

BEFORE THE IOWA BOARD OF PHYSICIAN ASSISTANTS

IN THE MATTER OF:

CASE NOS.: 08-001, 09-020, 09-022
DIA NO.: 11DPHPA002

MICHAEL JOHNSTON, P.A.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, DECISION AND ORDER

Respondent

On December 1, 2011, the Iowa Board of Physician Assistants (Board) issued Notice of Hearing and Statement of Charges to Michael Johnston, P.A. (Respondent), pursuant to Iowa Code section 17A.12(2), 17A.18(3) (2011) and 645 IAC 11.6.

Respondent is charged with:

Count I: Obtaining, possessing, attempting to obtain or possess, or administering controlled substances without lawful authority in violation of 645 IAC 329.2(7);

Count II: Violation of a regulation or law of this state, another state, or the United States which relates to the practice of the profession in violation of 645 IAC 329.2(12);

Count III: Failure to comply with the terms of a Settlement Agreement and Final Order in violation of 645 IAC 329.2(19);

Count IV: Habitual intoxication or addiction to the use of drugs in violation of 645 IAC 329.2(6);

Count V: Engaging in any conduct that subverts or attempts to subvert a board investigation in violation of 645 IAC 329.2(17).

Hearing on the Statement of Charges was held on January 18, 2012 at the Lucas State Office Building, Des Moines, Iowa. Respondent Michael Johnston appeared and was represented by attorney Connie Diekema. Assistant Attorney General September Lau represented the state of Iowa. The following Board members served as the presiding officers for the hearing: Theresa Hegmann, P.A., Chairperson; Ted Smith, P.A.; Susan Koehler, P.A.; Jon Ahrendsen, M.D.; Joseph Molnar, D.O.; and, Mara Swanson, Public Member. The hearing was closed to the public at Respondent's request, pursuant to Iowa Code section 272C.6(1). The hearing was recorded by a certified court reporter. Administrative Law Judge Kerry Anderson assisted the Board in conducting the hearing. Following the hearing, the Board convened in closed executive session, pursuant to Iowa Code section 21.5(1)(f), to deliberate its decision. The Board directed the administrative law judge to prepare the Findings of Fact, Conclusions of Law, Decision and Order, in conformance with the deliberations.

THE RECORD

The record includes the testimony of Anne Cardinal, Account Manager with FirstLab, Respondent Michael Johnston and his Alcoholics Anonymous Sponsor, H.D.O.¹ Additionally, State's Exhibits 1-7 and Respondent's Exhibits A, B, and C were admitted into evidence without objection.

FINDINGS OF FACT

1. On January 20, 2006, the Board issued Respondent license number 001694 to engage in the practice of a physician assistant in the state of Iowa. (State Exhibit 7)
2. Subsequently, Respondent suffered a back injury and, during his recovery, became addicted to pain medications. Prior to 2010, Respondent entered into an Impaired Practitioner Program (IPP) recovery contract. (Johnston testimony; State Exhibits 5-7)
3. On February 12, 2010, the Board filed a Notice of Hearing and Statement of Charges against Respondent charging him with obtaining, possessing, attempting to obtain or possess, or administering controlled substances without lawful authority; violating a law which relates to the practice of the profession; and, violating the terms of his IPP contract. (State Exhibit 5) Subsequently, on April 21, 2010, the Board approved a settlement agreement entered into by Respondent whereby Respondent admitted using hydrocodone (Vicodin) on one occasion without a legitimate prescription. As a part of the agreement, Respondent was ordered by the Board to serve a four-year term of probation, to abstain from the use of drugs and alcohol, to participate in the Board's chemical screening program, and to attend aftercare. (State Exhibit 6)
4. In July 2011 Respondent petitioned the Board for early release from his probationary period. (State Exhibits 4, 7; Johnston testimony)

Respondent testified that he became obsessed with obtaining early release from his probation and began to resent the obligations he assumed under the April 2010 settlement agreement. (Johnston testimony)

Respondent's AA sponsor testified that, initially, Respondent was not fully engaged in the program. He noted he had concerns about Respondent's lack of commitment to AA and he advised Respondent he need to become more active in the program. (H.D.O. testimony)

5. In September 2011 Respondent accepted approximately thirty (30) tablets of Lortab and Percocet from an acquaintance for whom he was providing transportation to aftercare meetings. Respondent admits having used the medication. However, the record is

¹ Given that H.DO is a member of Alcoholics Anonymous, the Board has elected to exclude the witness' full name from this decision and order and refer to the witness by the witness' initials.

somewhat unclear as to how much and how often. Respondent provided a written statement that contained the following account of his relapse:

At the beginning of September I was asked by [an individual] from the Harbor of Hope to give him a ride to a meeting. I have been involved in giving many others rides to meetings. He has apparently had no "clean time". After about a week of giving him rides and listening to the talk of his use I succumbed to the temptation getting pain medication from him in the form of [L]ortab and [P]ercocet. This was given to me and I accepted (sic) it. I can't tell you exactly how I made that decision, but once I did the obsessive compulsive thoughts took over reason I used this in the amount of about 4 or 5 tabs on Thursday, Friday and Saturdays. This went on until October 10th.

(State Exhibit 4)

At hearing, Respondent testified he used only on three weekends and only on the Thursday, Friday or Saturday evening of those weekends. Respondent testified he took four or five tablets on each occasion, he never used when he had to work and he was never under the influence when he did work. (Respondent testimony)

Respondent's AA sponsor testified Respondent admitted he was taking five or six tabs per day. (H.D.O. testimony)

6. On September 30, 2011 and October 10, 2011, Respondent provided urine specimens for chemical screening in accordance with the provisions of his April 2010 settlement agreement. Those specimens were deemed invalid. Respondent admits he over-hydrated and ingested herbal diuretics prior to these tests in an attempt to alter the results and hide his drug usage.²

7. On October 19, 2011 Respondent appeared before the Iowa Board of Physician Assistants' Discipline Committee to advocate for the early probation release he previously requested. Respondent did not inform the subcommittee of his relapse. (State Exhibit 4; Respondent testimony) Respondent testified it was "unfortunate" that he appeared before the subcommittee and did not choose to withdraw his request for early probation release. (Johnston testimony)

8. On November 21, 2011, Respondent provided a hair sample which tested positive for opiates, oxycodone and hydrocodone. (State Exhibits 1-3)

9. On December 1, 2011, the Board found probable cause to issue the present charges against Respondent. (State Exhibit 7)

² It should be noted that Respondent provided urine samples in May, June and July 2011 that, while negative for screened substances, also demonstrated notably low creatinine levels. Respondent's creatinine levels increased dramatically after his hair panel test. Respondent testified he was not aware of any medical condition he has that might have resulted in the low creatinine levels.

10. On December 9, 2011 Respondent entered into the Powell CDC Evening Outpatient Level 2.1 Substance Abuse Treatment Relapse Program which he successfully completed on January 16, 2012. (Respondent Exhibit B)

11. Respondent has been employed by Mahaska Health Partnership in Oskaloosa, Iowa for approximately two years. He is supervised by Dr. Sreedhar Somisetty, Staff Orthopedic Surgeon. Dr. Somisetty provided the Board with a statement that he has never had reason to believe Respondent was under the influence of any medication while at work. Dr. Somisetty noted that Respondent assists him with major surgeries and has always demonstrated competence, compassion and reliability. (Respondent Exhibit C)

12. Jay Christensen is the CEO of Mahaska Health Partnership. He provided the Board with a written statement that he is assured of Respondent's commitment to his recovery and that Mahaska Health Partnership is willing to implement the procedures necessary to monitor Respondent in the workplace. Mr. Christensen noted that there was no compromise in patient care during Respondent's relapse and that Respondent has agreed to provide all future test results required by the Board to Mahaska Health Partnership and to make himself available for additional random testing by Mahaska Health Partnership. Mr. Christensen stated that Respondent would be left on staff with the understanding that there is "zero tolerance" with regard to future substance abuse. (Respondent Exhibit A)

13. Respondent's AA sponsor testified that he believes Respondent has put more effort into his recovery in the past 90 days than he has in the previous three years of their acquaintance. He informed the Board that, while he has had past concerns about Respondent's commitment to recovery, that he now believes Respondent is on the right path. (H.D.O. testimony)

CONCLUSIONS OF LAW

Charges:

Iowa Code section 147.55(9)(2011) authorizes the Board to revoke, suspend or otherwise discipline a licensee who is guilty of acts or offenses as specified by board rule. The Board has promulgated rules pertaining to discipline for physician assistants at 645 IAC chapter 329. In relevant part, those rules allow the Board to dispense disciplinary action to licensees who:

- are habitually intoxicated or addicted to the use of drugs;
- obtain or possess controlled substances without lawful authority; in violation of 645;
- violate a state or federal relating to the practice of a physician assistant;
- subvert or attempt to subvert a Board investigation; or
- fail to comply with the terms of a Settlement Agreement and Final Order;

645 IAC 329.2(6), (7), (12), (17), (19).

Respondent does not deny the charges and the evidence in this case is undisputed. Respondent admits he is addicted to prescription pain medication. He was the subject of a Settlement Agreement and Final Order that required him to abstain from the use of drugs and alcohol. In September 2011, with the agreement and order still in effect, Respondent concedes he obtained Lortab and Percocet tablets from an acquaintance without a lawful prescription. Respondent admits he ingested the drugs on multiple occasions. Additionally, Respondent acknowledges that he attempted to alter urine specimens required under the April 2010 Settlement Agreement and Final Order in order to hide his relapse from the Board. Finally, Respondent confesses that he misrepresented his sobriety to the Iowa Board of Physician Assistant's Discipline Committee in October 2011 when he advocated for early release from probation but did not inform the committee of his relapse.

The undisputed evidence clearly demonstrates Respondent violated 645 IAC 329.2(6), (7), (12), (17), and (19).

Sanction:

Respondent asks that his license to practice as a physician assistant be continued subject to probationary conditions. (Respondent testimony) However, the Board is left with several concerns.

First, while Respondent admits attempting to skew the results of drug testing on two occasions, his urine test results show abnormally low creatinine levels on a regular basis until after he was required to provide a hair sample for testing. Thereafter, Respondent's creatinine levels improved dramatically. While Respondent denied any over-hydrating prior to his invalid tests in September and October, he was unable to offer a medical reason for his low creatinine levels prior to those occasions or for his improved creatinine levels after being required to submit a hair sample.

Second, the Respondent was less than clear about how many Lortab and Percocet tablets he ingested and when he did so. His written statement to the Board, his testimony and the testimony of his AA sponsor on the subject were inconsistent.

Third, Respondent's enrollment in a relapse treatment program did not occur until December 2011, after he became aware of the Board's decision to issue the Notice of Hearing and Statement of Charges in this case.

Finally, Respondent's actions in appearing before the Board's Discipline Committee, arguing for the early conclusion of his probation, and testifying to his sobriety at a time when he had relapsed raises serious concerns not only as to Respondent's insight into his addiction and his commitment to recovery, but also as to Respondent's respect for the Board and its authority to enforce the rules regulating this profession.

Balanced against these concerns is the fact that Respondent did enroll in and successfully complete relapse treatment, he is currently active in AA and appears sincere about his recovery. Respondent's AA sponsor is encouraged by Respondent's renewed commitment to the program and believes he is on the right path. Additionally, Respondent has the

support of his employer. The statements provided to the Board by Jay Christensen and Dr. Somisetty paint the picture of a competent professional who cares about the treatment provided to their patients.

Having weighed the evidence, the Board is unwilling to continue Respondent's current probationary status. A period of suspension is warranted after which Respondent's license may be reinstated on a probationary basis subject to random drug testing approved by the Board to verify Respondent's continued sobriety.

DECISION AND ORDER

IT IS THEREFORE ORDERED that Respondent's license shall be **SUSPENDED** for a period of thirty (30) days and continuing thereafter until such time as Respondent provides a hair sample for testing with negative results and Respondent pays a civil penalty of One Thousand Dollars (\$1,000). The specific chemical screening test to be used is left to the discretion of the Board.

Once Respondent has served his thirty (30) day suspension, complied with the testing requirement and paid the civil penalty set forth above, license number 001694 shall be reinstated. Respondent's license will be subject to the terms and conditions of licensure reactivation and immediately following reactivation it will be placed on probation for an indefinite period subject to the following provisions:

- A. Termination of Probation: Respondent shall have no opportunity to request termination of probation prior to the expiration of five years from the date of this order. Unless otherwise approved by the Board, five years is calculated based on years of active practice which is defined as working at least thirty (30) hours per week as a physician assistant. If Respondent is not engaged in active practice, such time will not apply to the five year requirement. Respondent shall provide documented proof of such active employment upon Board request.
- B. Abstinence from Drugs and Alcohol: Respondent shall not consume alcohol and shall abstain from the use of marijuana or any illegal substance. Respondent shall not use any controlled or prescription drug in any form unless the controlled or prescription drug has been prescribed for his use by a duly licensed treating physician or other licensed treating health care provider. Respondent shall inform any treating physician or other treating health care provider of his history of substance abuse prior to receiving any prescription drug. Respondent shall provide the Board written notice within seventy-two (72) hours of the use of any controlled or prescription drug and provide copies of each prescription drug prescribed by the treating physician or other treating health care provider. Respondent will not consume any foods or products containing poppy seeds and/or alcohol or use any type of soaps, body lotions or mouth washes containing alcohol.
- C. Chemical screening: Respondent shall submit to all requirements and conditions of the Board's chemical screening program using FirstLab or

other laboratory identified by the Board. This may include but is not limited to a daily call-in and random laboratory reporting requirements to provide a urine, blood, hair, nail, saliva, sweat or other bodily substance specimen on demand by an agent of the Board. Collection of samples is to be witnessed by authorized personnel at the approved collection site. Respondent is responsible for all costs of drug chemical testing.

- D. AA/NA Meeting Attendance: Respondent shall attend at least three (3) Board-approved aftercare meetings (Alcoholics Anonymous, Narcotics Anonymous, or other similar organization) weekly. Respondent shall attach to each quarterly report required under the next section of this Order statements signed or initialed by another person in attendance at the meetings attesting to his attendance. The statements shall include the time, date and location of the meetings attended. Respondent shall have an AA/NA sponsor and have at least weekly contact with said sponsor.
- E. Licensee Reports: Respondent shall file sworn quarterly reports with the Board attesting to his compliance with all the terms and conditions of this Order. The report shall detail each condition of this Order and how the Respondent has complied with the Requirement. The reports shall be filed no later than January 1, April 1, July 1, and October 1 of each year during the course of Respondent's probation.
- F. Substance Abuse/Aftercare Counselor and Reports: Respondent shall continue to meet once every two weeks with his Board-approved substance abuse or aftercare counselor until said counselor recommends and the Board approves meetings on a less frequent basis. Respondent shall continue to meet with this counselor until discharged from counseling and until his discharge from counseling is approved by the Board. Respondent shall ensure his counselor submits quarterly written reports to the Board concerning his treatment progress no later than January 1, April 1, July 1, and October 1 of each year.
- G. Notification of Employer: Respondent shall provide his present employer with a copy of the Notice of Hearing and Statement of Charges filed December 1, 2011 and a copy of this Order. In the event Respondent changes employers but remains practicing as a physician assistant or in another health-related field, he shall provide copies of the Statement of Charges filed December 1, 2011 and this Order to any future employers. Respondent shall, within ten (10) days of the date of this Order provide the Board with written verification from his current employer that the notification required under this section has been provided. Respondent shall, within ten (10) days of employment, provide the Board with written verification that any future employer has received the notification required under this section.
- H. Worksite Monitor and Reports: Respondent shall submit to the Board for its approval the name of a worksite monitor, who is another health care professional who regularly observes and/or supervises Respondent in his practice as a physician assistant. Respondent shall provide the worksite monitor a copy of the Notice of Hearing and Statement of charges filed December 1, 2011 and a copy of this Order. Respondent shall ensure his

worksite monitor submits quarterly written reports to the Board concerning his practice no later than January 1, April 1, July 1, and October 1 of each year during the course of Respondent's probation. Respondent shall have the worksite monitor sign an agreement to report to the Board any suspected impairments or violations of the law governing physician assistant practice required by this section, as well as to provide the quarterly reports required in this section. Respondent shall submit the signed agreement within fourteen (14) days of the date of this Order, of any new employment as a physician assistant or in any other health-related field, or of a change in worksite monitor if the current worksite monitor cannot fulfill the obligations specified in this section.

- I. Board Appearances: Upon the request of the Board, Respondent shall appear to report on the status of his recovery and to answer any questions or concerns the Board may have regarding his practice as a physician assistant. Respondent shall be given reasonable notice of the date, time and location for the appearances. Respondent agrees that any appearance is governed by 645 IAC 9.7 and waives any objection to the Board members participating in the appearance and later participating as decision makers in a contested case hearing.
- J. Change in Practice Address or Status: Respondent agrees to notify the Board in writing prior to any change in his practice address or status. Failure to notify the Board within fifteen days of a change in employment status shall constitute a violation of this agreement.
- K. Obey All Laws: Respondent shall obey all federal, state and local laws, and all rules governing the practice of a physician assistant in Iowa.
- L. Residence or Practice Outside Iowa: In the event Respondent leaves Iowa to reside or practice outside the state, he shall notify the Board in writing of the dates of departure and return. Periods of residence or practice outside the state of Iowa will not apply to the duration of the probationary period.

IT IS FURTHER ORDERED that the Respondent shall pay a \$75.00 hearing fee and the \$137.50 fee for the court reporter. These sums shall be paid within thirty (30) days of the date of this decision. If a transcript is ordered, the cost will be charged to the party requesting it. Iowa Code section 272C.6(6); 645 IAC 11.23.

Dated this 23rd day of February, 2012.



Theresa Hegmann, PA
Chairperson
Iowa Board of Physician Assistants

cc: September Lau, Assistant Attorney General
Connie Diekema, Respondent's Attorney

Any appeal to the district court from a decision in a contested case shall be taken within 30 days from the date of issuance of the decision by the board. Iowa Code section 17A.19; 645 IAC 11.29.