IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SEVEN

ANN K. NEUHAUS,	)	
	)	
Petitioner,	)	
	)	Case No. 2012-CV-873
vs.	)	
	)	
KANSAS STATE BOARD OF HEALING ARTS,	)	
	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND ENTRY OF JUDGMENT

The above captioned matter comes before the Court upon Petitioner Ann K. Neuhaus's Petition for Judicial Review. After consideration, the Court finds and concludes as follows:

NATURE OF THE CASE

This case is before the Court on Ann K. Neuhaus's ("Petitioner") latest Petition for Judicial Review. This matter has a long procedural history with numerous Final Orders issued by the Kansas State Board of

Healing Arts ("the Board"), Petitions for Judicial Review, and Opinions issued by this Court. The latest Petition for Judicial Review, filed February 15, 2019, is predicated on the Board's latest Final Order, dated January 15, 2019. The Board's 2019 Final Order ("Final Order") was issued in response to the Court's July 31, 2018 *Opinion* remanding the matter for further consideration. The Petitioner now complains that the Board acted contrary to the Court's prior *Opinions* and that the Board otherwise acted in ways that entitle her to relief under K.S.A. 77-521(c)(4), (c)(5), (c)(7), and (c)(8). The matter has been fully briefed by both parties.

On January 15, 2019, the Board entered a "Final Order ON REMAND" which again revoked the Petitioner's license to practice medicine and affirmed its prior cost assessment, which cost assessment the Court had earlier affirmed, as modified, as a valid lawful order, both in the manner of its assessment and amount. The

Petitioner here again has appealed the latest Board decision, asserting that the Board has not yet conformed its decision making authority in accordance with past mandates and, specifically, the principles annunciated in the Court's 2018 *Opinion and Order of Remand*.

The Petitioner asserts the Board has erred in the following respects:

1. The Board Failed to Follow the Remand Order Regarding Intent;
2. The Board Improperly Applied the "Full and Free Disclosure" Aggravating Factor;
3. The Board Failed to Properly Apply the "Remorse and Rehabilitation" Aggravating Factors;
4. The Board Improperly Applied the "Pattern of Misconduct" Aggravating Factor;
5. The Board Improperly Applied the "Public Perception" Aggravating Factor; and
6. The Board Ordered a Disproportionate Sanction.

The Petitioner asks the Court to again vacate the Board's Order and effectively claims the Board has demonstrated that its lacks the capacity to adjudicate this case in conformance with governing legal principles, asking that the Court dismiss this proceeding altogether in lieu of continuing this process as one without end or, alternatively, that the Court act to mandate a result that conforms with the law on the facts existing when the errors existing are excised.

CONCLUSIONS OF LAW:

Undoubtedly here, the Board's initiative to sanction the Petitioner pursuant to what it stresses is its "informal" - its term - 2008 sanctioning guidelines' policy, which, in light of past Court opinions, has constituted a conundrum for the Board. The Court cannot but think that this policy, if it was to be applied, is one that should have been adopted only after it has been vetted through the process of

rule and regulation authority. *See* K.S.A. 77-415, *et seq.; Bruns v. Bd. of Technical Professions,* 255 Kan. 728 (1994). However, as that sentencing guidelines policy identified officially as *Guidelines for the Imposition of Disciplinary Sanctions* (August 2008) had been published by the Board on its internet site and, otherwise, as well, announced as its policy, it, whether properly or improperly adopted, could not escape the fact that if it is to be used, it needed to be followed, not just applied at random or selectively. Parties facing the Board as a matter of discipline have a due process interest inuring in determining their approach to any proceeding before the Board, including the Board's use of this advertised policy. Certainly here in this case, the Board - and the Petitioner having embarked into this proceeding with an eye to the Board's intended, and actual, use of it - cannot change or manipulate the sanctioning policies after the

process has begun, particularly, at this stage of the process.

Moreover, as the Court has opined, the Court was, and is, not inclined to sanction a Board's final order that effectively requires the Court to either ignore guiding principles or guess at which factors among many - with some failing, perhaps, of reason or relevance to some degree or another - might sustain its judgment. These principles of lawful adjudication and adherence to the separation of powers that have always pertained, still pertain. The only question now is whether this latest sequel of final orders conforms with law, fact, and reason, which if so, would trump any other considerations.

Petitioner claims that the Board's finding of intent was misapplied in determining an appropriate sanction for Dr. Neuhaus's recordkeeping violations. As discussed in prior rulings, incorporated here, but not repeated, the Board placed Dr. Neuhaus's conduct in

category, Patient Records, at Grid 10A, which placement on its sanctioning grid had already enhanced the presumed penalty, based on "intent", only to be potentially lessened on findings of mitigating factors or potentially increased on findings of aggravating factors. The Doctor's contention is that the Board found her awareness or "knowledge", as the Board characterized the nature of her recordkeeping failures, was an aggravating factor. Of course, if so, absent a succinct differential, this is a redundancy because intent is defined by the Board's guidelines for gridline 10A as "deceptively altered or intentionally failed to create documentation". Dr. Neuhaus's conduct fell in the latter category. The guidelines' policy itself further defines "intent" as "the conscious objective or purpose to accomplish a particular result", which the Court had pointed out not only in its 2017 *Opinion*, at page 17, but in its *Opinion* in 2018 at page 10. Thus, if "knowledge", which can only

be derived from consciousness, was categorized in a context not involving another distinct factor specifically to be weighed, it could constitute a redundancy and, hence, enhance a penalty already determined by grid placement or movement along the grid.

The Petitioner points to the Board's Final Order at page 14, where it considered factors under its aggravating/mitigating category captioned "D. General aggravating and mitigating circumstances", a listed factor "a) Licensee's knowledge, intent, degree of negligence". The Petitioner also asserts the Board used "knowledge" or state of mind in assessing under the same category at "d) potential for successful rehabilitation" and, again in the aggravating/ mitigating category denominated "C. Factors Relevant to the Disciplinary Process" at factor "f) Remorse and/or consciousness of wrongfulness of conduct". In all, it

labeled them as aggravating in some respect making reference as follows:

> "The aggravating factor of 'intentional vs. inadvertent' being removed from the analysis for the purpose of this remand proceeding as required by the district court, the Board finds that, in the context of the district court's view of the descriptive factors, the Board's substantive analysis in regard to Dr. Neuhaus' state of mind amplifies the Board's application of factor 'h) remorse and/or consciousness of wrongfulness of conduct', the knowledge aspect of factor 'a) Licensee's knowledge, intent, degree of negligence', and 'd) potential for successful rehabilitation.' Aspects of the substance of the Board's discussion at page 47 of the 2017 Final Order regarding Dr. Neuhaus' state of mind related to her awareness of the wrongfulness of her conduct and her disregard for the wrongfulness of her conduct are (based on the premises mandated by the district court) more properly placed in the context of these aggravating factors. Based on the analysis and direction mandated by the district court, the Board finds these factors to be strongly aggravating. Specifically, as referenced at page 47 of the 2017 Final Order, the Board finds that Dr. Neuhaus provided a facially illogical explanation of her motivation for her conduct in sworn testimony before the Board, and this enhances the weight of these aggravating factors by making it clear that her underlying conduct was not only intentional, it was done with the knowledge that it was wrongful and with disregard for its wrongfulness. Although the Board did not find

> that Dr. Neuhaus acted with a nefarious/ malicious motivating purpose, it found that she knew her intentional conduct was wrongful and provided no logical explanation to justify[2] her conduct. Even more importantly for the purposes of determining the appropriate sanction, as described in the 2017 Final Order, and discussed at greater length below, she lacks any remorse for her conduct, which amplifies the Board's concern that there is little to no potential for rehabilitation in this case.

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2 Although a logical and reasonably compelling rationale for intentionally failing to create records would not have excused the violation of law, it is relevant in the context of aggravation and mitigation. In this case, although the Board did not find that she had an immoral or nefarious underlying purpose, the fact that she did not provide any logical rationale indicates, at best, a disregard for the importance of creating and maintaining adequate records."

The reference above to page 47 of the Board's 2017 Final Order is to the Board's response to factor "k)" under the category of "A. Factors Relevant to the Misconduct", which the Court found improper in its 2018 *Opinion*. That reference was as follows:

> "k.) **Intentional vs. inadvertent:** Strongly aggravating. The actions of Respondent were clearly and admittedly intentional, willful and knowing. The acts of improper recordkeeping were not inadvertent. The Board is much more forgiving of mistakes. However, the Board does

not consider the actions of the Respondent to be inadvertent or honest mistakes, made negligently or recklessly. The Board notes Respondent's own testimony that she was intentional in her effort to conceal the information. When Doctor Milfeld inquired of Dr. Neuhaus and asked for her interpretation of 'intentional' action, Dr. Neuhaus did not shy away from her disclosure that she was making a conscious effort not to document, for privacy purposes. Dr. Neuhaus attempted to put the actions in context by explaining: 'Well, I don't know if anyone is familiar with this case, but a number of these patients' records were discussed at length on the Bill O'Reilly show.' (Tr. at p. 59, ln. 9-17). Dr. Neuhaus's own lawyer resisted objections to prevent testimony on this subject and argued that the hearing was de novo, expressing that it was expected that the Board would gather whatever information that it wanted to justify a decision (Tr. at p. 59, ln. 18 to p. 60, ln. 25). Dr. Neuhaus continued, explaining her 'motivation' and specific reason for not having personally identifying data in the patient records that could be used to identify the patients. (Tr. at p. 61, ln. 2-24). This issue was also previously addressed in the conclusions of the Initial Order: 'The Licensee attempts to explain why there is nothing of hers in these patient files. She argues that was to protect the patients. This argument has no merit since each patient was clearly identified. How the nonexistence of specific patient documentation protects patients is not clear and is without merit.' (Initial Order at Conclusion No. 6; 2012 Agency Record 01052).

> Additionally, Respondent testified in the initial hearing (on September 15 and 16, 2011) that she intentionally omitted information on the medical records because she was trying 'to protect my patients' privacy as much as I could.' (ROA 003121). The Board has reviewed the evidence in the record and concludes that the substantial competent evidence supports the reasonable conclusion that the stated motivations of the Licensee was to create an inadequate record and that the action was intentional and purposeful. This fails to meet the minimum recordkeeping requirements and the Board believes that this purposeful desire to protect the patient(s) is an intentional action by the Licensee. The Board concludes that this determination is supported by substantial competent evidence in the record and any other conclusion is unreasonable."

As to the Board's actions in regard to the noted factors under category "C" at "f)" and category "D" at "d)", the 2019 Board Final Order addressed "f)" of "C" as follows:

> "'**f) Remorse and/or consciousness of wrongfulness of conduct' on page 49:** Strongly aggravating, for the reasons stated therein and above. This is another among the constellation of factors that fall into the group of factors that relate to Dr. Neuhaus' historic and continuing lack of appreciation of the importance of complying with the Healing Arts Act and her disinterest in modifying her practice habits."

As noted, it referred to its 2017 Order in support, at page 49, in regard to "f", which reflected as follows:

> **"f.) Remorse and/or consciousness of wrongfulness of conduct:** The Board concludes that it does not appear that the Licensee recognizes that she has done anything wrong. It also appears that Respondent has not learned from prior disciplinary actions taken by the Board and the Respondent fails to express contrition or otherwise acknowledge the wrongful nature of her conduct or the negative impact it has upon the profession The Board observed that Respondent felt justified in her actions and showed no signs of remorse."

As to factor "d)" of "D", the Board said in its 2019 Final Order as follows:

> "**'d) Potential for successful rehabilitation' on page 50:** Exceptionally aggravating. The question of whether the licensee shows potential for rehabilitation is a key consideration, and strongly influenced the Board's determination on remand that revocation is the appropriate sanction in this case. Dr. Neuhaus history of repeated refusal to comply with the Healing Arts Act, combined with lack of remorse or interest in modifying her practices, demonstrate that rehabilitation is not a reasonably achievable goal in this case."

In reference to the same factor in its 2017 Final Order, that Order stated:

> **"d.) Potential for successful rehabilitation:** The history for the Respondent suggests that Respondent is incapable of successful rehabilitation."

Petitioner further claims the Board has now indirectly bootlegged matters going to intent into its categorization of factor "b)" Full and Free Disclosure to the Board" under category "C. Factors relevant to the disciplinary process", where the Board in its 2017 Order responded to this factor without labeling it at all, yet effectively stating its affect was neutral:

> **"b.) Full and free disclosure to the Board:** There is no evidence that Respondent has attempted to conceal facts. Respondent has fully and freely disclosed information to the Board. However, the Presiding Officer found that Respondent's testimony was lacking in credibility and persuasiveness."

However, the Board's 2019 Final Order labeled that factor as "slightly aggravating", stating as follows:

- "'**Full and free disclosure to the Board.**' on page 49. The Board finds this factor to be slightly aggravating. The baseline

> expectation is that licensees must not conceal facts and should fully cooperate with requests from the Board for factual information. Falling to meet this baseline obligation may serve as an aggravating factor. Generally, there are no 'bonus points' for meeting this obligation. In cases in which a licensee is unusually cooperative and forthcoming, this factor may be applied in mitigation. However, in this case, although Dr. Neuhaus met the baseline expectations in regard to disclosing objective facts in response to requests during the investigation, the Board found that her testimony to the Board at the review hearing reflected concealment in regard to her motivations for her conduct because she provided a facially illogical explanation of her motivations in response to questioning from the Board (as referenced at page 47 of the 2017 Final Order). The Board, assessing both the substance of her testimony and relying on its opportunity to observe her testimony in person, found her to lack credibility in this regard."

Beyond the above, Petitioner further regresses to compare the factual basis for the Board's reference to p. 49 of its 2017 Final Order where it was noted that the original hearing officer also, but without a citation to the record, believed Dr. Neuhaus was not credible. Whether the 2017 rendition is correct by

language, it unquestionably is a fair inference to be had from the presiding officer's findings, which the Court considered as part of its evidentiary rulings in its initial 2014 *Opinion*. However, that language was dropped in the Board's 2019 Final Order in favor of the Board's own personal assessment of credibility. The reference to the 2017 Final Order was to the page number of the Order where it appeared, not an incorporation of it. When Dr. Neuhaus appeared before the Board as part of the earlier remand process and responded to Board questioning, her explanation for her omissions was not accepted by the Board as the Board correctly detailed above. The Petitioner is essentially arguing that the dichotomy between the two final orders and, hence the recharacterization by the Board of its thinking, is not permitted. However, rethinking was inherent in the remand and who believed Dr. Neuhaus not to be credible is not such a material

inconsistency as to disable the response or label it as improper or spurious.

Thus, at this juncture, given the above renditions, the Court would stop to address how the Board handled the issue of intent, which under its prior *Order*, the Court found it mishandled by failing to find how Dr. Neuhaus's intent or state of mind, which had already been embedded in, and punished in the Patient Records - 10A Grid - selected would be embellished or enhanced from the perspective of other factors and their perspectives when proceeding through its mitigating/aggravating phase of procedural analysis.

The Court does not believe after a careful review of the Board's 2019 *Final Order* that this same failure attends it, notwithstanding that a simple facial reading of the analytical renditions set out previously might, at first glance, cause such a concern. The Court believes the footnote to the rendition in reference to factor "a) Licensee's knowledge, intent,

or degree of negligence" under category "D. General aggravating and mitigating circumstances" restrains the analysis sought to be placed on that factor by the Petitioner and, hence, would not constitute a misapplication, but rather an explanation of how Dr. Neuhaus's state of mind spoke volumes in regard to her lack of respect to the duties imposed upon her as a physician, both then, *and going forward.* Again that footnote stated:

> "2. Although a logical and reasonably compelling rationale for intentionally failing to create records would not have excused the violation of law, it is relevant in the context of aggravation and mitigation. In this case, although the Board did not find that she had an immoral or nefarious underlying purpose, the fact that she did not provide any logical rationale indicates, at best, a disregard for the importance of creating and maintaining adequate records."

Rather, what appears to have occurred, is that the Board separately considered Dr. Neuhaus's intent in the context of her knowledge - given her tenure in the practice of medicine - in reference the importance of

recordkeeping, which the Board must have believed demonstrated a cavalier attitude. It could not be questioned that if the factual findings had classified her intent as "nefarious", that state of mind could be, as well, assessed independent of the fact the act was intentional. The "D." category as well stands out more or less as an "overall" category thus lending propriety to a response there. Thus, the Board's response was an exposition of Dr. Neuhaus's attitude in light of her knowledge, rather than simply her conduct, *per se*. Further, "knowledge" as used in the category "a)" factor in Category "D" is set out as a separate item from the terms "intent" and "degree of negligence". As such, the Board cannot fairly be said to have "doubled down" on punishment already subsumed in the selected grid nor clearly identified as one necessarily appropriate for comment only in some other factor.

As to Petitioner's assertion Dr. Neuhaus's "knowledge", which she construes as intent, also

impermissibly corrupted the Board's finding under the "full and free disclosure" factor the Court finds this stands merely as a misperception by her. Her argument is that the Board's use of its belief that she misspoke before the Board about why her record omissions occurred merely shifted any enhanced punishment for her intent to the "Full and Free Disclosure" factor. The error by the Board before in considering intent was in choosing the category under which the consideration of her intent was made. However, determining how Dr. Neuhaus's intent impacted other factors, if any, is exactly what the Board was supposed to do under the Court's 2018 remand order. Thus, to export the concern engendered by the fact her conduct was intentional to other factors, if any, to which it had impact is consistent with the Court's *Opinion*, even if in doing so it might change the Board's view of the proper perspective to give to that factor under consideration. Whether the Court agrees with its new placement, *per*

se, is not the test, only whether it is rational and reasonable. As such, the Board's response and weighting under the "Full and Free Disclosure" factor does not stand as "so wide of the mark" as to label it as arbitrary or unreasonable.

The Petitioner has asserted the Board abused its authority in regard to factors going to voluntary restitution (Category "C. Factors relevant to the disciplinary process" at factor "c"), remorse, *Id.* at factor "f)", and rehabilitation (Category "D. General aggravating or mitigating circumstances at factor "d)". The gravamen of Petitioner's claim rests first in a multiplicity argument, that is, applying the same essential reasoning to find some degree of aggravation in each. The Petitioner points to the Court's 2017 *Opinion* at p. 86 in support. However, the Court there at that time was faced principally with no reasons given for the 2017 ratings assigned. Although it did opine, as Petitioner states, that giving the same

weight to the same "result" despite differing questions "would" represent a flaw in analysis, recognizing, however, that would not pertain if it was weighing the underlying issue supporting the result. However, the Court was discussing how it saw no problem in responding to differing questions from differing perspectives. Substituting the word "factor" for the word "issue" provides for what was intended.

Correctly, as the Petitioner points out, the Court did feel that the Board's finding Dr. Neuhaus's failure to seek training (2017 *Opinion* at p. 78) was "conflicted". The Court felt the Board there was simultaneously asserting that her conduct was intentional and by age and time in the profession knew better - more or less what more to learn - but then, it is true Dr. Neuhaus made no proffer than she had sought means *of any kind* in an aim to better her conduct. Accordingly, overall, the Court finds Petitioner's

objections to the Board's responses to these identified factors cannot be sustained.

The Petitioner next confronts the Board's evaluation of the "Pattern of Misconduct" factor, which appears in the Board's guidelines under the "D General aggravating and mitigating circumstances" at factor "g)". The Petitioner argues that the Board's reference to page 50 of the 2017 Final Order demonstrates it has been misapplied such as to conflict with the "Multiple Instances, Same Conduct" column of the 10A Grid where which Dr. Neuhaus had been placed by virtue of the eleven cases subject of her record violations. That column had further enhanced the presumed penalty. The facial language used by the Board, however, fairly does raise a question. The Board's analysis of this factor in it 2017 Final Order was as follows:

> "**g.) Pattern of misconduct:** There have been multiple and repeated acts of recordkeeping violations by the Respondent; both present and past. The recent acts which form the basis for the Petition involve eleven (11) separate and distinct patients and involve numerous

recordkeeping violations."

In that 2017 Final Order it had set out this factor but it was one of those factors the Board had commented on, but had failed to score as aggravating, mitigating or not applicable. Petitioner's assertion is that the reference to this factor in the current 2019 Final Order to that page of the 2017 Final Order where it had been commented on means it accepted, as well, the 2017 Order's analysis or doubling down on the already enhanced penalty accompanying that column placement. This, however, is a misperception. Correctly, while some factors in the 2019 Final Order do make reference to the 2017 Final Order, some merely cite the page number of that *Order* for reference while others, but not this one, not only cite the page number of the 2017 Order for reference, but also then find the scored result is based *on* the 2017 Final Order "for the reasons stated therein". The 2019 Final Order as to this factor stated:

> "'g) **Pattern of misconduct' on page 50.** Strongly aggravating. The pattern of misconduct in regard to record keeping shown over Dr. Neuhaus career and in this case indicate Dr. Neuhaus is unlikely to ever embrace her duty to comply with the Healing Arts Act."

Accordingly, the reference to p. 50 is merely to where the earlier 2017 comment was in the Final Order, not an embrace of the statement there. In the Court's 2018 *Opinion*, the Court had faulted the Board and proscribed it on the Remand from adding any enhancement of penalty *solely* from the multiple, same type of conduct, offenses in this case because Dr. Neuhaus's presumed sanction had already been placed in the multiple instances, same conduct, column, hence, providing an enhanced penalty for that multiple conduct. The Board in its 2019 Order declared it did not repeat that error, which the Court must accept in the absence of proof to the contrary. Thus, whereas, the Board's 2017 Final Order had allowed this multiplicity in Dr. Neuhaus's conduct to appear in its evaluation of this pattern of conduct factor, it is

clear by the 2019 Final Order's text under this factor that it did not consider the multiplicity of offenses in this case as a material part of the response, but rather Dr. Neuhaus's conduct to date historically in assessing its impact. Hence, the Petitioner's challenge here is askew of the facts and can have no merit.

The Petitioner also challenges the Board's scoring of its aggravating/mitigating analysis under "C. Factors Relevant to the Disciplinary Process" at factor "h) Public perception of protection", which the Board commented on, but did not rate, in its 2017 Final Order stating:

> "**h.) Public perception of protection:** The public perception is damaged, and the negative impact upon the public trust in the profession, by the actions of Respondent through her complete disregard for recordkeeping requirements."

Id. at p. 50.

The same factor also appears in "D. General aggravating and mitigating circumstances:" at factor

"n)" in its 2017 Final Order, which factor the Board also left unrated.

> **"n.) Public's perception of protection:** Disciplinary sanctions in general send a strong message to the general public that the Board is interested and committed to protecting the integrity of the profession and protecting the public. The Mission of the Board, the Philosophy of the Agency and the policies behind the Sanctioning Guidelines are all implicated by a physicians inadequate recordkeeping."

In her challenge, the Petitioner refers back to an *Opinion* the Court entered on a second remand of the matter to the Board issued June 13, 2017. At that time, under the Final Order then under review, the Board had rated these factors as, respectively "extreme aggravating" and "strongly aggravating". It had done so without any specific accompanying comment. Notwithstanding, the Court in its 2017 *Opinion* opined on those factors, as relevant here, first at pps. 79-80 on factor "h)" in "C":

> "Lastly, under this category under factor 'h)', which the Board found as an 'extremely aggravating' factor - again in the context of

the necessity of the Board proceeding - the inquiry is in reference to 'the public's perception of protection', which question is most likely grounded on the effect of the publicity occasioned in seeking to discipline a perceived errant health care professional under the Board's oversight. Here, certainly, the high profile nature of the underlying medical procedure for which adequate records were not Kept, and which absence certainly gave cause to initiate and continue these proceedings, could certainly not be graded as a positive. The Court would have to believe that the average citizen, regardless, would hope that whatever rules governed any procedure would be overseen and enforced. That the Board undertook its perceived duty, while comforting, could not belie doubts raised about whether professionalism was exercised in the past, as this character of proceeding necessarily comes after the fact in the alleged events. The Board's characterization of the effect of Dr. Neuhaus's record omissions as 'extremely aggravating', particularly from the perspective of health care officials, cannot be labeled as without reason or arbitrary."

As to factor "n)" in "D", the Court stated at pps. 86-87:

"Petitioner's challenges to the Board's conclusion, under j) - ill repute to the profession — and n) — public perception of protection - as, respectively, "strongly aggravating", and "strong aggravating", are not convincing. She claims they lack evidence and double count. It can also be noted that the

same question as n) also appeared as factor h) under 'Factors Relevant to the Disciplinary Process'. The principal flaw would rest in the silence as to the weighting employed, as noted earlier.

Nevertheless, simply, no question exists, particularly as a general consideration, that both the public and the profession demand that oversight systems work, and the fact they do in reference to past occurrences naturally raises questions about how such conduct was allowed to occur or continue in the first instance. However, short of education or monitoring in advance, operating in hindsight is the norm and is inherent in these systems. Blaming the person disciplined for the public perception of the quality of the Board's oversight or of the profession overall probably would be a step too far; however, the fact that a high profile case might appropriately be the forum for setting a high level example as a deterrent cannot be overlooked, assuming that result is also independently justified. But again, because the Board made no explanation, sound review is precluded."

In this proceeding the Petitioner relies on the Court's admonition that blaming the person prosecuted for the public's perception of the quality of the oversight "might be a step too far". However, Petitioner overlooks the context for her quote. This case can fairly be described as "high profile" in terms

of the area of practice in which it occurred, which faces an advocacy group that is principally seen as opposed to any abortion at all. Dr. Neuhaus's alleged errors, including her errors in recordkeeping, would, at least to them, perhaps, expose a systemic failure, and, in fact, it was their general complaint that the Board acceded to in justification of the Board's investigation, which resulted in the overall complaint filed in this case against Dr. Neuhaus by the Board. Nevertheless, no question - regardless of which side the issue the advocacy rested concerning the subject matter - not only the individual, but the issue, the profession, and the Board were spotlighted. The Court finds no problem with the classification as each was assessed from a differing perspective for reasons the Court noted in its 2017 *Opinion* earlier quoted. The only difference between the ratings in the 2017 Final Order and the 2019 Final Order is that the 2019 Order dropped the adjectives and added needed comment.

Additionally, neither of these rated factors were identified as ones materially supporting the imposition of the sanction of revocation in this case. Accordingly, the Petitioner's claim as to the misapplication and consideration of these factors is rejected as not materially determinative of the final result nor improperly determined.

Lastly, the Petitioner argues that the penalty - revocation of licensure and the assessment of a proportionate share of the costs incurred arising only from the original hearing - is disproportionate and should be set aside. Admittedly, revocation of a physician's license for recordkeeping violations is - by the evidence advanced - establishing a first, a precedent. But as the Court noted in its 2017 *Opinion* at pages 11-14 on a similar argument made, the evidence proffered to the Court here relating to physician discipline decisions in other cases before the Board that might be lesser on facially more egregious

violations lacked sufficient factual material about these other cases, such that the Court could not weigh or measure any true disparity. No further evidence has been suggested nor proffered to challenge or warrant any change to this earlier conclusion. The Court ruled on the cost assessment long ago and the reduced, proportional, assessment has long been approved and the Board has assessed no costs as a consequence of any subsequent appeals or hearings on remand. Accordingly, the Court feels there is no basis upon which to change its past rulings.

Given all the above discussions, the only further review that needs to be taken is whether the Board sufficiently collated its findings such that the Court can successfully determine that the sanctioning decision arrived at is supported by the record and that the reasoning directed to that conclusion is not so loose as to compel the Court to divine what ultimately guided that final conclusion.

Here, unlike the Board's 2017 Final Order, it proceeded through its sentencing guidelines matrix, scoring all aspects of its aggravating/mitigating factors and indicating their relevance or non-relevance. Too, in Part III of the 2019 Final Order, it articulated clearly the concerns it had as health care professionals with Dr. Neuhaus's omissions in light of the case before them and in light of Dr. Neuhaus's professional obligations and history before the Board. It also incorporated its belief of the importance of good recordkeeping for a health care professional. It might be questioned whether the Board's intimation that Dr. Neuhaus should have undertaken self-help steps in improving her recordkeeping skills, yet without suggesting what that would be, particularly, given Dr. Neuhaus's tenure in her profession, was sound. However, the Board's articulation of its belief as to her motivation and the overall tenor of its basis for determining revocation

appropriate, based on her years in the profession and her history before the Board, is rationally based. This principally leaves that perceived fault as to lack of self-help remedial efforts as without governing ascendancy to its final conclusion.

Accordingly, the Board having acted in accordance with early noted governing legal principles, and given that there is sufficient substantial evidence in the record to support its determinations, the Court is required to find for the Respondent, the Kansas State Board of Healing Arts, and against the Petitioner, Ann K. Neuhaus, by affirmance of Board's January 15, 2019 Final Order.

ENTRY OF JUDGMENT

Judgment is hereby entered for the Respondent, the Kansas State Board of Healing Arts, and against the Petitioner, Ann K. Neuhaus, for the reasons stated in the foregoing *Memorandum Opinion.* Costs, if any due, are taxed to the Petitioner.

This entry of judgment shall be effective when filed with the Clerk of this Court and no further journal entry is required.

IT IS SO ORDERED this 18th day of July, 2019.

Franklin R. Theis
Judge of the District Court
Division Seven

cc: Robert Eye
Tucker Poling