

BEFORE THE IOWA BOARD OF MEDICINE

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IN THE MATTER OF THE STATEMENT OF CHARGES AGAINST

ROBERT F. TOBIN, M.D., RESPONDENT

FILE Nos. 02-07-731 & 02-11-541

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REINSTATEMENT ORDER

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COMES NOW the Iowa Board of Medicine (Board) and Robert F. Tobin, M.D. (Respondent), and on May 23, 2013, and enter into this Reinstatement Order.

1. Respondent was issued Iowa medical license no. 26658 on July 11, 1988.
2. Respondent's Iowa medical license went inactive due to non-renewal on April 1, 2012.
3. The Board has jurisdiction in this matter pursuant to Iowa Code chapters 147, 148 and 272C.
4. Respondent is an Iowa-licensed physician who currently practices ophthalmology in St. Joseph, Missouri.
5. **First Disciplinary Action:** On December 16, 2004, the Board charged Respondent with engaging in professional incompetency and practice harmful or detrimental to the public. On November 15, 2005, Respondent entered into a Settlement Agreement and Final Order with the Board to resolve the disciplinary pending charges. The Board issued Respondent a Citation and Warning and ordered him to pay a \$2,500 civil penalty. Respondent also agreed to comply with certain conditions in his ophthalmology practice.

6. **Second Disciplinary Action:** On November 8, 2007, the Board charged Respondent with violating the terms of the November 15, 2005, Settlement Agreement and Final Order. On May 6, 2010, Respondent entered into a Settlement Agreement with the Board to resolve the pending disciplinary charges. Respondent completed a Board-approved comprehensive clinical competency evaluation and a Board-approved neuropsychological evaluation. The Board issued Respondent a Citation and Warning and ordered him to pay a \$10,000 Civil Penalty and complete a Board-approved professional ethics program and record keeping program. The Board placed Respondent on probation for a period of five years subject to certain conditions.

7. **Third Disciplinary Action:** On September 23, 2011, the Board charged Respondent with violating the terms the May 6, 2010, Settlement Agreement. On February 17, 2012, a hearing was held before the Board. On March 29, 2012, the Board issued a Findings of Fact, Conclusions of Law, Decision and Order. The Board concluded that Respondent repeatedly violated the terms of the May 6, 2010, Settlement Agreement. The Board issued Respondent a Citation and Warning and suspended his Iowa medical license for a minimum of six months. The Board ordered Respondent to pay a \$10,000 civil penalty and continue to fully comply with the CPEP Educational Intervention Plan during the period of suspension. The Board ordered Respondent to continue to be on probation, subject to the terms and conditions established in the May 6, 2010, Settlement Agreement, upon reinstatement of his Iowa medical license.

8. **Application for Reinstatement:** On March 15, 2013, Respondent filed a Renewed Application for Reinstatement of his Iowa medical license. Respondent indicated that he no longer practices medicine in Iowa and he allowed his Iowa medical license to go inactive on April 1, 2012. Respondent demonstrated that he has paid the \$10,000 civil penalty and has continued to fully comply with the CPEP Educational Intervention Plan during the period of suspension.

9. **Reinstatement:** On May 23, 2013, the Board voted to reinstate Respondent's Iowa medical license subject to the terms of this Order.

10. **Five year probation:** Respondent shall be placed on **probation for a period of five (5) years** from the date of this Order subject to the terms and conditions established below. Respondent's Iowa medical license is currently inactive due to non-renewal. Should Respondent choose to reactivate his inactive Iowa medical license in the future, he shall fully comply with the following terms and conditions:

A. **Monitoring Program:** Respondent shall contact Shantel Billington, Compliance Monitor, Iowa Board of Medicine, 400 SW 8<sup>th</sup> Street, Suite C, Des Moines, IA 50309-4686, Ph.#515-281-3654 to establish a monitoring program. Respondent shall fully comply with all requirements of the monitoring program.

B. **Terms and Conditions:** Respondent agrees to fully comply with the following terms and conditions:

1) Respondent shall conform to the minimal standard of acceptable and prevailing practice in his postoperative management practices following cataract and refractive ophthalmologic surgery for all patients in the future.

- 2) Respondent shall perform and document appropriate preoperative examinations for all patients in the future.
  - 3) Respondent shall obtain and document appropriate informed consent for all patients prior to ophthalmologic surgery in the future.
  - 4) Respondent shall appropriately explain and document the risks, benefits and alternatives for recommended surgical procedures for all patients in the future.
  - 5) Respondent shall appropriately explain and document the risks, benefits and alternatives for postoperative management plans with all patients in the future.
  - 6) Respondent shall maintain appropriate patient operative reports for all patients in the future.
  - 7) Respondent shall appropriately inform the patient and document all serious complications suffered by patients in the future.
- C. **CPEP Remediation Plan:** Respondent shall successfully complete a Board-approved educational program as recommended by CPEP including the following:
- 1) **Educational Preceptor:** Respondent shall submit the name and CV of an ophthalmologist to serve as his educational preceptor as recommended by CPEP. Respondent shall meet regularly with the educational preceptor to review cases, discuss decisions, review specific areas of need and engage in a quality improvement processes.

- 2) **Continuing Medical Education and Self-Study:** Respondent successfully completed continuing medical education and self-study as recommended by CPEP.
  - 3) **Documentation Course:** Respondent successfully completed a Board-approved documentation program.
  - 4) **CPEP Reassessment:** Respondent recently completed a reassessment and CPEP recommended further remediation. Respondent shall fully comply with CPEP's recommended remediation.
- D. **Practice Monitoring Plan:** Respondent shall fully comply with the practice monitoring plan approved by the Board. The practice monitor shall be an Iowa-licensed, board-certified, ophthalmologist. The practice monitor shall agree to serve under the terms of the practice monitoring plan. The practice monitor shall review medical records for selected patients and meet regularly with Respondent to review cases, review specific topics and engage in a quality improvement processes. Respondent shall fully comply with all recommendations of the practice monitor. The practice monitor shall immediately notify the Board if he receives information which indicates that Respondent has violated the appropriate standard of care or has engaged in practice which is harmful or detrimental to the public. The practice monitor shall submit written quarterly reports to the Board no later than 1/20, 4/20, 7/20 and 10/20 of each year of this Order.

- E. **Worksite Monitor:** Respondent shall submit for Board approval the name of an Iowa-licensed physician who regularly observes and/or supervises Respondent in the practice of medicine to serve as worksite monitor. The Board shall provide a copy of all Board orders relating to this matter to the worksite monitor. The worksite monitor shall provide a written statement indicating that they have read and understand this Order and agrees to serve under the terms of this Order. The worksite monitor shall agree to inform the Board immediately if there is evidence of professional misconduct, sexual misconduct, substance abuse or a violation of the terms of this Order. The worksite monitor shall submit quarterly reports to the Board no later than 1/20, 4/20, 7/20 and 10/20 of each year of this Order.
- F. **Quarterly Reports:** Respondent shall file sworn quarterly reports attesting to his compliance with all the terms of this Settlement Agreement. The reports shall be filed not later than 1/10, 4/10, 7/10 and 10/10 of each year for the duration of the period of probation.
- G. **Board Appearances:** Respondent shall appear before the Board annually or upon request of the Board for the duration of the period of this Order. Respondent shall be given reasonable notice of the date, time and location for the appearances. Said appearances shall be subject to the waiver provisions of 653 IAC 24.2(5)(e)(3).

H. **Monitoring Fee:** Respondent shall make a payment of \$300 to the Board each quarter for the duration of this Order to cover the Board's monitoring expenses in this matter. The monitoring fee shall be received by the Board with all quarterly reports required under this Order. The monitoring fee shall be sent to: Shantel Billington, Compliance Monitor, Iowa Board of Medicine, 400 SW 8<sup>th</sup> Street, Suite C, Des Moines, IA 50309-4686. The check shall be made payable to the Iowa Board of Medicine. The monitoring fee shall be considered repayment receipts as defined in Iowa Code section 8.2.

11. Respondent shall submit a written statement to the Board which demonstrates that Respondent has shared a copy of this order with all medical licensing boards where Respondent holds a license, whether active or not, within thirty (30) days of the date of this order.

12. Respondent shall submit a written statement to the Board which demonstrates that Respondent has shared a copy of this order with all hospitals and clinics where Respondent practices medicine within thirty (30) days of the date of this order.

13. Pursuant to 653 IAC 21.6, if applicable, Respondent shall notify all physician assistant supervisees within one workday upon receiving disciplinary action from the Board or any other change in status that affects the physician's eligibility to supervise a physician assistant.

14. Respondent voluntarily submits this Order to the Board for consideration.

15. Respondent agrees that the State's counsel may present this Order to the Board for consideration.

16. By entering into this Order, Respondent voluntarily waives any rights to a contested case hearing and waives any objections to the terms of this Order. This Order constitutes the resolution of a contested case proceeding.

17. In the event Respondent fails to comply with any of the terms of this Order, the Board may initiate action to suspend or revoke Respondent's license or to impose other license discipline as authorized in Iowa Code chapters 148 and 272 and 653 IAC 25.

18. Periods in which Respondent does not practice medicine or fails to comply with the terms established in this Order shall not apply to the duration of this Order unless Respondent obtains prior written approval from the Board.

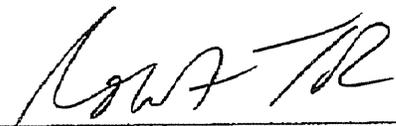
19. Respondent shall obey all federal, state and local laws, and all rules governing the practice of medicine in Iowa.

20. Respondent understands that the Board is required by Federal law to report this Order to the National Practitioner Data Bank and Healthcare Integrity and Protection Data Bank.

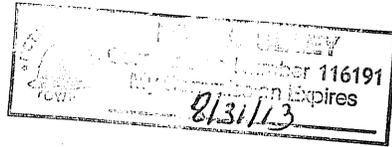
21. The Order becomes a public record available for inspection and copying upon execution in accordance with the requirements of Iowa Code Chapters 17A, 22 and 272C.

22. This Order is subject to approval of the Board. If the Board fails to approve this Order it shall be of no force or effect to either party.

23. The Board's approval of this Order shall constitute a **Final Order** of the Board.



Robert F. Tobin, M.D., Respondent



Subscribed and sworn to before me on April 24, 2013.

Notary Public, State of Iowa. *Lion L. Seley*

~~This Order is approved by the Board on \_\_\_\_\_, 2013.~~

~~Colleen K. Stockdale, M.D., M.S., Chairwoman  
Iowa Board of Medicine  
400 SW 8<sup>th</sup> Street, Suite C  
Des Moines, Iowa 50309-4686~~

This Order is approved by the Board on May 23, 2013.



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Gregory B. Hoversten, D.O., Chairman  
Iowa Board of Medicine  
400 SW 8<sup>th</sup> Street, Suite C  
Des Moines, Iowa 50309-4686

BEFORE THE IOWA BOARD OF MEDICINE

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IN THE MATTER OF THE ) FILE NO. 02-11-541  
STATEMENT OF CHARGES ) DIA NO. 11IMB013  
AGAINST: )  
) PROPOSED RULINGS ON  
ROBERT F. TOBIN, M.D. ) REQUEST FOR STAY and  
) REQUEST FOR RECONSIDERATION,  
RESPONDENT ) PRODUCTION OF DOCUMENTS, and  
EXPANSION OF THE RECORD

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*Procedural Background*

On September 23, 2011, the Iowa Board of Medicine (Board) filed a Statement of Charges alleging that Respondent willfully and repeatedly violated the terms and provisions of a consent agreement or informal settlement, in violation of Iowa Code sections 148.6(2)(i) and 653 IAC 23.1(11). A hearing was held on February 17, 2012.

On March 29, 2012, the Board issued its Findings of Fact, Conclusions of Law, Decision and Order. The Board's decision suspended Respondent's medical license for six months, fined Respondent \$10,000, ordered him to continue with his CPEP Educational Intervention Plan during the suspension, and required him to obtain Board approval for a Worksite Monitor, Practice Monitor, and signed Practice Monitoring Plan.

On April 18, 2012, Respondent filed a Motion to Reconsider Findings of Fact, Conclusions of Law, Decision and Order dated March 29, 2012, or, in the alternative, Request for Rehearing. On April 23, 2012, the state filed a Resistance to Request for Rehearing. On April 30, 2012, the Board issued a final Order that denied Respondent's motions. On May 16, 2012, Respondent filed a Petition for Judicial Review in Polk County District Court. The Judicial Review petition is pending.

*Request for Reconsideration*

On May 16, 2012, Respondent filed a 17A.17(7) Affidavit, Request For Reconsideration, Production of Documents, and Expansion Of The Agency Record. On May 30, 2012, the state filed a Resistance to Request for Reconsideration. On May 30, 2012, the Board delegated ruling on the motions to the undersigned administrative law judge.

The undersigned agrees with the position taken by the state in its Resistance. The Polk County District Court now has jurisdiction over this appeal, and there is no authority for the Board to exercise concurrent jurisdiction, with the exception of ruling on the Request for Stay. IT IS THEREFORE ORDERED that Respondent's Request for Reconsideration, Production of Documents, and Expansion of the Agency Record is hereby DENIED for lack of jurisdiction.

*Request for Stay*

On May 16, 2012, Respondent filed a Request for Stay of Agency Action, pursuant to Iowa Code section 17A.19(5) and 653 IAC 25.27. Respondent incorporated the arguments made in his April 18, 2012 Request for Reconsideration/Rehearing, his reply to State's Resistance, and his request for reconsideration to expand the record in this matter for judicial review. On May 30, 2012, the state filed a Resistance to Request for Stay of Agency Action. On May 30, 2012, the Board delegated ruling on the motions to the undersigned administrative law judge.

Iowa Code section 17A.19(5)(2011) provides, in relevant part:

5. *a.* The filing of the petition for review does not itself stay execution or enforcement of agency action. ***Unless precluded by law***, the agency may grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review.
- b.* A party may file an interlocutory motion in the reviewing court, during the pendency of the judicial review, seeking review of the agency's action on an application for stay or other temporary remedies.
- c.* If the agency refuses to grant an application for stay or other temporary remedies, ...the court may grant relief but only after a consideration and balancing of all of the following factors:
  - (1) The extent to which the applicant is likely to prevail when the court finally disposes of the matter.
  - (2) The extent to which the applicant will suffer irreparable injury if relief is not granted.
  - (3) The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings.
  - (4) The extent to which the public interest relied on by the agency is sufficient to justify the agency's actions in the circumstances.

(emphasis added)

653 IAC 25.27(2) provides that in “determining whether to grant a stay, the Board shall consider the factors listed in Iowa Code section 17A.19(5)”c.” *The board shall not grant a stay in any case in which the district court would be expressly prohibited by statute from granting the stay.*” (emphasis added)

Iowa Code section 148.7(2011) provides, in relevant part:

9. Judicial review of the board’s action may be sought in accordance with the terms of the Iowa administrative procedure Act, chapter 17A.
10. The board’s order revoking or suspending a license to practice medicine and surgery...or to discipline a licensee shall remain in force and effect until the appeal is finally determined and disposed of on its merit.

The provisions of Iowa Code sections 148.7(10), 17A.19(5)(a), and 653 IAC 25.27(2) preclude the Board from granting a stay of an order suspending a license. Therefore, the state’s assertion that the Board lacks authority to stay its suspension order is correct. The Board’s final order suspended Respondent’s license and imposed the \$10,000 civil penalty based on Respondent’s repeated failure to comply with the terms and conditions of a Settlement Agreement and his failure to comply with the additional extensions and deadlines granted by the Board. That Settlement Agreement resolved a prior Statement of Charges alleging Respondent’s failure to comply with a prior Settlement Agreement as well as charges of professional incompetency and practice harmful and detrimental to the public.

Even if the Board has the authority to stay the portion of its Decision and Order that imposed the \$10,000 civil penalty, the 17A.19(5)(c) factors do not support the issuance of a stay. The Board fully considered Respondent’s arguments prior to making their findings and determining the appropriate sanctions. Prior to issuing its April 30, 2012 Ruling, the Board fully considered Respondent’s arguments on the Motion to Reconsider. Respondent is not likely to prevail on judicial review. In addition, any monetary loss due to the payment of the \$10,000 civil penalty does not constitute an “irreparable injury.” *Teleconnect Co. v. Iowa State Commerce Commission*, 366 N.W.2d 511, 514 (Iowa 1985). See also *Pro Farmer Grain V. Iowa Department of Agriculture*, 427 N.W. 2d 466, 468-69(Iowa 1988); *Salsbury Laboratories v. Iowa Dep’t of Ervtl. Quality*, 276 N.W. 2d 830, 837 (Iowa 1979); *Richards v. Iowa State Commerce Commission*, 270 N.W. 2d 616, 624 (Iowa 1978). The public interest is significant when a licensed physician repeatedly fails to comply with a Settlement Agreement that addresses serious professional competency concerns.

IT IS THEREFORE ORDERED that Respondent’s Request for Stay of the Board’s final decision issued on March 29, 2012 is hereby DENIED.

DATED THIS 1ST DAY OF JUNE, 2012.

*Margaret LaMarche*

Margaret LaMarche  
Administrative Law Judge  
Department of Inspections and Appeals  
Administrative Hearings Division  
3rd Floor, Wallace State Office Building  
Des Moines, IA 50319  
[FOR THE IOWA BOARD OF MEDICINE]

cc: David L. Brown, Hansen, McClintock & Riley, 520 Walnut St., 5<sup>th</sup> Floor, Des Moines, Iowa 50309 [First Class Mail]

Theresa O'Connell Weeg, Assistant Attorney General, Hoover State Office Building, 2<sup>nd</sup> Floor [LOCAL]

Kent Nebel, Iowa Board of Medicine, 400 SW 8<sup>th</sup> Street, Suite C, Des Moines, IA [LOCAL]

**BEFORE THE IOWA BOARD OF MEDICINE**

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**IN THE MATTER OF THE STATEMENT OF CHARGES AGAINST**

**ROBERT F. TOBIN, M.D., RESPONDENT**

**FILE No. 02-2011-541**

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**ORDER RE:**

**RESPONDENT'S MOTION TO RECONSIDER  
FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER  
DATED MARCH 29, 2012**

**Or, in the alternative,**

**RESPONDENT'S REQUEST FOR RE-HEARING**

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1. On September 23, 2011, the Iowa Board of Medicine (Board) filed a Statement of Charges alleging that Respondent willfully or repeatedly violated a lawful order of the Board or violated the terms and provisions of a consent agreement or informal settlement, in violation of Iowa Code sections 148.6(2)(i) and 653 IAC 23.1(11). A hearing was held on February 17, 2012.
2. On March 29, 2012, the Board issued a Findings of Fact, Conclusions of Law, Decision and Order. The Board suspended Respondent's Iowa medical license for 6 months, fined him \$10,000, ordered him to continue with his CPEP Educational Intervention Plan during the suspension, and required that he obtain Board approval for a Worksite Monitor, Practice Monitor and a signed Practice Monitoring Plan.

3. On April 18, 2012, Respondent filed a Motion to Reconsider Findings of Fact, Conclusions of Law, Decision and Order, dated March 29, 2012, or, in the alternative, Respondent's Request for Rehearing. Respondent argues the following:
  - A. Respondent is a sole practitioner and has been for years.
  - B. The Board's Decision and Order is punitive and inappropriate. Respondent argues that there are no current patient care issues. Respondent argues that the Board knows the suspension and fine is potentially career ending for a solo practitioner.
  - C. Respondent has already been fined and paid \$10,000; the additional fine with the most recent Decision raises the total amount to \$20,000. Respondent argues that this is clearly not in accordance with past practice and precedence of the Board. Respondent argues that not only has he already paid \$10,000, he has been evaluated by CPEP, successfully completed CPEP's Patient Care Documentation Seminar and Personalized Implementation Program, successfully completed CPEP's ProBE program, has had a total of three extensive neurological examinations (July 2009, November 2009, January 2011) and submitted to an Independent Medical Examination (which found no concerns) at the insistence of the Board despite not being part of the settlement.

D. The Board's factual basis in its Decision and Order is not in accord with the facts of this case. Respondent argues that by the time of hearing, all requirements of the 2010 Settlement Agreement had been met with the exception of those requiring practice monitoring / supervision. Respondent argues that the Board knows the main problem with compliance has been obtaining an ophthalmological surgeon to serve the dual roles of worksite monitor and CPEP practice monitor. Respondent argues that:

- Respondent operates a solo practice.
- Respondent only practiced in Iowa once a week, at most.
- The practical and logistical difficulties in finding an Iowa ophthalmological surgeon to operate as a worksite monitor and practice monitor for a sole practitioner who merely has a single satellite office in Iowa that is only open once a week.
- The Board refused to accept Respondent's first candidate, a fully qualified ophthalmological surgeon practicing in the same general locale as Respondent's main office in Kansas City (where the vast majority of Respondent's operation existed at the time and now is the sole location for his practice), as Respondent's worksite and practice monitor.

- The Board demanded Respondent find an Iowa-licensed ophthalmological surgeon despite knowing how difficult complying with that demand would be.
- Respondent did his best to find an Iowa ophthalmological surgeon to serve as his worksite and practice monitor.
- Respondent's second candidate, an Iowa-licensed ophthalmologist, ultimately declined to function as the worksite and practice monitor due to the logistics and time commitment involved under the facts of this case.
- The logistical problems were not caused by Respondent.

E. The Board's decision attempts to create the impression that Respondent closed his Iowa practice in response to the Board filing charges. Respondent argues that this is untrue. His decision to close his Iowa office, where he only practiced one day a week at most, and his Nebraska office that operated similarly, had nothing to do with the Board filing charges as he did not even know the charges had been filed. It was purely a logistical decision that had nothing to do with the Iowa Board.

F. Due the inability of Respondent's second candidate to act as the worksite practice monitor, Respondent resubmitted the name of his first candidate to be approved on September 20, 2011, three days

before the Board voted to file charges. As of the hearing on February 17, 2012, the Board had yet to even deliberate regarding the resubmission of Respondent's first candidate and indicated they would not do so until March 2012, six months after Respondent resubmitted him for approval.

- G. The Board has complete control over who it approves and does not approve as the monitor. Respondent cannot even complete the CPEP requirements without the Board making an approval. Respondent argues that it was the Board's own refusal to approve Respondent's first candidate and its demand that Respondent find an Iowa ophthalmological surgeon that have prevented Respondent's compliance - both matters that are completely out of Respondent's control.
- H. The Board also charged Respondent for submitting his October 2011 quarterly report two-months late. Respondent argues that what the Board conveniently failed to indicate in its Decision was the fact Respondent submitted the report to the undersigned counsel's office in a timely fashion for filing and, due to the undersigned's law firm moving (for the first time in 70 years), the submission was unfortunately delayed. (Respondent Ex. E). The Board even cited Exhibit E, yet still refused to acknowledge that the late submission

was not Respondent's fault.

- I. The suspension and fine levied by the Board have no basis in fact or in the law; they are purely punitive in nature, inappropriate, and should be vacated immediately.
- J. Under the facts of this case, the Board's Order with the independent, punitive, suspension and punitive \$10,000 fine, does not appear to accord with past agency practice or precedent. Respondent's counsel is unaware of such a severe sanction being imposed previously when a physician is not refusing to comply and much of the delay and problems with monitoring are due to the Board's demand that put Respondent in a nearly impossible situation regarding finding a worksite and practice monitor and its refusal to approve a fully qualified monitor in Respondent's home practice area in Kansas City. Iowa Code § 17A.19.
- K. Respondent requests the Board detail its rationale and basis for suspending his license for six-months and its \$10,000 fine - a sanction which, for a sole practitioner who does not even currently practice in Iowa, is clearly potentially career ending.
- L. That State's Exhibit 16, coupled with the unprecedented punitive sanction meted out by the Board in this matter, gives rise to the question of bias and whether or not Respondent's due process rights

under the Iowa and United States Constitutions has been violated.

State's Exhibit 16 indicates:

- 10/21/10 "Board voted to set deadlines ... T. Weeg sent email with the guts of what the letter should be that we send to Respondent in what he's to do to be in compliance with deadlines." (p. 160)
- 10/27/11 "Decision letter sent to Respondent and Dave. Was scripted by T. Weeg."
- 2/28/11 His PROBE report, upon receipt, was immediately forwarded to "Russell, Mark, Kent, Theresa and Julie." (p. 161)
- 3/29/11 His neuro-psyche evaluation, upon receipt, was immediately forwarded to "Kent, Theresa, Mark, Julie and Russell." (p. 163)
- 4/27/11 "Emailed Kent, Theresa and Russell, that I got two names from Tom Drew of someone who could do IMEs. (p. 165) Iowa Code § 17A.17.
- 5/3/11 "Theresa asked of either NE or MO were investigating. Wondering if they would want to coordinate efforts on the IME to protect their patients too. ... NE - not sure but Kent is putting together some things to send to them." (p. 166) Respondent and his counsel were not even notified of new IME demand until

5/13/11. (p. 167) Even the whole Board did not know about the IME demand. (p. 168)(6/2/11 Dr. Hoversten asking about who was doing the IME and how that was determined)

- 7/22/11 “Sent copy of Dr. Kuhnlein’s eval report to Kent, Theresa, Julie, Mark and Russell for review.”
- 8/10/11 “Kent emailed asking a series of eight questions re: Respondent’s compliance. Sent Mary, CPEP, email with some questions. Mary sent back ... Forwarded answers to Kent, Theresa and Russell.”
- 9/7/11 “Forwarded CPEP progress report to Kent, Theresa, Mark, Russell and Julie.”
- 9/20/11 “Dave Brown called checking on clients. Said Respondent was closing his Iowa practice. ... Told Kent about the closing of the practice so he would be prepared since the last discussion of Charges. He already knew about it.”
- 9/23/11 Statement of Charges filed by Board.
- 10/20/11 “Rec’d dexterity report from Dr. Kuhnlein. He found no concerns about his ability to function safely. Forwarded copy to Russell, Mark, Weeg, Julie, Kent and Mary Knapp.”

M. Respondent was not aware of the above prior to Exhibit 16 being produced for hearing and was unable to prepare to address the

constitutional questions raised by this information in his defense.

- N. The Iowa Supreme Court has stated, “To permit an advocate for one party to act as the legal advisor for the decision-maker creates a substantial risk that the advice given to the decision-maker will be skewed, particularly when the prosecutor serves as the decisionmaker's advisor in the same or a related proceeding.” *Botsko v. Davenport Civil Rights Comm’n*, 774 N.W.2d 841, 851 (Iowa 2009). “[W]hen a staff member becomes involved in the plaintiffs litigation strategy or assumes a personal commitment to a particular result, he or she becomes an adversary with the ‘will to win.’ ... [W]hen an agency staffer functions as an advocate, experience teaches that the probability of actual bias is too high to allow the staffer to also participate in the adjudicative process.” *Id.* at 852.
- O. A party in an administrative proceeding is entitled to procedural due process. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Due process always involves a constitutional floor of a fair trial in a fair tribunal. *Botsko*, 774 N.W.2d at 848 (emphasis added). Based on the past practice of the Board, and prior sworn testimony of both Mr. Nebel and Mr. Bowden in other matters, as well as this instant case, it is the undersigned’s understanding that Mr. Nebel and/or Mr.

Bowden were present at the closed deliberations of the Board in violation of Respondent's right to due process.' Based on State's Exhibit 16, both Mr. Nebel and Mr. Bowden were clearly involved in one form or another in the litigation strategy utilized by the State to prosecute Respondent; they have a "will to win" and their presence in the deliberations, at a minimum, raises serious questions about the integrity of the process and the extreme and punitive decision of the Board. *Botsko*, 774 N.W.2d at 851 ([It is] improper for an attorney to serve as a partisan advocate and as a legal advisor to the neutral decision-maker.)

- P. Respondent is entitled to know who participated in the decision to suspend his license and levy a \$10,000 fine against him; a decision the Board well knows may be career ending.
- Q. Respondent requests the Board provide a complete list of those present during deliberations and make its closed deliberations a part of the record in this matter in response to this Request for Rehearing or Reconsideration. *Fisher v. Iowa Bd. of Optometry Examiners*, 478 N.W.2d 609, 611 (Iowa 1991).
- R. It also appears that the prosecutor, Theresa Weeg, was acting as a Board representative - even drafting letters from the Board to Respondent and his counsel. This is a clear violation of the

separation of functions required under the law. Iowa Code § 17A.17. This also appears to be a violation of ex-parte communications under that same code section. Respondent had no knowledge of these matters prior to Exhibit 16 being produced for hearing and was unable to prepare to address the constitutional questions raised by this information in his defense. *Botsko*, 774 N.W.2d at 851 ([It is] improper for an attorney to serve as a partisan advocate and as a legal advisor to the neutral decision-maker.)

- S. Respondent requests the Board provide a complete disclosure of all records, written, electronic, and otherwise, regarding all communications between the Board and the Attorney General's office, and internal Board communications, for the complete duration of this case beginning with the Statement of Charges filed on December 16, 2004, (and its investigation) forward through the completion of the February 17, 2012, hearing. Respondent is entitled to a full disclosure of all interactions between the Board and the Attorney General's office, and internally, regarding the investigation and prosecution of his case.
- T. Finally, Respondent requests the disclosures requested be made by the Board, the Board make its deliberations a part of the record and the Board reconsider its March 29, 2012, Decision and Order, and

vacate the suspension and fine. In the alternative, Respondent requests a rehearing that will allow him to fully develop the record regarding due process and separation of functions and preserve it for appeal.

4. On April 23, 2012, the State filed the State's Resistance to Respondent's Request for Rehearing. The State argues the following:
  - A. Many of the issues now raised by Respondent were fully litigated before the Board at hearing. The Board has already considered and decided these issues.
  - B. The imposition of the fine is reasonable given this is the third case in which Respondent has been disciplined by the Board and the second case in which Respondent has been disciplined for failing to comply with an order of the Board.
  - C. There was no violation of the law when Executive Director Bowden and Legal Director Nebel were present for Board deliberations in accordance with Iowa Code Section 17A.17(1)(b).
  - D. There was no violation of the separation of functions prohibitions in Section 17A.17, and the objections Respondent raises here were not properly raised.
  - E. Finally, the State requests that the Board deny Respondent's motion.

5. On April 24, 2012, Respondent filed a Reply to State's Resistance to Respondent's Request for Rehearing and Request for In-person Hearing on Dr. Tobin's Motion to Reconsider or, in the alternative, Request for Rehearing. Respondent argues the following:
  - A. The Board did not fully and appropriately assess all of the facts and factors involved in this matter. If the Board is unwilling to reconsider its decision, Respondent has asked for a rehearing on all matters.
  - B. The Board's fine in this matter is not reasonable under the facts.
  - C. Mr. Bowden and Mr. Nebel were improperly present during the Board's deliberations in this matter.
  - D. Ms. Weeg acted as a Board representative in this matter in violation of the separation of functions required under Iowa Code Section 17A.17.
  - E. Finally, Respondent again requests the disclosures requested be made by the Board, the Board make its deliberations a part of the record and the Board reconsider its March 29, 2012, Decision and Order, and vacate the suspension and fine. In the alternative, Respondent requests a rehearing that will allow him to fully develop the record regarding due process and separation of functions and preserve it for appeal.

6. On April 20, 2012, the Board considered Respondent's Motion to Reconsider Findings of Fact, Conclusions of Law, Decision and Order, dated March 29, 2012, or, in the alternative, Respondent's Request for Rehearing, the State's Resistance to Respondent's Request for Rehearing and Respondent's Reply to State's Resistance to Respondent's Request for Rehearing and Request for In-person Hearing on Dr. Tobin's Motion to Reconsider or, in the alternative, Request for Rehearing.

A. The Board concluded that Respondent has repeatedly violated the terms of the order he entered into with the Board despite the fact that the Board extended the deadlines for compliance to accommodate him.

B. The Board concluded that Respondent failed to make a good-faith effort to locate an "Iowa-licensed, board-certified, ophthalmologist" to serve as his practice monitor in a timely manner. Paragraph 11D of the Settlement Agreement that Respondent entered into with the Board on May 6, 2010, clearly states in relevant part,

"The practice monitor shall be an Iowa-licensed, board-certified, ophthalmologist. The practice monitor shall agree to serve under the terms of the practice monitoring plan."

- C. The Board concluded that the basis for Respondent's decision to close his Iowa office is irrelevant to its decision in this matter.
- D. The Board concluded that Respondent submitted his October 2011 quarterly report two-months late. Respondent argues that he sent the report to his attorney's office and there was a two-month delay because his attorney's law firm was in the process of moving to a new location. However, Respondent and his attorney were both aware that the report was due on October 10, 2011. The Board noted that timely quarterly reports are essential to the Board's ability to monitor Respondent's compliance with his order.
- E. The Board concluded that the suspension and fine imposed in this matter are appropriate under the circumstances. The Board noted that Respondent has repeatedly violated the laws and rules governing the practice of medicine in Iowa. The Board noted that this is the third time the Board has taken formal disciplinary action against Respondent and the second time the Board has disciplined Respondent for violating an order that he entered into with the Board. Finally, the Board noted that it is unaware of any other case in which a licensee has been disciplined multiple times under such circumstances.

- F. The Board concluded that there was no violation of the law when Mr. Bowden and Mr. Nebel were present for Board deliberations in accordance with Iowa Code Section 17A.17(1)(b). The Board noted that neither, Mr. Bowden nor Mr. Nebel has ever served as prosecutor before the Board. The Board noted that Mr. Bowden and Mr. Nebel have no voting authority with the Board. The Board noted that the presence of Mr. Bowden and Mr. Nebel during deliberations is essential to provide institutional knowledge when requested by the Board. Finally, the Board noted that there is absolutely no evidence that Mr. Bowden or Mr. Nebel inappropriately influenced the Board's decision in this matter.
- G. The Board concluded that there was no violation of the separation of functions prohibitions in Section 17A.17, and the objections Respondent raises here were not properly raised. The Board concluded that Respondent failed raise such objections before or during the hearing in this matter. Additionally, the Board concluded that Respondent failed to provide evidence that any prosecutor in this matter acted as a "Board representative" once the contested case proceeding was initiated. It is clear from Respondent's own motion that all of the questioned communications occurred before the Board filed the Statement of Charges in this matter on September 23, 2011.

H. After careful consideration, the Board voted to deny Respondent's motions in this matter.

**THEREFORE IT IS HEAREBY ORDERED** that Respondent's Motion to Reconsider Findings of Fact, Conclusions of Law, Decision and Order, dated March 29, 2012, or, in the alternative, Respondent's Request for Rehearing, and Respondent's Request for In-person Hearing are **DENIED**.

Dated this 30<sup>th</sup> day of April, 2012.

A handwritten signature in black ink, appearing to read "Amir D. Shirazi", written over a horizontal line.

Siroos Shirazi, M.D., Chairperson  
Iowa Board of Medicine  
400 S.W. 8<sup>th</sup> Street, Suite C  
Des Moines, IA 50309-4686

**BEFORE THE IOWA BOARD OF MEDICINE**

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<b>IN THE MATTER OF THE</b>	)	<b>FILE NO. 02-11-541</b>
<b>STATEMENT OF CHARGES</b>	)	<b>DIA NO. 11IMB013</b>
<b>AGAINST:</b>	)	
	)	
<b>ROBERT F. TOBIN, M.D.</b>	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW,</b>
<b>RESPONDENT</b>	)	<b>DECISION AND ORDER</b>

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Date: March 29, 2012.

On September 23, 2011, the Iowa Board of Medicine (Board) filed a Statement of Charges alleging that Robert F. Tobin, M.D. (Respondent) willfully or repeatedly violated a lawful order of the board or violated the terms and provisions of a consent agreement or informal settlement, in violation of Iowa Code sections 148.6(2)(i) and 653 IAC 23.1(11). The hearing was held on February 17, 2012 before the following Board members: Siroos Shirazi, M.D., Chairperson; Analisa Haberman, M.D.; Jeff Snyder, M.D.; Dana Shaffer, D.O.; Joyce Vista-Wayne, M.D.; and Amber Mian, public member. Respondent was represented by attorney David L. Brown. Assistant Attorney General Julie Bussanmas represented the state. The hearing was closed to the public at Respondent's request, pursuant to Iowa Code section 272C.6(1) and 653 IAC 25.18(12). The hearing was recorded by a certified court reporter. Administrative Law Judge Margaret LaMarche assisted the Board in conducting the hearing and was instructed to prepare a written decision for Board review, in accordance with their deliberations.

**THE RECORD**

The record includes the Notice of Hearing and Statement of Charges; Respondent's Motion to Continue; State Resistance; Initial Prehearing Conference Scheduling Order; Second Hearing Order; testimony of Shantel Billington and Respondent; State Exhibits 1-16 and Respondent Exhibits A-G (See Exhibit Lists for description).

## FINDINGS OF FACT

### *Licensing and Disciplinary History*

1. Respondent was issued Iowa medical license number 26658 on July 11, 1988. Respondent's Iowa medical license is active and will next expire on April 1, 2012. Respondent is also licensed in Nebraska, Missouri, Kansas, and Illinois. At times relevant to this Decision and Order, Respondent practiced ophthalmology in Iowa, Nebraska, and Missouri. He is currently practicing ophthalmology in St. Joseph, Missouri and Fall City, Nebraska. (State Exhibit 2; Respondent testimony)

2. On December 16, 2004, the Board filed disciplinary charges alleging that Respondent engaged in professional incompetency and practice harmful or detrimental to the public in the practice of ophthalmology. The charges were filed following a peer review of twenty (20) of Respondent's ophthalmic surgical cases. (State Exhibit 6)

On November 15, 2005, Respondent entered into a Settlement Agreement and Final Order with the Board to resolve the pending charges. Under the terms of the Settlement Agreement and Final Order, the Board issued Respondent a Citation and Warning for failing to conform to the minimum standard of acceptable and prevailing practice of ophthalmology and required him to pay a \$2500 civil penalty. In addition, Respondent agreed to fully comply with the following terms and conditions in his ophthalmology practice:

- Conform to the minimal standard of acceptable and prevailing practice in his postoperative management practices following cataract and refractive ophthalmologic surgery for all patients in the future;
- Perform and document appropriate preoperative examinations for all patients in the future;
- Obtain and document appropriate informed consent for all patients prior to ophthalmologic surgery in the future;
- Appropriately explain and document the risks, benefits and alternatives for postoperative management plans with all patients in the future;
- Maintain appropriate patient operative reports for all patients in the future;
- Appropriately inform the patient and document all serious complications suffered by patients in the future.

(State Exhibit 5)

3. On November 8, 2007, the Board filed a second Statement of Charges alleging that Respondent failed to comply with the November 15, 2005, Settlement Agreement and Final Order by:

- Failing to provide preoperative and postoperative examinations and management plans;
- Failing to maintain appropriate medical records; and
- Failing to properly inform a patient about a serious complication.

The Board also alleged that Respondent demonstrated a pattern of professional incompetency and practice harmful or detrimental to the public by failing to perform and/or document proper systematic management of glaucoma patients and by failing to maintain appropriate medical records. (State Exhibit 4)

4. On May 14-15, 2009, while the Statement of Charges was still pending, Respondent submitted to a comprehensive clinical competency evaluation at the Center for Personalized Education for Physicians (CPEP). CPEP prepared a detailed Assessment Report, which recommended an Educational Intervention to address deficiencies in Respondent's medical knowledge, clinical judgment and reasoning, and documentation. In addition, CPEP recommended that Respondent undergo a comprehensive neuropsychological examination to rule out any underlying medical or neurological disease. (State Exhibit 7)

Respondent completed the comprehensive neuropsychological evaluation at the University of Iowa on July 16, 2009, and a follow-up evaluation by a neurologist at the University of Kansas on November 20, 2009. Both evaluators recommended that Respondent have a re-evaluation in approximately 12 months. (State Exhibits 8, 9)

5. On April 16, 2010, Respondent signed a Settlement Agreement to resolve the November 8, 2007, Statement of Charges. The Board approved the Settlement Agreement on May 6, 2010, and it then became the Board's Final Order. Pursuant to the terms of the Settlement Agreement, Respondent was:

- Issued a Citation and Warning for violating the terms and conditions of a Board Order and for engaging in practice harmful or detrimental to the public and for professional incompetence in his ophthalmologic surgical practice;
- Assessed a civil penalty of \$10,000, payable within twenty (20) days;
- Required to complete a Board-approved neuropsychological re-evaluation no later than December 31, 2010;

- Required to successfully complete the Professional/Problem Based Ethics (PROBE) program sponsored by the Ethics Group, LLC, of Summit, New Jersey, within 60 days; and
- Required to successfully complete CPEP's record keeping program within 60 days.

In addition, Respondent was placed on probation for a period of five (5) years, subject to a number of terms and conditions. In relevant part, Respondent was required to:

- Establish and comply with a monitoring program through the Board's Compliance Monitor;
- Successfully complete a Board-approved education program as recommended by CPEP;
- Successfully complete a Board-approved documentation course within 90 days;
- Complete a CPEP Reassessment;
- Obtain a Board-approved practice monitor and comply with a Board-approved Practice Monitoring Plan;
- Obtain a Board approved Worksite Monitor; and
- File quarterly reports no later than 1/10, 4/10, 7/10, and 10/10 of each year for the duration of the probation.

(State Exhibit 3)

6. Respondent paid the \$10,000 civil penalty on May 27, 2010. (Shantel Billington testimony; State Exhibit 16, p. 157).

7. Shantel Billington is the Board's Compliance Monitor. Ms. Billington is responsible for ensuring that Iowa physicians comply with the terms of their Board-approved monitoring programs and is currently monitoring 236 physicians for the Board. Ms. Billington initially has a face-to-face meeting with each physician to review and explain all of the requirements of their disciplinary order and then monitors their ongoing compliance with the order. Ms. Billington contemporaneously documents all of her contacts and activities with respect to each physician's case and maintains a chronological written narrative. Ms. Billington's detailed narrative for Respondent's case is eighteen pages. (Billington testimony; State Exhibit 16)

8. On June 22, 2010, Shantel Billington emailed Respondent and his attorney to schedule a face-to-face meeting to review the requirements of the Settlement Agreement. In her email, Ms. Billington asked if Respondent had been scheduled to take the PROBE and recordkeeping course. Ms. Billington also informed them that she

would need the curriculum vitae (CV) for Respondents' practice monitor and his worksite monitor by the end of the day on July 19<sup>th</sup>. (State Exhibit 16, p. 157)

Respondent and his attorney scheduled a meeting with Shantel Billington for July 28, 2010. However, Respondent had to reschedule the meeting for health reasons. Ms. Billington, Respondent, and Respondent's attorney eventually met at the Board office on September 23, 2010. Ms. Billington went through and reviewed all of the requirements and deadlines established in the May 6, 2010 Settlement Agreement. At the time of this meeting, Respondent had not yet completed the PROBE ethics course or the CPEP recordkeeping course, although it was more than two months after the July 5, 2010 deadlines established in the Settlement Agreement. Respondent had not established his Educational Remediation Plan with CPEP and did not have an Educational Preceptor. Respondent did not have a Practice Monitor or Worksite Monitor and had not established a Board-approved Practice Monitoring Plan. (Testimony of Shantel Billington; Exhibit 16, pp. 157-159)

**Respondent's Personal Appearance Before the Board on October 21, 2010**

9. Respondent made a personal appearance before the Board on October 21, 2010. At this meeting:

- Respondent submitted the name and CV of Dr. Joe Parelman as his proposed Worksite Monitor and Practice Monitor. The Board did not approve Dr. Parelman because Respondent's monitors needed to review his medical practice in Iowa, and Dr. Parelman is not an Iowa licensed physician.
- Respondent reported that he was on the waiting list for the PROBE Ethics course scheduled for October 29<sup>th</sup> and was registered for the next scheduled course on December 3-4, 2010. The Board denied Respondent's request to allow him to attend his last meeting as a trustee for his alma mater rather than attend the PROBE course in December. The Board gave Respondent a new deadline of December 31, 2010 to complete the PROBE course and the CPEP recordkeeping course.
- Respondent reported that he had also submitted Dr. Parelman's name to CPEP as his Educational Preceptor. Respondent still had not contacted CPEP to establish his Educational Intervention Plan. The Board set a deadline of October 29, 2010 for Respondent to enroll with CPEP and an additional deadline of December 1, 2010, for Respondent to submit the signed educational plan to CPEP.

On October 27, 2010, Respondent and his attorney were notified in writing of the new deadlines established by the Board. (Billington testimony; State Exhibit 16, pp. 159-160)

**Neuropsychological Re-Evaluation**

10. Respondent completed the neuropsychological re-evaluation at the University of Kansas on January 7, 2011, which was one week after the December 31, 2010, deadline set by the Board. Respondent also complied with the Board's request that he undergo an Independent Medical Examination to evaluate his right hand manual dexterity. (Billington testimony; State Exhibit 16, p. 161, 167-170; State Exhibit 10)

**PROBE Ethics Course**

11. Respondent did not attend the PROBE Ethics Course on December 3-4, 2010, but attended the college trustee meeting instead. Respondent successfully completed the PROBE Ethics Course on January 28-30, 2011. This was more than six months after the July 5, 2010, deadline established in the Settlement Agreement and four weeks after the December 31, 2010 deadline. (Billington, Respondent testimony; State Exhibit 16, p. 161; Respondent Exhibit B)

**CPEP Recordkeeping and Board Approved Documentation Course**

12. Respondent successfully completed the CPEP Patient Care Documentation Seminar on March 11, 2011. This was more than eight months after the July 5, 2010 deadline established in the Settlement Agreement and more than two months after the second deadline of December 31, 2010. In January 2012, Respondent successfully completed the course's follow-up component, entitled Personalized Implementation Program. This satisfied Respondent's requirement to complete approved courses in recordkeeping and documentation. (Billington, Respondent testimony; Respondent Exhibits A, C; State Exhibit 15, p. 142)

**CPEP Educational Intervention**

13. The Settlement Agreement required Respondent to successfully complete a Board-approved educational program as recommended by CPEP. Respondent was required to submit the name and the CV of an educational preceptor for CPEP's approval. Respondent was required to meet regularly with the educational preceptor to review cases, discuss decisions, review specific areas of need, and engage in quality improvement processes. Respondent was also required to complete continuing education and self-study as recommended by CPEP. Finally, Respondent was required to complete a CPEP reassessment. (State Exhibit 3)

a) As of November 16, 2010, Respondent still had not established an Educational Intervention Plan with CPEP. Shantel Billington called Respondent's office and spoke to his office manager. The office manager thought Respondent was only required to take the CPEP courses and was not required to do an educational plan. Ms. Billington told the office manager that Respondent had been required to set up a plan with CPEP by October 29<sup>th</sup> and to be ready to start the plan by December 1, 2010. Ms. Billington then notified Respondent's attorney that Respondent had not yet signed up for his CPEP Educational Intervention Plan and that he needed to contact CPEP immediately. (State Exhibit 16, p. 160).

b) On December 10, 2010, CPEP emailed a letter to Respondent and his office manager explaining the development of his educational plan. CPEP developed an Educational Intervention Plan for Respondent, which was sent to him on January 20, 2011. Respondent did not sign and return the Educational Intervention Plan to CPEP in a timely manner. On March 24, 2011, CPEP emailed the Board to report that Respondent had not yet initiated his educational plan or presented an Educational Preceptor candidate. Shantel Billington called Respondent's office and asked to speak to Respondent or to leave a message for him. The office manager took the call and told Ms. Billington that Respondent was with a patient. Ms. Billington told the office manager that Respondent and his preceptor needed to sign and return the Educational Intervention plan by March 31, 2011. Respondent signed and returned the Educational Plan to CPEP on March 24, 2011, which was more than three months after the December 1, 2010, deadline set by the Board. Respondent still did not have an Educational Preceptor. (State Exhibit 11; Exhibit 16, pp. 161-162; Billington testimony)

c) Respondent was scheduled to start the CPEP Educational Intervention Plan on April 1, 2011. On April 8, 2011, Shantel Billington emailed Respondent's office manager and told her that Respondent had not submitted the name and CV of his preceptor to CPEP by the March 31<sup>st</sup> deadline. Ms. Billington gave Respondent a third final due date of April 13, 2011, to submit the name and signature of an educational preceptor. (State Exhibit 16, pp. 163-164)

On April 27, 2011, Respondent submitted the CV of Dr. Ira Priluck to CPEP as his proposed educational preceptor, but Dr. Priluck never assumed the preceptor duties. On June 2, 2011, Respondent personally appeared before the Board at the Board's request. Respondent reported that Dr. Priluck was supposed to let him know the following day if he intended to fulfill the role of educational preceptor. The Board gave Respondent a deadline of July 1, 2011, to provide CPEP with the name and CV of a replacement educational preceptor if Dr. Priluck was unwilling to serve in this capacity. As of July 25, 2011, neither CPEP nor Respondent had heard from Dr. Priluck. As of

August 10, 2011, Respondent still did not have an approved educational preceptor. (State Exhibit 16, p. 163-164; 169-171; Billington testimony)

d) In September 2011, CPEP issued a written progress report on Respondent's participation in the educational intervention for the period from April-August 2011. CPEP reported that Respondent's educational progress and his participation in activities both "needed improvement." Respondent had not yet started updating his surgical skills by participating in a hands-on course or training program with another ophthalmologist. He had not started his review of peer reviewed, evidence based resources for the topics identified in Module A, Learning Goals. He did not submit education logs during the months of April-July 2011 and submitted the logs late on August 5, 2011. Respondent still did not have an educational preceptor and therefore had not had any of the required weekly meetings with his preceptor. (State Exhibit 15, pp. 148-156)

e) In February 2012, CPEP issued a second written progress report for Respondent's participation in the educational Intervention for the period from September 2011 through January 2012. CPEP approved Joseph J. Parelman, M.D. as Respondent's new educational preceptor in December 2011, and Respondent started preceptor meetings in January 2012. In late January, Respondent submitted six charts that he had reviewed with his preceptor. Respondent had begun the self-study of peer-reviewed, evidence based medical resources. Respondent still had not started the surgical skills update. (State Exhibit 15, pp. 139-146; Exhibit 16, p. 174; Billington testimony)

#### *Practice Monitor and Worksite Monitor Requirements*

14. The Settlement Agreement required Respondent to have an Iowa-licensed, board-certified ophthalmologist as his practice monitor and to fully comply with a practice monitoring plan approved by the Board. The practice monitor was required to review medical records for selected patients and to meet regularly with Respondent to review cases, review specific topics, and engage in quality improvement processes.

Respondent was also required to have a Board approved Worksite Monitor who is a physician who regularly observes and/or supervises Respondent's practice of medicine. The Worksite Monitor was required to immediately inform the Board of any evidence of professional misconduct or any violations of the terms of the Settlement Agreement. Both the practice monitor and the worksite monitor were required to submit quarterly written reports to the Board. (State Exhibit 3)

a) On January 17, 2011, Respondent's attorney provided the Board with the CV of Dr. Ira Priluck, who was being proposed as Respondent's Worksite Monitor. Ms. Billington asked if Dr. Priluck would also be serving as Respondent's Practice Monitor. She reminded Respondent's attorney that Respondent still needed to submit a practice monitoring plan for Board review. (State Exhibit 16, p. 161)

b) At its April 8, 2011, meeting, the Board approved Dr. Ira Priluck to serve as Respondent's Worksite Monitor and as his Practice Monitor. (State Exhibit 16, p. 164) On May 5, 2011, Dr. Priluck contacted Shantel Billington with a number of questions and concerns. Based on this conversation, it was unclear if Dr. Priluck would agree to perform the roles of practice monitor and worksite monitor. (State Exhibit 16, p. 167)

c) At his personal appearance on June 2, 2011, the Board gave Respondent a new deadline of July 1, 2011, for Dr. Priluck to be functioning as his practice monitor and his worksite monitor or to submit the name and CV of another ophthalmologist if Dr. Priluck was not willing to serve. On June 8, 2011, Shantel Billington emailed Respondent's office manager and asked if she had heard from Dr. Priluck. The office manager emailed back that Respondent was out of the office for the rest of the week and she would speak to him on Monday. (State Exhibit 16, p. 169)

d) On June 15, 2011, Shantel Billington sent Respondent and his attorney a Practice Monitoring Plan that he could show to his practice monitor. (State Exhibit 16, p. 169; State Exhibit 12) On June 23, 2011, Ms. Billington again emailed Respondent's office manager and his attorney to remind them of the July 1, 2011, deadline and to ask for an update on the status of Dr. Priluck. The office manager responded that Dr. Priluck was waiting for a call back from his malpractice insurer and another potential preceptor was out of town. She also reported that Respondent would be on vacation for three weeks starting on June 24, 2011. (Billington testimony; State Exhibit 16, pp. 169-170)

e) Respondent did not have an approved practice monitor and worksite monitor by the July 1, 2011, deadline. On July 28, 2011, the Board voted to file charges against Respondent based on his non-compliance with the Settlement Agreement. (State Exhibit 16, pp. 170-171; Billington testimony)

f) On September 20, 2011, Respondent's attorney notified the Board that Respondent would be closing his Iowa practice at the end of October 2011 for business reasons and would no longer be seeing Iowa patients. Respondent also planned to

close his practice in Omaha, Nebraska, at the same time but to continue his ophthalmology practice in the Kansas City, Missouri area. (Billington, Respondent testimony; State Exhibit 16, p. 172; Respondent Exhibit G, p. 29)

g) On September 20, 2011, Respondent re-submitted the name of Dr. Joseph Parelman to serve as his practice monitor. This request was on the Board's agenda for its January 2012 meeting, but an emergency hearing prevented the Board from completing its agenda. Respondent's proposal for Dr. Parelman to serve as his worksite monitor and practice monitor is on the agenda for the Board's meeting in March. (State Exhibit 16, pp. 172-174; Billington testimony)

### Quarterly Reports

15. Respondent was required to submit quarterly reports on January 10, April 10, July 10, and October 10 of each year for the duration of his probation. He was also required to submit a \$100 monitoring fee with each report. Respondent's quarterly report and monitoring fee that was due on October 10, 2011, was filed two months late. (Billington testimony; Respondent Exhibits D, E, G)

### CONCLUSIONS OF LAW

The Board is statutorily authorized to discipline physicians for violating a lawful order of the board, previously entered by the board in a disciplinary or licensure hearing, or for violating the terms and provisions of a consent agreement or informal settlement between a licensee and the board. Iowa Code section 148.6(2)(i); 653 IAC 23.1(11). The preponderance of the evidence established that Respondent violated Iowa Code section 148.6(2)(i) and 653 IAC 23.1(11) when he repeatedly failed to comply with the terms and conditions of the May 6, 2010 Settlement Agreement and when he failed to comply with the additional extensions and deadlines. Respondent has been given more than ample opportunity to comply with the requirements of the Settlement Agreement and Final Order.

Respondent failed to provide any satisfactory explanation for his failure to timely comply with the CPEP educational requirements or for his failure to obtain a practice monitor and worksite monitor in a timely manner. The Board's Compliance Monitor has committed extraordinary effort and time to aid Respondent's compliance with the terms of the order. In the twenty plus months that Respondent has been on probation, he has had minimal direct contact with the Board's Compliance Monitor. Respondent has repeatedly failed to give appropriate attention and priority to his obligations under the Board's Order.

The disciplinary sanctions imposed thus far have been insufficient to secure Respondent's compliance. The Board has determined that the nature and circumstances of Respondent's repeated violations of the terms of the Settlement Agreement warrants suspending his license and imposing a \$10,000 civil penalty.

### **DECISION AND ORDER**

**IT IS HEREBY ORDERED** that Respondent is hereby **CITED** for violating the terms and conditions of a Board in violation of the laws and rules governing the practice of medicine in Iowa. Respondent is hereby **WARNED** that such conduct in the future may result in further disciplinary action, including revocation of his Iowa medical license.

**IT IS FURTHER ORDERED** that Iowa medical license number 26658, issued to Respondent Robert F. Tobin, M.D., is hereby **SUSPENDED for a minimum period of six (6) months, effective immediately upon service of this Decision and Order.**

**IT IS FURTHER ORDERED** that Respondent shall pay a **\$10,000 civil penalty**. The civil penalty shall be paid within twenty (20) days of the date of this Order and shall be made payable to the Treasurer of Iowa and mailed to the Executive Director of the Board. The civil penalty shall be deposited in the State General Fund.

**IT IS FURTHER ORDERED** that Respondent shall continue to fully comply with the **CPEP Educational Intervention Plan during the period of his license suspension**. Respondent's license shall not be reinstated until Respondent verifies that he has:

- A. Timely paid the \$10,000 civil penalty;
- B. Continued to fully comply with the provisions of the CPEP Educational Intervention Plan; and
- C. Obtained Board approval for a Worksite Monitor, Practice Monitor, and for a signed Practice Monitoring Plan.

**IT IS FURTHER ORDERED** that upon his reinstatement following suspension, Respondent will continue to be on probation, subject to the terms and conditions established in the May 6, 2010, Settlement Agreement. The Board also noted that

**IT IS FURTHER ORDERED**, in accordance with 653 IAC 25.33, that Respondent shall pay a disciplinary hearing fee of \$75.00. In addition, Respondent shall pay any costs certified by the executive director and reimbursable pursuant to subrule 25.33. All fees and costs shall be paid in the form of a check or money order payable to the state of Iowa within thirty days of the issuance of a final decision.

Dated this 29<sup>th</sup> day of March, 2012.

A handwritten signature in black ink, appearing to read "Siroos Shirazi". The signature is written in a cursive style and is positioned above a horizontal line.

Siroos Shirazi, M.D.,

Chairperson

Iowa Board of Medicine

cc: David L. Brown, Respondent's Attorney  
Julie Bussanmas, Assistant Attorney General

Judicial review of the board's action may be sought in accordance with the terms of the Iowa administrative procedure act.

**BEFORE THE IOWA BOARD OF MEDICINE**

\*\*\*\*\*

**IN THE MATTER OF THE STATEMENT OF CHARGES AGAINST**

**ROBERT F. TOBIN, M.D., RESPONDENT**

**FILE No. 02-11-541**

\*\*\*\*\*

**STATEMENT OF CHARGES**

\*\*\*\*\*

**COMES NOW** the Iowa Board of Medicine (Board) on September 23, 2011, and files this Statement of Charges pursuant to Iowa Code section 17A.12(2). Respondent was issued Iowa medical license no. 26658 on July 11, 1988. Respondent's Iowa medical license is active and will next expire on April 1, 2012.

**A. TIME, PLACE AND NATURE OF HEARING**

1. Hearing. A disciplinary contested case hearing shall be held on December 16, 2011, before the Board. The hearing shall begin at 8:30 a.m. each day and shall be located in the conference room at the Board office at 400 SW 8<sup>th</sup> Street, Suite C, Des Moines, Iowa.
2. Answer. Within twenty (20) days of the date you are served this Statement of Charges you are required by 653 IAC 24.2(5)(d) to file an Answer. In that Answer, you should state whether you will require a continuance of the date and time of the hearing.
3. Presiding Officer. The Board shall serve as presiding officer, but the Board may request an Administrative Law Judge make initial rulings on pre-hearing matters, and be present to assist and advise the board at hearing.

4. Prehearing Conference. A prehearing conference will be held by telephone on October 26, 2011, at 9:30 a.m., before an Administrative Law Judge from the Iowa Department of Inspections and Appeals (ALJ). Please contact Kent M. Nebel, J.D., Legal Director, Iowa Board of Medicine, at 515-281-7088 with the telephone number at which you or your legal counsel can be reached. Board rules on prehearing conferences may be found at 653 IAC 25.15.

5. Hearing Procedures. The procedural rules governing the conduct of the hearing are found at 653 IAC 25. At hearing, you will be allowed the opportunity to respond to the charges against you, to produce evidence on your behalf, cross-examine witnesses, and examine any documents introduced at hearing. You may appear personally or be represented by counsel at your own expense. If you need to request an alternative time or date for hearing, you must review the requirements in 653 IAC 25.16. The hearing may be open to the public or closed to the public at the discretion of the Respondent.

6. Prosecution. The office of the Attorney General is responsible for representing the public interest (the State) in this proceeding. Pleadings shall be filed with the Board and copies should be provided to counsel for the State at the following address: Theresa O'Connell Weeg, Assistant Attorney General, Iowa Attorney General's Office, 2<sup>nd</sup> Floor, Hoover State Office Building, Des Moines, Iowa 50319.

7. Communications. You may not contact board members by phone, letter, facsimile, e-mail, or in person about this Notice of Hearing. Board members may only receive information about the case when all parties have notice and an opportunity to participate, such as at the hearing or in pleadings you file with the Board office and serve upon all parties in the

case. You should direct any questions to Kent M. Nebel, J.D., the Board's Legal Director at 515-281-7088 or to Assistant Attorney General Theresa O'Connell Weeg at 515-281-6858.

## **B. LEGAL AUTHORITY AND JURISDICTION**

8. Jurisdiction. The Board has jurisdiction in this matter pursuant to Iowa Code chapters 17A, 147, 148, and 272C.

9. Legal Authority: If any of the allegations against you are founded, the Board has authority to take disciplinary action against you under Iowa Code chapters 17A, 147, 148, and 272C and 653 IAC 25.

10. Default. If you fail to appear at the hearing, the Board may enter a default decision or proceed with the hearing and render a decision in your absence, in accordance with Iowa Code section 17A.12(3) and 653 IAC 25.20.

## **C. SECTIONS OF STATUTES AND RULES INVOLVED**

### **COUNT I**

11. Respondent is charged pursuant to Iowa Code sections 148.6(2)(i) and 653 IAC 23.1(11) with willful or repeated violation of lawful rule or regulation adopted by the board or violating a lawful order of the board, previously entered by the board in a disciplinary or licensure hearing, or a violating the terms and provisions of a consent agreement or informal settlement between a licensee and the board.

## **STATEMENT OF THE MATTERS ASSERTED**

12. Respondent is an Iowa-licensed physician who practices ophthalmology in Council Bluffs, Iowa, Omaha, Nebraska and St. Joseph, Missouri.

13. On December 16, 2004, the Board filed formal disciplinary charges against Respondent alleging that he engaged in professional incompetency and practice harmful or detrimental to the public in the practice of ophthalmology.

14. On November 15, 2005, Respondent entered into a Settlement Agreement and Final Order with the Board to resolve the pending disciplinary charges. Under the terms of the Settlement Agreement and Final Order, Respondent received a Citation and Warning for failing to conform to the minimal standard of acceptable and prevailing practice of ophthalmology and he was required to pay a \$2,500 civil penalty.

15. Respondent also agreed to fully comply with the following terms and conditions in his ophthalmology practice:

- A. Respondent shall conform to the minimal standard of acceptable and prevailing practice in his postoperative management practices following cataract and refractive ophthalmologic surgery for all patients in the future.
- B. Respondent shall perform and document appropriate preoperative examinations for all patients in the future.
- C. Respondent shall obtain and document appropriate informed consent for all patients prior to ophthalmologic surgery in the future.
- D. Respondent shall appropriately explain and document the risks, benefits and alternatives for recommended surgical procedures for all patients in the future.
- E. Respondent shall appropriately explain and document the risks, benefits and alternatives for postoperative management plans with all patients in the future.

- F. Respondent shall maintain appropriate patient operative reports for all patients in the future.
- G. Respondent shall appropriately inform the patient and document all serious complications suffered by patients in the future.

16. On November 8, 2007, the Board filed formal disciplinary charges against Respondent alleging that he violated the terms and conditions of a Board Order and he engaged in practice harmful or detrimental to the public and professional incompetence in his ophthalmologic surgical practice, including the following:

- A. Failing to provide preoperative and postoperative examinations and management plans.
- B. Failing to maintain appropriate medical records.
- C. Failing to properly inform a patient about a serious complication.
- D. Failing to perform and/or document proper systematic management of glaucoma patients.
- E. Failing to maintain appropriate medical records.

17. On May 6, 2010, Respondent entered into a Settlement Agreement with the Board to resolve the pending disciplinary charges. Under the terms of the Settlement Agreement, Respondent completed a Board-approved comprehensive clinical competency evaluation and a Board-approved neuropsychological evaluation. The Board issued Respondent a Citation and Warning and ordered him to pay a \$10,000 Civil Penalty and complete a Board-approved professional ethics program and record keeping program. Finally, the Board placed Respondent on probation for a period of five years subject to the following terms and conditions:

- A. **Monitoring Program:** Respondent shall contact Shantel Billington, Compliance Monitor, Iowa Board of Medicine, 400 SW 8<sup>th</sup> Street, Suite C, Des Moines, IA 50309-4686, Ph.#515-281-3654 to establish a monitoring program. Respondent shall fully comply with all requirements of the monitoring program.
- B. **Terms and Conditions:** Respondent agrees to fully comply with the following terms and conditions:
- 1) Respondent shall conform to the minimal standard of acceptable and prevailing practice in his postoperative management practices following cataract and refractive ophthalmologic surgery for all patients in the future.
  - 2) Respondent shall perform and document appropriate preoperative examinations for all patients in the future.
  - 3) Respondent shall obtain and document appropriate informed consent for all patients prior to ophthalmologic surgery in the future.
  - 4) Respondent shall appropriately explain and document the risks, benefits and alternatives for recommended surgical procedures for all patients in the future.
  - 5) Respondent shall appropriately explain and document the risks, benefits and alternatives for postoperative management plans with all patients in the future.
  - 6) Respondent shall maintain appropriate patient operative reports for all patients in the future.

7) Respondent shall appropriately inform the patient and document all serious complications suffered by patients in the future.

C. **CPEP Remediation Plan:** Respondent shall successfully complete a Board-approved educational program as recommended by CPEP including the following:

1) **Educational Preceptor:** Respondent shall submit the name and CV of an ophthalmologist to serve as his educational preceptor as recommended by CPEP. Respondent shall meet regularly with the educational preceptor to review cases, discuss decisions, review specific areas of need and engage in a quality improvement processes.

2) **Continuing Medical Education and Self-Study:** Respondent shall complete continuing medical education and self-study as recommended by CPEP.

3) **Documentation Course:** Respondent shall complete a Board-approved documentation program within ninety (90) days of the date of this order.

4) **CPEP Reassessment:** Respondent shall complete a reassessment as recommended by CPEP.

D. **Practice Monitoring Plan:** Respondent shall fully comply with the practice monitoring plan approved by the Board. The practice monitor shall be an Iowa-licensed, board-certified, ophthalmologist. The practice monitor shall agree to serve under the terms of the practice monitoring plan. The practice monitor shall review medical records for selected patients and meet regularly with Respondent to review cases, review specific topics and engage in a quality improvement

processes. Respondent shall fully comply with all recommendations of the practice monitor. The practice monitor shall immediately notify the Board if he receives information which indicates that Respondent has violated the appropriate standard of care or has engaged in practice which is harmful or detrimental to the public. The practice monitor shall submit written quarterly reports to the Board no later than 1/20, 4/20, 7/20 and 10/20 of each year of this Order.

E. **Worksite Monitor:** Respondent shall submit for Board approval the name of a physician who regularly observes and/or supervises Respondent in the practice of medicine to serve as worksite monitor. The Board shall provide a copy of all Board orders relating to this matter to the worksite monitor. The worksite monitor shall provide a written statement indicating that they have read and understand this Order and agrees to serve under the terms of this Order. The worksite monitor shall agree to inform the Board immediately if there is evidence of professional misconduct, sexual misconduct, substance abuse or a violation of the terms of this Order. The worksite monitor shall submit quarterly reports to the Board no later than 1/20, 4/20, 7/20 and 10/20 of each year of this Order.

F. **Quarterly Reports:** Respondent shall file sworn quarterly reports attesting to his compliance with all the terms of this Settlement Agreement. The reports shall be filed not later than 1/10, 4/10, 7/10 and 10/10 of each year for the duration of the period of probation.

- G. **Board Appearances:** Respondent shall appear before the Board annually or upon request of the Board for the duration of the period of this Order. Respondent shall be given reasonable notice of the date, time and location for the appearances. Said appearances shall be subject to the waiver provisions of 653 IAC 24.2(5)(2).
- H. **Monitoring Fee:** Respondent shall make a payment of \$100 to the Board each quarter for the duration of this Order to cover the Board's monitoring expenses in this matter. The monitoring fee shall be received by the Board with all quarterly reports required under this Order. The monitoring fee shall be sent to: Shantel Billington, Compliance Monitor, Iowa Board of Medicine, 400 SW 8<sup>th</sup> Street, Suite C, Des Moines, IA 50309-4686. The check shall be made payable to the Iowa Board of Medicine. The monitoring fee shall be considered repayment receipts as defined in Iowa Code section 8.2.

18. The Board alleges that Respondent has willfully and repeatedly violated the terms and conditions of probation established in the May 6, 2010, Settlement Agreement, including, but not limited to, the following:

- A. **Educational Preceptor:** The Board alleges that Respondent failed to obtain an Educational Preceptor in a timely manner in violation of paragraph 11(C)(1) of the Settlement Agreement he entered into with the Board on May 6, 2010.
- B. **Continuing Medical Education and Self-Study:** The Board alleges that Respondent failed to complete and/or document continuing medical education and self-study as recommended by CPEP in violation of paragraph 11(C)(2) of the Settlement Agreement he entered into with the Board on May 6, 2010.

- C. **11 Medical Knowledge Learning Goals:** The Board alleges that Respondent failed to complete and/or document the 11 Medical Knowledge Learning Goals as recommended by CPEP in violation of paragraph 11(C) of the Settlement Agreement he entered into with the Board on May 6, 2010.
- D. **Practice Monitoring Plan:** The Board alleges that Respondent failed to participate in a Board-approved Practice Monitoring Plan in a timely manner in violation of paragraph 11(D) of the Settlement Agreement he entered into with the Board on May 6, 2010.
- E. **Worksite Monitor:** The Board alleges that Respondent failed to participate in Board-approved Worksite Monitoring in a timely manner in violation of paragraph 11(E) of the Settlement Agreement he entered into with the Board on May 6, 2010.

#### **E. SETTLEMENT**

19. Settlement. This matter may be resolved by settlement agreement. The procedural rules governing the Board's settlement process are found at 653 Iowa Administrative Code 12.25. If you are interested in pursuing settlement of this matter, please contact Kent M. Nebel, J.D., Legal Director at 515-281-7088.

#### **F. PROBABLE CAUSE FINDING**

20. On September 23, 2011, the Iowa Board of Medicine found probable cause to file this Statement of Charges.



Siroos S. Shirazi, M.D., Chairman  
Iowa Board of Medicine  
400 SW 8<sup>th</sup> Street, Suite C  
Des Moines, Iowa 50309-4686