

her practice is in furtherance of the public health. A meaningful hearing must be one in which the legality and appropriateness of the emergency order is not predetermined. Without the ability to present rebuttal evidence pursuant to the express language in KRS 13B.125 and 311.592, the KBML's interpretation and application of 201 KAR 9:240 Sections 3 and 5 render any post-deprivation hearing illusory with no meaningful ability to affect the outcome of an emergency action. *See Parrish v. Kentucky Board of Medical Licensure*, 145 S.W.3d 401, 410 (Ky. App. 2004).

B. Course of Proceedings of the KBML

Kendall E. Hansen, MD, DABA, ABAPM, DABPH, FIIP, is a Board-Certified Anesthesiologist who has specialized in pain medicine for over twenty-five (25) years at his practice and clinic in Crestview Hills, Kenton County, Kentucky. On November 23, 2021, upon receipt of an indictment against Dr. Hansen brought in the United States District Court for the Northern Division of the Eastern District of Kentucky, the KBML issued an Emergency Order of restriction pursuant to KRS 311.592 and 201 KAR 9:240 Section 3 that prohibited him from prescribing or dispensing controlled substances. As previously found by this Court and uncontested by the KBML, the sole basis for the indictment was a single prescribing offense that allegedly occurred in 2016 and a single prescribing offense that allegedly occurred in 2018. On or about December 9, 2021, upon motion of Dr. Hansen, the KBML conducted an administrative hearing pursuant to KRS 311.592 and KRS 13B.125.

At the hearing, the KBML tendered the indictment as its sole evidence of Dr. Hansen's danger to the public health, safety and welfare. When Dr. Hansen attempted to call witnesses to testify, KBML's counsel moved to exclude Dr. Hansen's evidence pursuant to 201 KAR 9:240

Sections 3 and 5 as irrelevant. Accepting the KBML's position, the Hearing Officer excluded all of Dr. Hansen's offered proof as irrelevant.

At the December 9, 2021 hearing, Dr. Hansen offered into evidence the testimony of three (3) witnesses – Michael Staples, CBMI; Dawn Hall, RN; and Patrick Murphy, MD by avowal. These witnesses were prepared to testify (and did testify by avowal) that Dr. Hansen's practice utilizes a number of safeguards in treating patients and prescribing practices as evidenced by the documentary evidence. Michael Staples, CBMI is an independent consultant in safe prescribing practices; he is a former investigator for the Ohio Board of Medical Licensure, and he has been retained by Dr. Hansen for over three years to conduct independent auditing and safe-practice consultation within Dr. Hansen's practice. Through Mr. Staples, Dr. Hansen offered proof that Mr. Staples is an independent compliance officer who works on-site at Dr. Hansen's office two days per week and conducts chart audits, prescription compliance education, advises on best practices, consults with prescribing staff as to necessary documentation and potentially aberrant patient behaviors, and consultation with regard to those safeguards that can be embedded into the electronic patient health record to assure compliance. Mr. Staples offered into evidence his professional opinion that Dr. Hansen's prescribing practices are exemplary, compliant with regulatory requirements, and present no risk of danger to his patients or the community.

Through Ms. Hall, Dr. Hansen offered testimony that she is a registered nurse who works with Information Technology at IPS and is familiar with their documentation and prescribing practices. Nurse Hall offered into evidence her professional opinion that Dr. Hansen's practice utilizes the documentary evidence such as patient Narcotics Agreements, review of KASPER reports, written tools to assess patients for risk of dependence and patient risk stratification in the use of urine drug screening, and other patient monitoring tools including specific computerized

safeguards to insure compliance with KBML monitoring and prescribing practices; that she has worked with Dr. Hansen for many years and knows his prescribing practices to be safe and within the standard of reasonable care; that she utilized available computer tools to determine the percentages of patients who have Narcotics Agreements, KASPER reporting, Urine Drug Screening, as well as reports on the number of patients who undergo non-controlled interventional procedures, those who are managed on anti-inflammatory or other non-narcotic means, and patients who have been discharged from the practice for aberrant behaviors or noncompliance with their Narcotics Agreements.

Through Patrick Murphy, MD, Dr. Hansen offered expert testimony that Dr. Murphy is a well-respected pain medicine physician who has been referenced by the KBML as an authority on safe-prescribing practices; that Dr. Murphy has reviewed, on two (2) occasions, sets of ten (10) patient medical records that each covered a span of years; that based upon his review of these twenty (20) patient records as well as professional interaction and on-site visits to Dr. Hansen's clinic, Dr. Murphy is familiar with Dr. Hansen's prescribing practices and his exemplary reputation in the pain management community; that Dr. Hansen's prescribing practices and professional reputation are exemplary, compliant with regulatory requirements, and present no risk of danger to his patients or the community.

Additionally, Dr. Murphy and Mr. Staples, CMBI, offered their expert opinion that the abrupt discontinuation of Dr. Hansen's authority to prescribe narcotic medications created a risk of danger to as many as three thousand (3000) patients in North Central Kentucky, as there are not adequate staff within the practice or in the North Central Kentucky region to provide care to Dr. Hansen's chronic pain patients. Through Dr. Murphy and Mr. Staples, Dr. Hansen offered testimony that the KBML's conduct in issuing this Emergency Order of Restriction would result

in a lessening of patient mobility and activity and an increase in uncontrolled, intractable patient pain; that the Board's Emergency Order would result in a risk of narcotic withdrawal symptoms for patients on chronic pain management; that the Board's conduct would result in a risk of patients falling out of organized care in a controlled environment; and, regardless of any efforts IPS may utilize, the Board's Emergency Order would result in a risk of potential illicit drug use by some patients, thus constituting a danger to the health, safety, and welfare of the public.

Upon motion of KBML's counsel pursuant to 201 KAR 9:240 Sections 3 and 5, the Hearing Officer excluded all of Dr. Hansen's offered proof as irrelevant. Dr. Hansen was not permitted to rebut the KBML's unsupported assertion (without medical proof, expert testimony,¹ or otherwise) that his practice constituted a danger to the health, safety, and welfare of his patients. According to the KBML, despite KRS 311.592, the only issue at the hearing was whether Dr. Hansen was the person named in the indictment. The Hearing Officer found that "There is no conflicting evidence of substance regarding the allegations against Dr. Hansen in this action; those allegations being that he was indicted for crimes related to controlled substances. There is substantial evidence in support of the allegations and therefore in support of the Board's Emergency Order." *Final Order* at 4. In reliance upon an improper interpretation and application of 201 KAR 9:240 Sections 3 and 5, the KBML denied Dr. Hansen the opportunity to address the issue set forth in KRS 311.592 and denied Dr. Hansen his right to a meaningful post-deprivation

¹ In Kentucky House Bill 1, enacted in a Special Session in 2012, the Kentucky General Assembly mandated that the KBML utilize experts to review the prescribing practices of physicians who are under investigation for allegedly aberrant prescribing practices. Specifically, the General Assembly provided:

- (4) A state licensing board shall employ or obtain the services of a specialist in the treatment of pain and a specialist in drug addiction to evaluate information received regarding a licensee's prescribing or dispensing practices related to controlled substances if the board or its staff does not possess such expertise, to ascertain if the licensee under investigation is engaging in improper, inappropriate, or illegal practices.

Codified at KRS 218A, Section 2(4).

hearing to rebut and challenge the basis for the Emergency Order, a bedrock requirement of due process. On December 13, 2021, the KBML Final Order was issued denying relief from the November 23, 2021 Emergency Order of Restriction.

C. Course of Judicial Proceedings

Dr. Hansen filed his Complaint and Appeal from the Final Order of the KBML and accompanying Petition for Declaratory Judgment, Temporary Restraining Order, and Permanent Injunction in the Jefferson Circuit Court on December 20, 2021. This Court heard arguments on the temporary injunction motion January 3, 2022. On January 4, 2022, this Court entered an Order finding that, as written and interpreted, 201 KAR 9:240 Sections 3 and 5 violated Dr. Hansen's due process rights and the separation of powers doctrine under Sections 27 and 28 of the Kentucky Constitution. *Order Temporary Injunction* at 2–3. The Court's *Order* temporarily enjoined the KBML from enforcing its Emergency Order issued on November 23, 2021 and its Final Order, issued on December 13, 2021, finding that Dr. Hansen would suffer permanent, immediate, and irreparable harm in the absence of an injunction. *Id.* at 3. The *Order* included a briefing schedule regarding constitutional arguments. *Id.* The constitutional issues were fully briefed and argued before the Court on March 23, 2022. This Opinion and Order follows.

LEGAL ANALYSIS

I. AS WRITTEN, INTERPRETED, AND APPLIED BY THE KBML, 201 KAR 9:240 SECTIONS 3 AND 5 VIOLATED DR. HANSEN'S STATE AND FEDERAL RIGHTS TO PROCEDURAL DUE PROCESS.

The KBML's restriction of Dr. Hansen's ability to practice medicine, despite overwhelming and uncontroverted evidence that his prescribing practices have been, currently are, and will continue to be consistent with accepted standards of medical practice and are not a danger to his patients or the public, constitutes arbitrary and fundamentally unfair state agency action that

is in violation of Sections 2 and 14 of the Kentucky Constitution and the Fifth and Fourteenth Amendments to the United States Constitution's guarantees of due process of law.

A. Due Process Under the Constitution of the Commonwealth of Kentucky

The Constitution of the Commonwealth of Kentucky prohibits the exercise of arbitrary power by an administrative agency. *Commonwealth Transportation Cabinet Department of Vehicle Regulation v. Cornell*, 796 S.W.2d 591, 594 (Ky. App. 1990). Section 2 of the Constitution of the Commonwealth states: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." In conjunction, Section 14 of the Constitution states: "All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

"[J]udicial review of administrative action is concerned with the question of arbitrariness." *American Beauty Homes Corp. v. Louisville & Jefferson City Plan. & Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964). "There is an inherent right of appeal from orders of administrative agencies where constitutional rights are involved, and section (2) of the Constitution prohibits the exercise of arbitrary power." *Id.* Arbitrary is defined as clearly erroneous, i.e. "unsupported by substantial evidence." *Kentucky Bd. of Nursing v. Ward*, 890 S.W.2d 641, 642 (Ky. App. 1994). If an agency acts in exercise outside of its statutory powers, "such action would be arbitrary within the prohibition of section (2) of the Kentucky Constitution." *American Beauty Homes*, 379 S.W.2d at 456. "*Administrative proceedings affecting a party's rights which did not afford an opportunity to be heard could likewise be classified as arbitrary.*" *Id.* (emphasis added).

By denying a meaningful opportunity to be heard through a fair hearing upon the issues set forth in KRS 311.592, the enabling statute for 201 KAR 9:240, and by entering the Final Order

restricting Dr. Hansen's property rights in his medical license and the privileges he earned appurtenant thereto, the KBML acted arbitrarily in violation of Dr. Hansen's right to a fair hearing and due process of law as guaranteed by the Constitution of the Commonwealth of Kentucky. The KBML presented no evidence by means of expert review, documentation, or witness testimony in support of its action restricting Dr. Hansen's license despite having the regulatory authority to engage an expert to review the case under 201 KAR 9:240 Sections 5(a) and 5(b). Indeed, as set forth above, House Bill 1 (Special Session 2012), as codified in KRS Chapter 218A, mandates that the KBML engage an expert to review a licensee's prescribing practices. The Hearing Officer abused his discretion when he erroneously determined the only fact the KBML needed to establish in support of its Final Order was that the allegations were brought against Dr. Hansen by means of a probable cause indictment.

The Final Order affirming the Emergency Order suspending Dr. Hansen's ability to practice medicine is arbitrary and capricious, constitutes an abuse of discretion, is not supported by substantial evidence, and is clearly erroneous in violation of Section 2 of the Kentucky Constitution.

B. Due Process Under the U.S. Constitution

The Fourteen Amendment to the U.S. Constitution provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.” “In the interest of fairness, a party to be affected by an administrative order is entitled to procedural due process.” *American Beauty Homes Corp. v. Louisville & Jefferson City Plan. & Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964). “Procedural due process requires that some kind of hearing be conducted before the State finally deprives a person of his liberty or property.” *TECO Mechanical Contractor, Inc. v. Commonwealth*, 366 S.W.3d 386, 393 (Ky. 2012). When a law or regulation is

challenged on procedural due process grounds, a two-part analysis applies: (1) is the interest being deprived a protected liberty or property interest and (2) do the procedures provided for its deprivation satisfy due process. *Id.*

Physicians enjoy a constitutionally protected property interest in their medical license, and thus have a right to procedural due process when a medical licensure board such as the KBML revokes or restricts his or her license. *See Abul-Ela v. Kentucky Board of Medical Licensure*, 217 S.W.3d 246, 251 (Ky. App. 2006). As to the adequacy of procedures provided for deprivation of a medical license, “due process does not always require a full-blown trial-type hearing.” *Id.* However, “Due process includes, *at a minimum*, reasonable notice of Board’s intended action and *a meaningful opportunity to be heard.*” *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970)) (emphasis added).

Parrish v. Kentucky Board of Medical Licensure is instructive. In *Parrish*, the KBML temporarily suspended Dr. Parrish’s license for dishonorable, unethical, or unprofessional conduct of a character likely to deceive, defraud, or harm the public. 145 S.W.3d 401, 405 (Ky. App. 2004). Dr. Parrish requested an emergency hearing to address the suspension. *Id.* A hearing was granted, and the hearing officer affirmed the suspension. *Id.* The Court of Appeals upheld the adequacy of the hearing explaining that:

Parrish received both a temporary suspension hearing and a three-day final disciplinary hearing. She was represented by counsel at both hearings. *She was permitted to and did call witnesses and to cross-examine opposing witnesses. In addition, the Board gave Parrish the opportunity to further supplement the record with additional deposition testimony after the three-day hearing. The record reveals that Parrish’s hearing was not merely token; it was more than adequate to protect her procedural due process rights.*

Id. at 410 (emphasis added).

KRS 311.592(1) empowers the KBML to issue an emergency order of restriction against a physician's license in accordance with KRS 13B.125 and requires the KBML to make a finding in that order that "*a physician's practice constitutes a danger to the health, welfare, and safety of his patients or the general public . . .*" (emphasis added). KRS 311.592(2) grants the physician an opportunity for a hearing on the KBML's emergency order and "the findings of fact in the emergency order shall constitute *a rebuttable presumption* of substantial evidence of a violation of law that constitutes immediate danger to the health, welfare, or safety of patients or the general public . . ." (emphasis added).

In Paragraph 17 of the KBML's Final Order, the Hearing Officer stated: "Clearly the focus of [KRS 311.592], as well as KRS 13B.125, is on whether the violation of the law constitutes an immediate danger, and not as Dr. Hansen suggests whether the current operational practice related to the prescribing of controlled substances and the treatment of those receiving such prescriptions is a danger to the health welfare or safety of patients or the general public." *Findings of Fact, Conclusions of Law and Final Order*, at 6. However, KRS 311.592 does not empower the KBML (1) to determine whether a violation of law was committed by any physician charged in a probable cause indictment; (2) to restrict a physician's license upon any grounds other than when, "a physician's practice constitutes a danger to the health, welfare, and safety of his patients or the general public"; or (3) to create an *irrebuttable presumption* that the fact of a physician's indictment constitutes a danger to the health, welfare, and safety of his patients or the general public.

201 KAR 9:240 Section 3 states: "If a licensee is indicted in any state for a crime classified as a felony in that state and the conduct charged relates to a controlled substance, *that licensee's practice shall be considered an immediate danger to the public health, safety, or welfare pursuant*

to KRS 311.592.” Likewise, 201 KAR 9:240 Section 5 states, “The singular function of the party conducting the emergency hearing shall be to determine whether the findings of fact providing the bases for the emergency order are supported by substantial evidence and, if so, constitute one (1) or more violations of KRS 311.595.”

At Paragraph 21 of the KBML’s Final Order, the Hearing Officer stated, “[201 KAR 9:240 Sections 3 and 5] set forth very strict parameters for the administrative hearing conducted in this case. Therefore even if Dr. Hansen’s argument were to be accepted as valid and he does have a due process right to an opportunity to be heard on the issue of whether his current prescribing practices ‘constitutes an immediate danger to the public health, safety and welfare’ *it is clear that the administrative hearing conducted in this case is not the appropriate and authorized venue for this issue to be adjudicated.*” *Findings of Fact, Conclusions of Law and Final Order*, at 7 (emphasis added). This conclusion demonstrates the hearing was merely token with no ability to affect the outcome of the Emergency Order of restriction.

Pursuant to the basic principles of due process, a physician facing an emergency order of restriction by the KBML **must** be permitted to present evidence at the hearing that his or her practice does not constitute a danger to the health, welfare, and safety of his patients or the general public. However, based on an erroneous interpretation and application of the fundamentally flawed regulations 201 KAR 9:240 Section 3 and 5, Dr. Hansen was denied his statutory and constitutional right to present evidence of safe practices deemed relevant under KRS 311.592. Through the implementation and application of these regulations, the KBML created an irrebuttable presumption that the fact of a physician’s indictment alone constitutes a danger to the health, welfare, and safety of his patients or the general public. Without the ability to present relevant evidence through documentation and testimony that his medical practice and his prescribing

practices have been, currently are, and will continue to be consistent with accepted standards of medical practice and not a danger to patients or the public, Dr. Hansen was denied the right to a meaningful opportunity to be heard. Instead, a fundamentally unfair hearing was provided with a pre-determined outcome.

II. 201 KAR 9:240, SECTIONS 3 AND 5, VIOLATE SECTIONS 27 AND 28 OF THE KENTUCKY CONSTITUTION AND FAIL TO FOLLOW STATUTORY REQUIREMENTS ENACTED BY THE KENTUCKY GENERAL ASSEMBLY.

Section 27 of the Constitution of Kentucky reads: "The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." In addition, Section 28 states: "No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." Read together, Section 27 "mandates separation among the three branches of government" whereas Section 28 "specifically prohibits incursion of one branch of government into the powers and functions of the others." *Coleman v. Campbell County Library Board of Trustees*, 547 S.W.3d 526, 533 (Ky. App. 2018). "The essential purpose of separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches." *Id.* (quoting *Appalachian Racing, LLC. v. Commonwealth*, 504 S.W.3d 1, 4-5 (Ky. 2016)).

The Kentucky General Assembly enacted KRS 13B.125(2) which provides the following: "An agency head or an official of an agency duly authorized by law to summarily act in emergency situations may issue an emergency order to stop, prevent, or avoid an immediate danger to the public health, safety, or welfare." KRS 311.592(1) empowers the KBML to issue an emergency

order of restriction against a physician's license conditioned in accordance with KRS 13B.125 and upon a finding of probable cause that the physician's practice "constitutes a danger to the health, welfare, and safety of his patients or the general public." In conjunction, the General Assembly enacted KRS 311.592(2) which reads: "For the purposes of a hearing conducted under KRS 13B.125 on an emergency order issued under subsection (1) of this section, the findings of fact in the emergency order shall constitute *a rebuttable presumption* of substantial evidence of a violation of law that constitutes immediate danger to the health, welfare, or safety of patients or the general public."

Pursuant to its authority granted by the General Assembly under 311.565(1)(i), the KBML promulgated 201 KAR 9:240 Section 3 which deems a physician's practice an immediate danger to the public health, safety, or welfare pursuant to KRS 311.592 following a felony indictment related to controlled substances. The KBML likewise promulgated 201 KAR 9:240 Section 5 which states: "The singular function of the party conducting the emergency hearing shall be to determine whether the findings of fact providing the bases for the emergency order are supported by substantial evidence and, if so, constitute one (1) or more violations of KRS 311.595."

The KBML improperly relied on these self-enacted regulations when they excluded Dr. Hansen's proffered documentary and testimonial evidence of safe prescribing practices and entered the Final Order affirming the Emergency Order upon no evidence, let alone expert evidence required by KRS Chapter 218A, save only the felony indictment. By promulgating 201 KAR 9:240 Sections 3 and 5, the KBML unconstitutionally usurped the power of the General Assembly by eviscerating the statutorily required analysis under KRS 311.592 of whether "a physician's practice constitutes a danger to the health, welfare, and safety of his patients or the general public." Rather, the KBML's regulations limit the inquiry to whether the physician against

whom an emergency order was issued is the physician named in the indictment, and whether the indictment relates to a controlled substance. The General Assembly granted the KBML the power to determine whether a physician's practice constitutes a danger to the health, welfare, and safety of his patients or the general public and the KBML improperly delegated this power to a lay person grand jury. In short, the KBML has delegated its statutory duty to evaluate whether a physician's practice constitutes an immediate danger to the public health, welfare and safety to the lay person grand jury.

The General Assembly never intended to grant the KBML authority to eviscerate the statutorily created rebuttable presumption requirement found in KRS 311.592 by its regulatory rulemaking. In reliance on 201 KAR 9:240 Sections 3 and 5, the KBML prohibited Dr. Hansen from offering evidence of his safe prescribing practices, evidence that is deemed relevant by KRS 311.592(2)'s rebuttable presumption. 201 KAR 9:240 Sections 3 and 5 as written and interpreted by the KBML not only exceed the statutory authority granted to it by the General Assembly but also constitute an unconstitutional delegation of its statutory duty in violation of the Constitution of the Commonwealth of Kentucky. Moreover, the KBML never engaged an expert to review Dr. Hansen's prescribing practices as required by KRS Chapter 218A.

The Court being sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED that:

1. 201 KAR 9:240 Section 3 and Section 5, as written, interpreted, and applied by the KBML, are unconstitutional violations of Dr. Kendall Hansen, M.D.'s right to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 2 and 14 of the Kentucky Constitution.

- 2. The Final Order restricting Dr. Kendall Hansen, M.D.'s prescribing authority constitutes an unlawful taking of property in violation of his right to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 2 and 14 of the Kentucky Constitution.
- 3. 201 KAR 9:240 Section 3 and Section 5, as written, interpreted, and applied by the KBML in entering its Final Order, are unconstitutional invasions of power reserved to the Kentucky General Assembly, as guaranteed by Sections 27 and 28 of the Kentucky Constitution.
- 4. Respondent, Kentucky Board of Medical Licensure, is hereby **PERMANENTLY ENJOINED** from enforcing its Emergency Order, issued on November 23, 2021, and Final Order, issued on December 13, 2021, restricting Dr. Kendall Hansen, M.D.'s license to practice medicine and, more specifically, to prescribe controlled substances.

There being no just cause for delay, this Order is final and appealable

Entered this 12th day of April, 2022.

Andrew Eckert
 JUDGE, JEFFERSON CIRCUIT COURT

Tendered by:

/s/ Edward Monarch

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ENTERED IN COURT
 DAVID L. NICHOLSON, CLERK
 APR 13 2022
 BY *WJN*
 DEPUTY CLERK

Commonwealth of Kentucky

Court of Appeals

NO. 2022-CA-0010-I

KENTUCKY BOARD OF MEDICAL LICENSURE

MOVANT

v. ON MOTION FOR INTERLOCUTORY RELIEF
ARISING FROM JEFFERSON CIRCUIT COURT
ACTION NO. 21-CI-007145

KENDALL E. HANSEN, M.D. AND
AUDRA ECKERLE, JUDGE

RESPONDENTS

ORDER GRANTING MOTION FOR EMERGENCY RELIEF

** ** * ** * ** *

This cause comes before the Court on motion of Movant, Kentucky Board of Medical Licensure (the Board), for emergency relief pursuant to CR¹ 65.07(6). No response to the motion was filed. Having considered the Board's motion for emergency relief, and being sufficiently advised, it is ORDERED that the motion for emergency relief shall be, and hereby is, GRANTED for reasons set forth below.

¹ Kentucky Rules of Civil Procedure.

I. BACKGROUND

In November 2021, Respondent, Dr. Kendall E. Hansen, who specializes in interventional pain management, was indicted on the following felony charges in the United States District Court, Eastern District of Kentucky, Northern Division:

[O]ne (1) count of conspiring and agreeing with others, employees 1 and 2, to knowingly and intentionally distribute and dispense controlled substances pursuant to prescriptions that were not for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice, in violation of Title 21, United States Code, Sections 841 (a)(1) and 846

...

[And] two (2) counts of knowingly and intentionally distributing controlled substances pursuant to prescriptions that were not issued for legitimate medical purpose by an individual practitioner acting in the usual course of his medical practice, in violation of Title 21, United States Code, Section 841(a)(1)[.]

The events giving rise to these charges appear to have occurred in 2016 and 2018.

The Board received notice of these charges soon thereafter, and, on November 23, 2021, an emergency order of restriction was issued. The November 23rd order allows Dr. Hansen to practice medicine but prohibits Dr. Hansen from prescribing controlled substances.² On December 1, 2021, Dr. Hansen initiated an

² The Court's impression of the November 23rd order is based on the Board's motions, the Board's findings of fact, conclusions of law and final order issued on December 13, 2021, and

administrative appeal of the November 23rd order pursuant to KRS³ 13B.125 and 201 KAR⁴ 9:240 section 4. A hearing was conducted on December 9, 2021, and the Board affirmed the November 23rd order in its findings of fact, conclusions of law, and final order issued on December 13, 2021.

Dr. Hansen filed a petition for review of the Board's orders in the Jefferson Circuit Court and further filed a motion for a temporary injunction. Following a January 3, 2022 hearing, the circuit court granted Dr. Hansen's request for a temporary injunction and stayed enforcement of the November 23rd and December 13th orders.

On January 5, 2022, the Board filed a motion for relief pursuant to CR 65.07 and a separate motion for emergency relief under CR 65.07(6) with this Court. In its motion for emergency relief the Board requests "emergency relief, pursuant to CR 65.07(6), by dissolving the Jefferson Circuit Court's *Order Temporary Injunction*, dated January 4, 2022, and reinstating the Board's Emergency Order of Restriction."

the circuit court's January 4, 2022 order. Movant did not make the November 23rd order part of the Court's record.

³ Kentucky Revised Statutes.

⁴ Kentucky Administrative Regulations.

II. ANALYSIS

CR 65.07(6) places a heavy burden on the movant seeking emergency relief before the Court of Appeals – a showing that irreparable harm will occur even before the motion for interlocutory relief can be heard by a three-Judge panel.

It provides:

If a movant will suffer irreparable injury before the motion [for interlocutory relief] will be considered by a panel, the movant may request emergency relief from a member of the Court which may be granted ex parte if necessary.

CR 65.07(6). “Irreparable” in this context connotes an injury “of a ruinous or grievous nature” or one that will result in “a substantial miscarriage of justice.”

Radford v. Lovelace, 212 S.W.3d 72, 78-79 (Ky. 2006), *overruled on other grounds by Cardine v. Commonwealth*, 283 S.W.3d 641 (Ky. 2009) (citation omitted). In *Boone Creek Properties, LLC v. Lexington-Fayette Urban County Bd. of Adjustment*, 442 S.W.3d 36, 40 (Ky. 2014), the Kentucky Supreme Court held that irreparable harm is presumed where the “government is enforcing a statute designed to protect the public interest.”

The practice of medicine is governed by KRS 311.530 through KRS 311.620. The Board is a government agency created by KRS 311.530(1). Its purpose is to “regulate, control and otherwise discipline the licensees who practice medicine and osteopathy within the Commonwealth of Kentucky,” to protect the

health and safety of the public. KRS 311.555. Additionally, the Board was given the authority pursuant to KRS 311.565(a) and (i) to enact reasonable administrative regulations to regulate the conduct of its licensees. The enacted regulations can be found in 201 KAR 9.

In the case *sub judice*, the Board issued the November 23rd order in accordance with KRS 311.592 and 201 KAR 9:240 Section 3(1) and (2) restricting Dr. Hansen's ability to prescribe controlled substances due to the pending federal charges. Because the Board was attempting to enforce statutes designed to protect the public interest, there is a rebuttable presumption that the circuit court's order causes irreparable injury. Here the circuit court's order essentially strips the Board of its ability to regulate, control and otherwise discipline this particular licensee in accordance with the relevant statutes, thereby undermining its authority. As such, emergency relief is appropriate.

Furthermore, the Court notes that as a prerequisite to issuance of a temporary injunction, our case law clearly required the circuit court to find:

(1) that [Dr. Hansen's] position presents "a substantial question" on the underlying merits of the case, i.e. *that there is a substantial possibility that the Appellant will ultimately prevail*; (2) that [Dr. Hansen's] remedy will be irreparably impaired absent the extraordinary relief; and (3) that an injunction will not be inequitable, i.e. will not unduly harm other parties or disserve the public.

Norsworthy v. Kentucky Board of Medical Licensure, 330 S.W.3d 58, 62 (Ky. 2009) (quoting *Price v. Paintsville Tourism Comm'n*, 261 S.W.3d 482, 484 (Ky. 2008)). The circuit court based its issuance of an injunction on only one of these factors, purported irreparable harm to Dr. Hansen, when all three are required. *Id.* Moreover, the type of harm relied upon by the circuit court, *i.e.* that Dr. Hansen would lose patients and suffer business losses, was specifically rejected by Supreme Court as insufficient to constitute irreparable harm in *Norsworthy*. *Id.* at 62 (“[M]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.”).

III. CONCLUSION

WHEREFORE, Movant’s motion for emergency relief pursuant to CR 65.07(6) is hereby GRANTED. The motion for interlocutory relief shall be assigned to a three-Judge panel of this Court following expiration of the response time provided in CR 65.07(4).



ENTERED: JAN 11 2022

JUDGE, COURT OF APPEALS

21C107145

NO. _____

JEFFERSON CIRCUIT COURT
DIVISION _____

KENDALL E. HANSEN, M.D.

PETITIONER

v.

KENTUCKY BOARD OF MEDICAL LICENSURE,
an agency of the Commonwealth of Kentucky, et al

RESPONDENTS

ORDER
TEMPORARY INJUNCTION

Upon Motion of the Petitioner, by counsel, pursuant to CR 65.04 of the Kentucky Rules of Civil Procedure, and the parties having opportunity to be heard before the Court, and the Court having made findings of fact as enumerated herein, and being otherwise sufficiently advised:

The Court finds:

1. Kendall E. Hansen, M.D., DABA, ABAPM, DABPM, FI is a pain medicine physician in practice in Crestview Hills, Kentucky.
2. On or about November 23, 2021, upon receipt of an Indictment brought in the United States District Court for the Eastern District of Kentucky, Northern Division, the Kentucky Board of Medical Licensure ("KBML") issued without hearing an Emergency Order of Restriction that prohibited Dr. Hansen from prescribing controlled substances.
3. On or about December 9, 2021, upon Motion of Dr. Hansen, the KBML, through Officer Keith Hardison, conducted a hearing pursuant to KRS 311.592 and KRS 13B.125 to determine the merits of the Emergency Order of Restriction.
4. At the hearing, Dr. Hansen, by counsel, offered into evidence documents and witness testimony as to the safety of his prescribing practices.

5. Upon Motion of KBML's Counsel, in reliance upon 201 KAR 9:240, Section Three and Section Five, Hearing Officer Hardison excluded Dr. Hansen's offered evidence.

6. As written and interpreted by the KBML, 201 KAR 9:240 Section Three and Section Five render only the fact of probable cause indictment relevant to the proceedings.

7. KRS 311.592 requires that the issuance of an Emergency Order by the KBML must be based upon a finding that the "physician's practice constitutes a danger to the health, welfare, and safety of his patients or the general public."

8. Excepting only an indictment charging a single offense that allegedly occurred in 2016 and a single offense that allegedly occurred in 2018, the KBML offered no evidence of Dr. Hansen's prescribing practices, nor otherwise offered any evidence that Dr. Hansen's practice constitutes a danger to the health, welfare, and safety of his patients or the general public.

9. Dr. Hansen offered substantial documentary evidence, fact witness testimony, and expert witness testimony offered by Dr. Hansen by avowal that, along with his long-standing medical practice, was sufficient to establish the safety of his prescribing practices.

10. In reliance upon 201 KAR 9:240 Section Three and Section Five, the KBML, acting through Hearing Officer Keith Hardison, entered Findings of Fact, Conclusions of Law, and a Final Order on or about December 13, 2021 that found, in error, that evidence of the safety of Dr. Hansen's prescribing practices were not relevant to the issues for determination at the hearing.

11. As written and interpreted by the KBML, 201 KAR 9:240 Section Three and Section Five at the hearing and in the Final Order, violated Dr. Hansen's rights to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Sections 2 and 14 of the Kentucky Constitution.

12. As written and interpreted by the KBML, 201 KAR 9:240 Section Three and Section Five constitute an unconstitutional infringement by the KBML upon the authority granted solely to the Kentucky General Assembly by Sections 27 and 28 of the Kentucky Constitution.

13. In the conduct of the hearing conducted pursuant to KRS 311.592 and KRS 13B.125, the KBML erred by applying an incorrect rule of law and finding, in error, that the KBML had carried its burden to establish that Dr. Hansen's practice constitutes a danger to the health, welfare, and safety of his patients or the general public.

14. Pursuant to CR 65.04, Dr. Hansen will suffer permanent, immediate, and irreparable harm, specifically that he will be unable to prescribe medications necessary for his patients; he reasonably can be expected to lose patient census from an inability to prescribe necessary medications; insurance company billing certification; Medicaid / Medicare certification; beneficial ownership interest in his practice, Interventional Pain Specialists, PLC; valued employees; and his losses can reasonably be expected to be irreparable through means other than the injunctive relief herein granted.

WHEREFORE IT IS ORDERED that Petitioner's Motion, pursuant to CR 65.04 of the Kentucky Rules of Civil Procedure, for temporary injunction is **GRANTED**; Respondent, Kentucky Board of Medical Licensure, is hereby **TEMPORARILY ENJOINED** from enforcing its Emergency Order, issued on November 23, 2021, and Final Order, issued on December 13, 2021, restricting Petitioner's license to practice medicine and, more specifically, to prescribe controlled substances. This Order shall remain in force until modified or dissolved on motions or until a permanent injunction is granted or denied.

regarding the due process argument by 1.15.22.

The response will be due on 2.1.22, and the reply on 2.8.22. The Court will contact the parties for a hearing date 3

Petitioner shall file a brief

Michael E. ...

JUDGE, JEFFERSON CIRCUIT COURT

Date

1.4.2022

CLERK
DAVID L. ...
BY <i>Wm</i>
DEPUTY CLERK

FILED OF RECORD

DEC - 2 2021

K.B.M.L

COMMONWEALTH OF KENTUCKY
BOARD OF MEDICAL LICENSURE
CASE NO. 2033

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF
KENTUCKY HELD BY KENDALL E. HANSEN, M.D., LICENSE NO. 25777,
340 THOMAS MORE PARKWAY, #260, CRESTVIEW HILLS, KENTUCKY
41017

COMPLAINT

Comes now the Complainant Waqar A. Saleem, M.D., Chair of the Kentucky Board of Medical Licensure's Inquiry Panel A, and on behalf of the Panel pursuant to 201 KAR 9:240 Section 1(3)(b), states for its Complaint against the licensee, Kendall E. Hansen, M.D., as follows:

1. At all relevant times, Kendall E. Hansen, M.D. ("the licensee"), was licensed by the Board to practice medicine in the Commonwealth of Kentucky.
2. The licensee's medical specialty is interventional pain management.
3. On or about November 18, 2021, in the United States District Court, Eastern District of Kentucky, Northern Division, the licensee was indicted on felony charges related to controlled substances.
4. The licensee was indicted on one (1) count of conspiring and agreeing with others, Employees 1 and 2, to knowingly and intentionally distribute and dispense controlled substances pursuant to prescriptions that were not issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice, in violation of Title 21, United States Code, Sections 841(a)(1) and 846.
5. The licensee was indicted on two (2) counts of knowingly and intentionally distributing and dispensing controlled substances pursuant to prescriptions that were not issued for a legitimate medical purpose by an individual practitioner acting in the usual course of

his professional practice, in violation of Title 21, United States Code, Section 841(a)(1), as set forth below:

Count	Approximate Date Prescription Written	Substances Distributed To	Substance Name	Quantity
2	November 21, 2016	Employee 2	Tramadol	480
3	March 13, 2018	Employee 2	Phentermine Hcl 37.5 MG	30

6. On or about November 23, 2021, an Emergency Order of Restriction was issued against the licensee's license to practice medicine in the Commonwealth of Kentucky.
7. By his conduct, the licensee has violated KRS 311.595(9), as illustrated by KRS 311.597(4), and KRS 311.595(12). Accordingly, legal grounds exist for disciplinary action against his license to practice medicine in the Commonwealth of Kentucky.
8. The licensee is directed to respond to the allegations delineated in the Complaint within thirty (30) days of service thereof and is further given notice that:
 - (a) His failure to respond may be taken as an admission of the charges;
 - (b) He may appear alone or with counsel, may cross-examine all prosecution witnesses and offer evidence in his defense.
9. NOTICE IS HEREBY GIVEN that a hearing on this Complaint is scheduled for May 10, 2022, at 9:00 a.m., Eastern Standard Time, at the Kentucky Board of Medical Licensure, Hurstbourne Office Park, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222. Said hearing shall be held pursuant to the Rules and Regulations of the Kentucky Board of Medical Licensure and pursuant to KRS Chapter 13B. This hearing shall proceed as scheduled and the hearing date shall only be modified by leave of the Hearing Officer upon a showing of good cause.

WHEREFORE, Complainant prays that appropriate disciplinary action be taken against the license to practice medicine in the Commonwealth of Kentucky held by Kendall E. Hansen, M.D.

This 2nd day of December, 2021.

W. Saleem.
WAQAR A. SALEEM, M.D.
CHAIR, INQUIRY PANEL A

CERTIFICATE OF SERVICE

I certify that the original of this Complaint was delivered to Mr. Michael S. Rodman, Executive Director, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222; a copy was mailed via first-class postage prepared to Keith Hardison, Esq., Hearing Officer, 2616 Bardstown Road, Louisville, Kentucky 40205 and copies were mailed via certified mail return-receipt requested to the licensee, Kendall E. Hansen, M.D., License No. 25777, 340 Thomas More Parkway, #260, Crestview Hills, Kentucky 41017; and his counsel, Lisa E. Hinkle, Esq, McBrayer PLLC, 201 East Main Street, Suite 900, Lexington, Kentucky 40507 on this 2nd day of December, 2021.

Sara Farmer
Sara Farmer
Assistant General Counsel
Kentucky Board of Medical Licensure
310 Whittington Parkway, Suite 1B
Louisville, Kentucky 40222
(502) 429-7150

FILED OF RECORD

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K.B.M.L.

COMMONWEALTH OF KENTUCKY
BOARD OF MEDICAL LICENSURE
CASE NO. 2033

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF KENTUCKY HELD BY KENDALL E. HANSEN, M.D., LICENSE NO. 25777, 340 THOMAS MORE PARKWAY, #260, CRESTVIEW HILLS, KENTUCKY 41017

EMERGENCY ORDER OF RESTRICTION

The Kentucky Board of Medical Licensure (“the Board”), acting by and through the Chair of its Inquiry Panel A, considered an Indictment, filed November 18, 2021, in the United States District Court, Eastern District of Kentucky, Northern Division. Having considered this information and being sufficiently advised, the Chair of Inquiry Panel A enters the following EMERGENCY ORDER OF RESTRICTION, in accordance with KRS 311.592(1) and 13B.125(1):

FINDINGS OF FACT

Pursuant to KRS 13B.125(2) and based upon the information available to him, the Chair of Inquiry Panel A concludes there is probable cause to make the following Findings of Fact, which support this Emergency Order of Restriction:

1. At all relevant times, Kendall E. Hansen, M.D. (“the licensee”), was licensed by the Board to practice medicine in the Commonwealth of Kentucky.
2. The licensee’s medical specialty is interventional pain management.
3. On or about November 18, 2021, in the United States District Court, Eastern District of Kentucky, Northern Division, the licensee was indicted on felony charges related to controlled substances.
4. The licensee was indicted on one (1) count of conspiring and agreeing with others, Employees 1 and 2, to knowingly and intentionally distribute and dispense controlled substances pursuant to prescriptions that were not issued for a legitimate medical

purpose by an individual practitioner acting in the usual course of his professional practice, in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

5. The licensee was indicted on two (2) counts of knowingly and intentionally distributing and dispensing controlled substances pursuant to prescriptions that were not issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice, in violation of Title 21, United States Code, Section 841(a)(1), as set forth below:

Count	Approximate Date Prescription Written	Substances Distributed To	Substance Name	Quantity
2	November 21, 2016	Employee 2	Tramadol	480
3	March 13, 2018	Employee 2	Phentermine Hcl 37.5 MG	30

CONCLUSIONS OF LAW

Pursuant to KRS 13B.125(2) and based upon the information available to him, the Chair of Inquiry Panel A finds there is probable cause to support the following Conclusions of Law, which serve as the legal bases for this Emergency Order of Restriction:

1. The licensee's Kentucky medical license is subject to regulation and discipline by this Board.
2. KRS 311.592(1) provides that the Board may issue an emergency order suspending, limiting, or restricting a physician's license at any time an inquiry panel has probable cause to believe that a) the physician has violated the terms of an order placing him on probation; or b) a physician's practice constitutes a danger to the health, welfare and safety of his patients or the general public.
3. There is probable cause to believe that the licensee has violated KRS 311.595(9), as illustrated by KRS 311.597(4), and KRS 311.595(12).

4. 201 KAR 9:240 §1 provides,

- (1) An inquiry panel or the panel's chair, acting on behalf of the inquiry panel, may issue an emergency order restricting or suspending a physician's license to practice medicine or osteopathy within the Commonwealth of Kentucky in accordance with KRS 311.592 and 13B.125.
- (2) ...
- (3) (a) An inquiry panel's chair may act on behalf of the inquiry panel and issue an emergency order restricting or suspending a physician's license to practice medicine or osteopathy within the Commonwealth of Kentucky if the panel chair determines that a basis for an emergency order as established in subsection (1) of this section exists and the circumstances of the specific case warrant emergency action prior to the next regularly scheduled meeting of the inquiry panel.

5. 201 KAR 9:240 §3 provides

- (1) If a licensee is indicted in any state for a crime classified as a felony in that state and the conduct charged relates to a controlled substance, that licensee's practice shall be considered an immediate danger to the public health, safety or welfare, pursuant to KRS 311.592 and 13B.125.
- (2) If the Board receives verifiable information that a licensee has been indicted in any state for a crime classified as a felony in the state of indictment and the conduct charged relates to a controlled substance, the inquiry panel or panel chair, acting on behalf of the inquiry panel, shall immediately issue an emergency order suspending or restricting that licensee's Kentucky license....

6. The Inquiry Panel Chair concludes there is probable cause to believe this licensee's practice constitutes a danger to the health, welfare and safety of his patients or the general public.

7. The Board may draw logical and reasonable inferences about a licensee's practice by considering certain facts about a licensee's practice. If there is proof that a licensee has violated a provision of the Kentucky Medical Practice Act in one set of circumstances, the Board may infer that the licensee will similarly violate the Medical Practice Act when presented with a similar set of circumstances. Similarly, the Board concludes that proof of a set of facts about a licensee's practice presents representative proof of

the nature of that licensee's practice in general. Accordingly, probable cause to believe that the licensee has committed certain violations in the recent past presents probable cause to believe that the licensee will commit similar violations in the near future, during the course of the licensee's osteopathic practice.

8. The United States Supreme Court has ruled that it is no violation of the federal Due Process Clause for a state agency to temporarily suspend a license, without a prior evidentiary hearing, so long as 1) the immediate action is based upon a probable cause finding that there is a present danger to the public safety; and, 2) the statute provides for a prompt post-deprivation hearing. Barry v. Barchi, 443 U.S. 55, 61 L.Ed.2d 365, 99 S.Ct. 2642 (1979); FDIC v. Mallen, 486 U.S. 230, 100 L.Ed.2d 265, 108 S.Ct. 1780 (1988) and Gilbert v. Homar, 520 U.S. 924 (1997), 117 S.Ct. 1807 (1997). Cf. KRS 13B.125(1).


KRS 13B.125(3) provides that the Board shall conduct an emergency hearing on this emergency order within ten (10) working days of a request for such a hearing by the licensee. The licensee has been advised of his right to a prompt post-deprivation hearing under this statute.

EMERGENCY ORDER OF RESTRICTION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Chair of Inquiry Panel A hereby ORDERS that the license to practice medicine in the Commonwealth of Kentucky held by Kendall E. Hansen, M.D., is RESTRICTED and Dr. Hansen is prohibited from prescribing, dispensing, or otherwise professionally utilizing controlled substances until the Board's hearing panel has finally resolved the Complaint after receipt of the court documents resolving the criminal charges in the indictment discussed in this pleading or until such further Order of the Board.

The Chair of Inquiry Panel A further declares that this is an EMERGENCY ORDER,
effective upon receipt by the licensee.

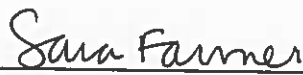
SO ORDERED this 23rd day of November, 2021.



WAQAR A. SALEEM, M.D.
CHAIR, INQUIRY PANEL A

CERTIFICATE OF SERVICE

I certify that the original of this Emergency Order of Restriction was delivered to Mr. Michael S. Rodman, Executive Director, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222; and a copy was mailed via certified mail return-receipt requested to the licensee, Kendall E. Hansen, M.D., License No. 25777, 340 Thomas More Parkway, #260, Crestview Hills, Kentucky 41017, on this 23rd day of November, 2021.



Sara Farmer
Assistant General Counsel
Kentucky Board of Medical Licensure
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