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IN THE MATTER OF DISCIPLINARY	:	FINAL DECISION AND ORDER
PROCEEDINGS AGAINST	:	WITH VARIANCE
	:	
JAMES A. PUERNER, M.D.,	:	DHA Case No. SPS-19-0060
RESPONDENT.	:	DLSC Case No. 18 MED 331

BACKGROUND

On February 7, 2020, Administrative Law Judge Sally Pederson, State of Wisconsin, Division of Hearings and Appeals, issued a Proposed Decision and Order (PDO) in the above referenced matter. The PDO was mailed to all parties. Neither party filed an Objection. On March 25, 2020, the Medical Examining Board (Board) met to consider the merits of the PDO. The Board voted to approve the PDO with variance. The PDO is attached hereto and incorporated in its entirety into this Final Decision and Order with Variance.

VARIANCE

Pursuant to Wis. Stat. §§ 440.035(1m) and 448.02, the Board is the regulatory authority and final decision maker governing disciplinary matters of those credentialed by the Board. The matter at hand is characterized as a class 2 proceeding pursuant to Wis. Stat. § 227.01(3). The Board may make modifications to a PDO, a class 2 proceeding, pursuant to Wis. Stat. § 227.46(2).

In the present case, the Board adopts the PDO in its entirety except for the sections titled, "Appropriate Discipline" and "ORDER". Those sections are varied as described below.

Discipline

The Division of Legal Services and Compliance (Division) recommended that the Respondent receive a reprimand in this matter, and the Administrative Law Judge agreed with that recommendation. However, the Board does not believe that a reprimand is an adequate disciplinary measure under the circumstances of this case and believes that a suspension of the Respondent's license and registration is supported by the evidence in the record. Furthermore, the Board believes that requiring the Respondent to demonstrate clinical competency before returning to practice is the least restrictive requirement that will adequately protect the health and safety of the public.

The record reflects a critical medical error which endangered the health, welfare, or safety of Patient A, including but not limited to stage IV appendiceal carcinoma. The Board finds this error to be a failure to practice medicine in a minimally competent manner, and the result of this was failure to detect the carcinoma that was responsible for the death of Patient A. The Respondent has furthermore failed to cooperate with the Department's investigation or this

administrative proceeding, despite the fact that the Respondent acknowledged that the Department was conducting an investigation and that this administrative proceeding was going on. The Respondent's blatant and ongoing disregard for the Department's investigation and the Board's authority indicates that rehabilitation is not an appropriate option. Based on the evidence in the record, suspension of the Respondent's license and registration is necessary to protect the health, safety, and welfare of the public, and requiring a clinical competency examination prior to reinstatement of the Respondent's license and registration is necessary to ensure the Respondent's fitness to practice and protect the public.

ORDER

The Order in the PDO is replaced in its entirety with the following Order:

1. The license and registration of James A. Puerner, M.D. (license #38934-20) to practice medicine and surgery in the State of Wisconsin, and any appurtenant right to renew that registration under Wis. Stats. § 440.08(3)(a) is indefinitely suspended.
2. Respondent's registration may not be renewed or reinstated until Respondent petitions the Board for renewal or reinstatement, and the Board, in its discretion, grants Respondent's request.
3. After no less than three (3) years from the date of this Order, James A. Puerner, M.D. may request that the Wisconsin Medical Examining Board fully or conditionally lift the suspension by submitting a petition which complies with the terms of this Order.
 - a. Any petition for reinstatement shall include a report of a clinical competence evaluation establishing Respondent's clinical competence to safely practice medicine and surgery, performed by an assessment program acknowledged by the Federation of State Medical Boards and preapproved by the Board or its designee.
 - i. The evaluation shall be completed no more than one hundred eighty (180) days prior to being submitted with the petition for reinstatement.
 - ii. Respondent shall provide the clinical competence evaluator with a copy of this Order and shall authorize the Board or its designee to communicate freely with the clinical competence evaluator.
 - iii. Respondent shall complete, to the satisfaction of the Board or its designee, all education and training recommended by the clinical competence evaluator before the Board will decide to grant, conditionally grant, or deny Respondent's petition for reinstatement.
 - b. Respondent shall be responsible for all costs associated with the clinical competence evaluation and training required under this Order, including all additional evaluations, treatment, education and training, as may be recommended by the evaluators.

- c. The Board shall have full discretion to grant, conditionally grant, or deny any petition for reinstatement, in full or in part, and may condition any reinstatement with limitations, including but not limited to, a Professional Mentor to monitor professional competence and behavior, mental health and/or AODA treatment, and restrictions related to practice scope and setting.
 - d. The Board may require Respondent to supplement a petition for reinstatement with any additional information it deems helpful to assessing the petition and, if the Board denies Respondent's petition for reinstatement, it may establish a reasonable time period before Respondent can file another petition for reinstatement.
1. Prior to any petition for reinstatement, Respondent James A. Puerner, M.D., shall, as a prerequisite, pay COSTS of this matter in an amount to be established pursuant to Wis. Admin. Code § SPS 2.18.
 - a. Payment of costs (made payable to the Wisconsin Department of Safety and Professional Services), any petition for reinstatement, requests for approval of evaluators, and evaluation reports and related documents shall be sent by Respondent to the Department Monitor at the address below:

Department Monitor
Division of Legal Services and Compliance
Department of Safety and Professional Services
P.O. Box 8935, Madison, WI 53708-8935
Telephone (608) 267-3817; Fax (608) 266-2264
DSPSMonitoring@wisconsin.gov

You may also submit this information via the DSPS Monitoring Case Management System:

<https://dpsmonitoring.wi.gov>

2. Violation of any of the terms of this Order may be construed as conduct imperiling public health, safety and welfare and the Board may, in its discretion, impose additional conditions and limitations or other additional discipline as it deems appropriate.
3. IT IS FURTHER ORDERED that Respondent pay all recoverable costs in this matter in an amount to be established, pursuant to Wis. Admin. Code § SPS 2.18.
4. IT IS FURTHER ORDERED that the terms of this Order are effective the date the Final Decision and Order in this matter is signed by the Board.

Dated at Madison, Wisconsin on the 6th day of May 2020.


Member
Medical Examining Board



Before the
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Disciplinary Proceedings Against
JAMES A. PUERNER, M.D., Respondent

DHA Case No. SPS-19-0060
DLSC Case No. 18 MED 331

PROPOSED DECISION AND ORDER

Sent via electronic mail and U.S. mail

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

James A. Puerner, M.D.

[REDACTED]
Roselle, IL 60172
[REDACTED]

Wisconsin Medical Examining Board
P.O. Box 8366
Madison, WI 53708-8366

Department of Safety and Professional Services, Division of Legal Services and
Compliance, by:

Attorney Joost Kap
Department of Safety and Professional Services
Division of Legal Services and Compliance
P.O. Box 7190
Madison, WI 53707-7190
Joost.Kap@wisconsin.gov

PROCEDURAL HISTORY

The proceedings were initiated when the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), filed a formal complaint against Respondent James A. Puerner, M.D. (Respondent) which alleged that his license was subject to disciplinary action pursuant to Wis. Stat. § 448.02(3), because Respondent engaged in unprofessional conduct as defined by Wis. Admin. Code §§ Med 10.02(2)(h) (Nov. 2002) and Med 10.03(3)(g) (Oct. 2013).¹ (Complaint)

¹ Wisconsin Administrative Code citations are to the code version in effect at the time of the conduct at issue.

The Division served Respondent on October 21, 2019 by sending a Notice of Hearing and the Complaint to Respondent via electronic, certified, and regular mail, pursuant to Wis. Admin. Code § SPS 2.08. Respondent failed to file an Answer to the Complaint.

Following expiration of the 20-day time period to file an Answer, the undersigned Administrative Law Judge (ALJ) scheduled a telephone prehearing conference for November 19, 2019. The ALJ's Notice of Telephone Prehearing Conference ordered Respondent to provide a telephone number where he could be reached and stated that, "Respondent's failure to appear at a scheduled conference or hearing may result in default judgment being entered against the Respondent."

Respondent failed to provide a telephone number and failed to appear at the November 19, 2019 prehearing conference. The ALJ telephoned Respondent at the number on file with the Department and left a voicemail stating Respondent should contact the ALJ within 15 minutes or she may enter default judgment. Respondent did not return the ALJ's message within 15 minutes, and the ALJ granted the Division's motion for default judgment based on Respondent's failure to file an Answer to the Complaint and failure to appear at the prehearing conference. *See* Wis. Admin Code § SPS 2.14 and Wis. Admin Code § HA 1.07(3)(c).

On November 20, 2019, the ALJ issued a Notice of Default and Order against Respondent and ordered that the Division file a recommended proposed decision and order by December 13, 2019.

Respondent subsequently contacted the ALJ and asked for another prehearing telephone conference. Over the Division's objection, the ALJ issued a Notice of Rescheduled Prehearing Telephone Conference and Order to File Answer, setting another prehearing telephone conference for December 2, 2019, and requiring Respondent to file an Answer to the Complaint by that date. The Notice specifically stated: [if] "Respondent fails to file an Answer by December 2, 2019, or fails to appear at the prehearing telephone conference on that same date, he will again be found in default . . ."

Respondent failed to file an Answer and failed to appear at the December 2, 2019 prehearing conference. The ALJ telephoned Respondent and left a voicemail message requesting that he return her call and stating that he must return her call and that, if he failed to do so, the previously-issued Notice of Default would likely be reinstated. Respondent did not return the phone call, and the prehearing conference was reconvened without him. Accordingly, the Division renewed its motion for default judgment, and the ALJ reinstated the Notice of Default and Order that was issued in November 2019.

On December 4, 2019, Respondent emailed the Division to apologize for missing the December 2, 2019 prehearing conference and to request another prehearing conference. The Division responded to the email, with copy to the ALJ, by objecting to Respondent's request. On

December 5, 2019, the ALJ denied Respondent's request and reiterated her Notice of Default and Order which directed the Division to file and serve a proposed decision and order by December 13, 2019. The Division timely filed and served a proposed decision and order as directed by the ALJ.

FINDINGS OF FACT

Facts Related to the Alleged Violations

Findings of Facts 1-15 are taken from the Division's Complaint against Respondent filed in this matter.

1. Respondent James A. Puerner, M.D., is licensed in the state of Wisconsin to practice medicine and surgery, having license number 38934-20, first issued on July 11, 1997, with registration current through October 31, 2019.
2. The most recent address on file with the Wisconsin Department of Safety and Professional Services (Department) for Respondent is [REDACTED] Roselle, Illinois 60172.
3. Respondent is a pathologist who, on April 17, 2008, examined an appendix specimen from Patient A, a male born in 1946.
4. Respondent charted his April 17, 2008 examination findings as follows:

Surg Path Final Report -- 4/17/2008 15:38 CDT

Specimen:

A Appendix

Clinical Information:

Abdominal pain.

Diagnosis:

Appendix, appendectomy:

Acute suppurative appendicitis and associated perforation.

James A Puerner, MD Electronically signed 04/17/2008

JP /PKK

Gross Description:

The specimen is labeled appendix. Received is an appendix that arrives in two parts. One segment measures 5 cm in length x 1 cm in diameter. The other segment measures 3.5 cm in length x 1.5 cm in diameter. Perforation is noted grossly. The serosal surface shows adherent fibropurulent exudate. Specimen is sectioned and lumen is filled with light tan soft tissue. Representative tissue is submitted in three cassettes.

JP /LRW

Microscopic Description:

Sections show transmural acute inflammation extending into periappendiceal tissue. Through-and-through necrosis of the wall, consistent with perforation, is noted. 88304, CR1

JP /PKK

5. In 2014, Patient A was diagnosed with Stage IV appendiceal carcinoma. On February 3, 2015, the appendectomy specimen slides that Respondent examined in 2008 were submitted for review by another pathologist who charted the following:

Result Information

Report Date and Time	Status	MyChart	Reviewed
2/3/2015 4:55 PM	Final result	Not Released	Yes

Narrative

UWMC Pathology Report

SOURCE OF TISSUE: OUTSIDE SLIDE CONSULT/APPENDIX

CLINICAL HISTORY:

Abdominal pain

GROSS:

Review of 3 slides labeled "OS-08-0001757" from Columbia St. Mary's Hospital Milwaukee, 2323 North Lake Drive, Milwaukee, Wisconsin 53211.

MICROSCOPIC:

The microscopic findings support the diagnosis given below.

FINAL DIAGNOSIS:

Appendix: Appendectomy (OS-08-0001757, dated 04/15/2008):

- Low grade appendiceal mucinous neoplasm with perforation, see comment

COMMENT:

Sections of the appendix reveal a low-grade mucinous neoplasm, comprising an undulating mucinous low cuboidal epithelium, with a pushing border of invasion. Periappendiceal abscess formation is present. The site of rupture is not identified. No extra appendiceal mucin or neoplastic cells are noted;

Telephone Contact Summary (continued)

Narrative (continued)

however, only three representative sections were submitted for histologic evaluation.

RA/lks

Rashmi Agni, MD
Staff Pathologist
Electronically signed Feb 03, 2015 4:55 PM

Performed at UWMC Anatomic Pathology, 600 Highland Ave, Madison, WI 53792.
(ACCESSION: S-15-03055, Collected: 01/30/2015, Received: 01/30/2015)

6. On March 14, 2018, Patient A died of metastatic appendiceal carcinoma.
7. A minimally competent pathologist would have identified the mucinous neoplasm on April 17, 2008.

8. Respondent's failure to identify the mucinous neoplasm created an unacceptable risk that Patient A may suffer adverse health consequences, including but not limited to Stage IV appendiceal carcinoma.
9. On December 4, 2018, the Department, on behalf of the Board, sent Respondent an email at his address of record with the Department, requesting a response no later than December 11, 2018, to a complaint alleging, *inter alia*, that he fell below standard in his 2008 examination of Patient A's appendix specimen.
10. Respondent did not respond to the Department's December 4, 2018 request for a response.
11. On December 13, 2018, the Department, on behalf of the Board, sent Respondent a letter and email to his addresses of record with the Department, requesting a response no later than December 21, 2018, to the complaint.
12. On December 20, 2018, Respondent emailed the Department from his email address of record and acknowledged receipt of the Department's requests for a response. Respondent wrote: "I am in the process of gathering all the requested documents. I will email you these documents ASAP."
13. Respondent did not provide a response to the complaint.
14. On January 31, February 13, February 19, April 26, and July 22, 2019, the Department, on behalf of the Board, sent Respondent additional requests via email to his address of record with the Department, requesting a response to the complaint.
15. On August 2, 2019, Respondent submitted a response to the Department.

Facts Related to Default

16. The Notice of Hearing and Complaint in this matter were served on Respondent on October 21, 2019, by both certified and regular mail, and electronic mail by which the Division had previously communicated with Respondent.
17. The Notice of Hearing informed Respondent that he was required to file an Answer within 20 days pursuant to Wis. Admin. Code § SPS 2.09(4) and stated that if he failed to timely file an Answer, he would be found in default and default judgment would be entered against him on the basis of the Complaint and other evidence.
18. Respondent failed to file an Answer.
19. Following expiration of the 20-day time period to file an Answer, the ALJ scheduled a telephone prehearing conference for November 19, 2019. The ALJ's Notice of Telephone Prehearing Conference ordered Respondent to provide a telephone number where he could be reached no later November 18, 2019 and stated that, "Respondent's failure to appear at a scheduled conference or hearing may result in default judgment being entered against the Respondent."

20. Respondent failed to provide a telephone number to the ALJ.
21. Respondent failed to appear at the November 19, 2019 prehearing conference. The ALJ telephoned Respondent at the number on file with the Department and left a voicemail stating that Respondent should contact the ALJ within 15 minutes or she may enter default judgment.
22. Respondent did not return the ALJ's message within 15 minutes, and the ALJ granted the Division's motion for default judgment based on Respondent's failure to file an Answer to the Complaint and failure to appear at the prehearing conference.
23. On November 20, 2019, the ALJ issued a Notice of Default and Order against Respondent and ordered that the Division file and serve a recommended proposed decision and order by December 13, 2019.
24. After the ALJ issued the Notice of Default and Order, Respondent left a voice mail message for the ALJ asking that the prehearing telephone conference be rescheduled. Over the Division's objection, the ALJ rescheduled the prehearing telephone conference for December 2, 2019.
25. On November 26, 2019, the ALJ issued a Notice of Rescheduled Prehearing Telephone Conference and Order to File Answer, which scheduled a prehearing teleconference for December 2, 2019. The Notice ordered Respondent to file a written Answer to the Complaint by December 2, 2019 and to appear at the prehearing telephone conference on that same date or he would be found to be in default.
26. Respondent failed to file an Answer and failed to appear at the December 2, 2019 prehearing conference. The ALJ attempted to call Respondent and left a voice mail message stating he must return her call within 15 minutes if he wished to avoid being found once again in default. He did not return the ALJ's hone call. Accordingly, the prehearing conference was reconvened without Respondent, and the ALJ granted the Division's motion to find Respondent in default.
27. On December 3, 2019, the ALJ issued an Amended Notice of Default and Order against Respondent and ordered the Division to file and serve a recommended proposed decision and order by December 13, 2019.
28. On December 4, 2019, Respondent emailed the Division to apologize for missing the December 2, 2019 prehearing conference and requested that another prehearing conference be scheduled. The Division responded to the email, with copy to the ALJ, and objected to Respondent's request.
29. On December 5, 2019, the ALJ denied Respondent's request and reiterated her Notice of Default and Order which directed the Division to file and serve a proposed decision and order by December 13, 2019.
30. The Division timely filed and served a proposed decision and order as directed by the ALJ.

DISCUSSION AND CONCLUSIONS OF LAW

Jurisdictional Authority

Pursuant to Wis. Admin. Code § SPS 2.10(2), the undersigned ALJ has authority to preside over this disciplinary proceeding in accordance with Wis. Stat. § 227.46(1).

Default

Respondent is in default for failing to file an Answer to the Complaint and failing to appear at two prehearing conferences. *See* Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3). Accordingly, an order may be entered against Respondent on the basis of the Complaint and other evidence. *See* Wis. Admin. Code §§ SPS 2.14 and HA 1.07(3).

Violations

Following an investigation and disciplinary hearing, if the Wisconsin Medical Examining Board (Board) determines that a physician is guilty of unprofessional conduct, it may “warn or reprimand that person or limit, suspend or revoke any license or certificate granted by the board.” Wis. Stat. § 448.02(3)(c).

Under Wis. Admin. Code § Med 10.02(2)(h) (Nov. 2002), unprofessional conduct by a physician includes “engaging in any practice or conduct which tends to constitute a danger to the health, welfare, or safety of patient or public.” Physicians are required to cooperate with Board investigations, as follows:

After a request by the board, failing to cooperate in a timely manner with the board’s investigation of a complaint filed against a license holder. There is a rebuttable presumption that a credential holder who takes longer than 30 days to respond to a request of the board has not acted in a timely manner.
Wis. Admin. Code § Med 10.03(3)(g) (Oct. 2013).

Here, the undisputed facts establish that Respondent engaged in unprofessional conduct with regard to patient care. As set forth in the Findings of Fact, Respondent failed to provide appropriate and professional care to Patient A. Specifically, Respondent failed to identify a mucinous neoplasm, which constituted a danger to the health, welfare, or safety of Patient A, including but not limited to Stage IV appendiceal carcinoma. Respondent’s failure constituted unprofessional conduct as defined by Wis. Admin. Code § Med 10.02(2)(h) (Nov. 2002).

Additionally, Respondent engaged in unprofessional conduct as defined by Wis. Admin. Code § Med 10.03(3)(g) (Oct. 2013), by failing to cooperate with the Board’s investigation. Again, the undisputed facts show that Respondent failed to respond to the Department’s requests for information on numerous occasions. Between December 4, 2018 and July 22, 2019, Respondent failed to send documents and information requested by the Department and failed to file a response to the Complaint.

Respondent's failure to cooperate with the Board's investigation is a violation under Wis. Admin. Code § Med 10.03(3)(g) (Oct. 2013), which establishes a rebuttable presumption that a credential holder who takes longer than 30 days to respond to a request of the board has not acted in a timely manner. Respondent has not rebutted that presumption.

As a result of the above violations, Respondent is subject to discipline pursuant to Wis. Stat. § 448.02(3)(c).

Appropriate Discipline

The three purposes of discipline are: (1) to promote the rehabilitation of the credential holder; (2) to protect the public from other instances of misconduct; and (3) to deter other credential holders from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 237 N.W.2d 689 (1976). The Division recommended that Respondent be reprimanded for the violations described herein. The recommended discipline is appropriate and consistent with the purposes articulated in *Aldrich* for the reasons set forth below.

Respondent has not meaningfully cooperated with the Department's investigation or this administrative proceeding, so it is not possible to assess whether rehabilitation is an appropriate option. Accordingly, the only way to assure the public is protected is to reprimand Respondent's license. Respondent made a critical medical error which tended to constitute a danger to the health, welfare, or safety of Patient A, including but not limited to Stage IV appendiceal carcinoma. A reprimand is appropriate discipline for such a serious error. Moreover, a reprimand would deter others from making medical errors and failing to cooperate with a Board's investigation. Based on the facts of this case and the criteria set forth in *Aldrich*, it is appropriate to impose a reprimand, which is the discipline recommended by the Division.

Costs

The Board is vested with discretion concerning whether to assess all or part of the costs of this proceeding against Respondent. *See Wis. Stat. § 440.22(2)*. In exercising such discretion, the Board must look at aggravating and mitigating facts of the case; it may not assess costs against a licensee based solely on a "rigid rule or invocation of an omnipresent policy," such as preventing those costs from being passed on to others. *Noesen v. State Department of Regulation & Licensing, Pharmacy Examining Board*, 2008 WI App 52, ¶¶ 30-32, 311 Wis. 2d 237, 751 N.W.2d 385.

Boards and the Department have also, in previous orders, considered many factors when determining if all or part of the costs should be assessed against a Respondent. Factors have included: (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 prosecutor; (4) the cooperation of the respondent; (5) any prior discipline; and (6) the fact that the Department is a program revenue agency, funded by other licensees. *See In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz*, LS 0802183 CHI (Aug. 14, 2008). It is within the Board's discretion as to which, if any, of these factors to consider, whether other factors should be considered, and how much weight to give any factors considered.

The Division has proven all counts alleged in that Respondent failed to file an Answer disputing the allegations in the Complaint. The case involves a serious medical error and Respondent has been uncooperative with the Department's investigation and these disciplinary proceedings. Furthermore, because the Department is a program revenue agency, it would be unfair to impose the costs of pursuing discipline in this matter on those licensees who have not engaged in misconduct. Therefore, it is appropriate for Respondent to pay full costs of the investigation and these proceedings.

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that Respondent James A. Puerner, M.D., is REPRIMANDED.

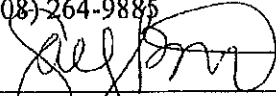
IT IS FURTHER ORDERED that Respondent pay all recoverable costs in this matter in an amount to be established, pursuant to Wis. Admin. Code § SPS 2.18.

IT IS FURTHER ORDERED that the terms of this Order are effective the date the Final Decision and Order in this matter is signed by the Board.

Dated at Madison, Wisconsin on 7 of February, 2020.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
4822 Madison Yards Way, 5th Floor
Madison, Wisconsin 53705
Tel. (608) 267-2745
Fax: (608) 264-9885

By: _____


Sally Pederson
Administrative Law Judge