controlled substances. Moreover, fentanyl and morphine sulfate are Schedule II controlled substances under Wis. Stat. §§ 961.01(4).

Based on the judgments of conviction in this matter and the Seventh Circuit Court of Appeals decision upholding the convictions, the facts are not in dispute that Dr. Pellmann has violated federal laws which regulate the possession, distribution and use of controlled substances as defined in Wis. Stat. § 961.01(4).

Dr. Pellmann asserts that the jury verdicts, the judgments of conviction and the Seventh Circuit Court of Appeals' decision were incorrect. In essence, he asks that he be permitted to relitigate the facts of the underlying criminal conviction before this tribunal. Dr. Pellmann's

mere assertion that the jury and courts got it wrong is insufficient to create a disputed issue of material fact that would require a fact-finding hearing in this matter.¹ Accordingly, the Division is entitled to summary judgment as a matter of law.

IV. Appropriate Discipline

The three purposes of discipline are: (1) to promote the rehabilitation of the licensee; (2) to protect the public from other instances of misconduct; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 237 N.W.2d 689 (1976). The primary purpose must be to protect the public interest and assure the moral fitness and professional competency of those who hold professional licenses. *State v. MacIntyre*, 41 Wis. 2d 481, 484, 164 N.W.2d 235 (1969).

The Division requests the following discipline in this matter: (1) an indefinite suspension, and (2) in the event Dr. Pellmann wishes to resume the practice of medicine and surgery in the State of Wisconsin, an appearance before the Board prior to applying for reinstatement of his license to satisfy the Board that he may safely and competently practice in the State of Wisconsin. The Division states that evidence of such safety and competence should include, but not be limited to, any testing, evaluation, continuing education and submission of documentation which the Board believes is necessary. The Division notes that because Dr. Pellmann will not be released from federal custody until 2014, he will have not engaged in the practice of medicine for a period of several years by the time of his release and potential resumption of practice. It is for that reason that the Division recommends that any discipline should include assurances that

¹ Notably, the Seventh Circuit Court of Appeals stated that “the jury's verdict is supported by overwhelming evidence,” *Pellman*, 668 F.3d at 919, and that the homes of both Dr. Pellmann and the individual to whom he distributed fentanyl and morphine resembled “drug houses.” *Id.* at 924. The Court further stated: “[T]he government was not required to present expert testimony, especially in light of overwhelming evidence of Pellmann’s unprecedented and undocumented prescriptions of profoundly addicting and potent painkillers, which he personally administered in multiple, private houses and hotel rooms Pellmann shared with [Ms. E.] for long-term treatment of a condition he was unqualified to diagnose and did not treat in his own area of practice.” *Id.* at 926.

he is able to safely and competently resume the practice of medicine for the protection of the public.

Dr. Pellmann states that no discipline should be ordered because he did not commit a crime and therefore did not engage in unprofessional conduct, and that he has been rehabilitated through his prison term.

Given the nature of the offenses, I agree with the Division that a significant discipline should be imposed both for purposes of rehabilitation and as a deterrent to other licensees and that an indefinite suspension is therefore warranted. I further find that, for the reasons stated by the Division, the suspension and conditions requested serve to protect the public and are appropriate under the circumstances in this case.

V. Costs

The final issue is what amount of costs, if any, of the investigation and prosecution of this matter should be borne by Dr. Pellmann under Wis. Admin. Code § SPS 2.18.

The Division requests that Dr. Pellmann be ordered to pay the full costs of its investigation and of these proceedings. Factors to be taken into account when considering imposition of costs in disciplinary matters were set forth in *In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz* (LS 0802183 CHI), in which the Chiropractic Examining Board stated:

The ALJ's recommendation and the ... Board's decision as to whether the full costs of the proceeding should be assessed against the credential holder..., is based on the consideration of several factors, including:

1. The number of counts charged, contested, and proven;
2. The nature and seriousness of the misconduct;
3. The level of discipline sought by the parties;
4. The respondent's cooperation with the disciplinary process;
5. Prior discipline, if any;

6. The fact that the Department of [Safety and Professional Services] is a “program revenue” agency, whose operating costs are funded by the revenue received from licenses, and the fairness of imposing the costs of disciplining a few members of the profession on the vast majority of the licensees who have not engaged in misconduct;
7. Any other relevant circumstances.

Considering the factors set forth in the *Buenzli-Fritz* decision, Dr. Pellmann is ordered to pay the full costs of this proceeding. Although Dr. Pellmann has generally cooperated in the disciplinary proceedings and has no prior discipline against him, these facts are outweighed by the other factors appropriate for consideration under *Buenzli-Fritz*. Most importantly, Dr. Pellmann engaged in serious misconduct, using his position as a physician to obtain Schedule II narcotics by misrepresentation, fraud and deception, and unlawfully distributing them to another individual. As a result of this conduct, the Division alleged two counts, both of which were contested, and which the Division has proven. Finally, as the costs of disciplinary proceedings are borne by the revenue received from licenses, it would be unfair not to impose the bulk of the costs of disciplining Dr. Pellmann on him rather than on his fellow physicians.

If the Board assesses costs against Dr. Pellmann, the amount of costs will be determined pursuant to Wis. Admin. Code § SPS 2.18.

ORDER

For the reasons set forth above, IT IS ORDERED that:

1. The Division’s motion for summary judgment is granted.
2. Dr. Pellmann’s license to practice medicine and surgery is suspended for an indefinite period of time, effective on the date the final decision in this matter is signed by a Board member.
3. In the event Dr. Pellmann wishes to resume the practice of medicine and surgery in the State of Wisconsin, he must appear before the Board prior to applying for reinstatement of

his license to satisfy the Board that he may safely and competently practice in the State of Wisconsin. Evidence of such safety and competence shall include, but not be limited to, any testing, evaluation, continuing education and submission of documentation which the Board deems necessary.

4. Dr. Pellmann shall pay the full costs of the investigation and prosecution in this matter in an amount to be established pursuant to Wis. Admin. Code § SPS 2.18. After the amount is established, payment shall be made by certified check or money order payable to the Wisconsin Department of Safety and Professional Services and sent to:


**Department Monitor
Department of Safety and Professional Services
Division of Enforcement
P.O. Box 8935
Madison, WI 53708-8935
Telephone: (608) 267-3817
Fax: (608) 266-2264**

IT IS FURTHER ORDERED that the above-captioned matter be and hereby is closed as to Respondent Roger A. Pellmann.

Dated at Madison, Wisconsin on August 2, 2012.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
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By:


Jennifer E. Nashold
Administrative Law Judge

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