

**BEFORE THE KANSAS STATE BOARD OF EXAMINERS IN OPTOMETRY**

In the Matter of  
MINDY L. ABBEY, O.D.  
Kansas License No. 1416-3

Case No. 2012-01  
OAH No. 14BO0001

**INITIAL ORDER**

Mindy L. Abbey, O.D., appeals from the Kansas State Board of Examiners in Optometry's ("Board") First Amended Petition for Disciplinary Action ("First Amended Petition") served on July 11, 2013.

The Board appointed a presiding officer from the Office of Administrative Hearings, which assigned Michele L. Tunnell, Administrative Law Judge, to hear the appeal.

The hearing in this matter was held on March 10, 2014. The Board appeared by Brenda L. Head, Disciplinary Counsel, and Jan Murray, Executive Director. Dr. Abbey appeared in person and by counsel, Tyson Langhofer.

The Board and Dr. Abbey presented witnesses and exhibits. Dr. Abbey, however, did not testify.

At the conclusion of the hearing, the parties were given an opportunity to submit their proposed findings of fact and conclusions of law, which were timely received. By agreement of the parties, Dr. Abbey was also allowed an opportunity to submit amended proposed findings of fact and law due to a discrepancy in the First Amended Petition. The matter is now ready for decision.

### Findings of Fact

At all times relevant to this disciplinary action, Dr. Abbey practiced optometry under License No. 1416-3 issued by the Board.

In August 1995, Dr. Abbey and her husband, Wade Abbey, were hired as optometrists by Michael D. Gordon, O.D., the principal owner of Vision Doctors of Optometry (“Vision Doctors”).

Dr. Abbey and her husband agreed to be compensated by Vision Doctors on the basis of a set base salary and an additional fee (“exam bonus”) for each full eye exam performed. In order to receive exam bonuses, Dr. Abbey and her husband reported the number of full eye exams they each performed on a bi-weekly basis to Vision Doctors’ external payroll accountant.

Relying on the statements provided by Dr. Abbey and her husband reflecting the number of exams performed, their exam bonuses were added to their salaries in their bi-weekly checks.

In August 2010, Vision Doctors discovered the number of full eye exams reported for Dr. Abbey and her husband exceeded the number they had actually performed. As a result, the Abbeyes each received bonus checks substantially larger than what they were entitled to receive for optometry services they had not actually performed.

On or about September 2, 2010, Dr. Abbey and her husband were confronted by Dr. Gordon and his attorney, Derek Casey, regarding the inflated number of full eye exams reported. In the presence of Dr. Gordon, Mr. Casey, and Dr. Gordon’s daughter, Nichole, Dr. Abbey’s husband admitted the number of full eye exams submitted for his

wife and himself had been falsely inflated to increase their compensation from Vision Doctors. Dr. Abbey was present during her husband's admission and did not deny knowledge of or participation in the false inflation of their compensation.

Dr. Abbey and her husband were immediately terminated from employment with Vision Doctors.

After discovery of the inflated numbers, Dr. Gordon further investigated and determined the inflated exam numbers for Dr. Abbey and her husband had occurred beginning in 2000 and had escalated over time until the discovery in 2010. The amount of money paid to Dr. Abbey on 18,100 fraudulent exams from 2000 to 2010 totaled \$282,487.00, and the amount of money paid to Dr. Abbey's husband on 19,608 fraudulent exams from 2000 to 2010 totaled \$300,573.00. The total amount paid to the Dr. Abbey and her husband for fraudulent exams over this time period was \$583,060.00.

On or about February 14, 2011, Dr. Gordon filed a civil lawsuit against Dr. Abbey and her husband related to the inflated exam numbers and compensation. Dr. Abbey and her husband denied the allegations and defended the civil lawsuit resulting in significant time and expense for Dr. Gordon.

On or about February 23, 2011, Dr. Gordon sent a complaint to the Board regarding the fraudulent scheme involving Dr. Abbey and her husband.

On or about March 1, 2012, a Grand Jury Indictment was filed in the United States District Court of Kansas, Case No. 12-10048-01-02-EFM against Dr. Abbey and her husband related to the inflated exam numbers reported and the compensation received from Vision Doctors.

On February 27, 2013, Wade Abbey entered into a plea agreement whereby he admitted to five counts of wire fraud and to inflating the number of full eye exams he and Dr. Abbey performed which led to the increased compensation they received from Vision Doctors. Wade Abbey admitted to have received money in the amount of \$583,060.00 from the scheme to defraud, which was the exact amount Vision Doctors alleged to have overpaid Dr. Abbey and her husband on fraudulent exams from 2000 to 2010.

On or about April 18, 2013, Wade Abbey entered into a Stipulation and Consent Order with the Kansas Board of Examiners in Optometry, whereby he surrendered his license to practice optometry in the State of Kansas and admitted that he inflated the number of full eye exams performed and was paid monies not earned based on the false information. Wade Abbey further admitted to the five counts of wire fraud which included inflating the number of full eye exams performed by Dr. Abbey which falsely inflated her compensation.

On May 27, 2013, U.S. District Court Judge Eric F. Melgren sentenced Wade Abbey. In declining to depart downward from the sentencing guidelines as requested by Wade Abbey, Judge Melgren noted the lack of remorse by Wade Abbey in the fraudulent obtainment of monies through a purported format of justification. Judge Melgren found the “white collar” crimes at issue were serious offenses. Judge Melgren also openly expressed his displeasure with the Government’s decision to drop the criminal charges against Dr. Abbey, who was present at the sentencing hearing.

Notwithstanding her husband’s guilty plea and admission of a longstanding fraudulent scheme, Dr. Abbey continued to defend the civil suit brought by Vision

Doctors. On or about August 20, 2013, Dr. Gordon dismissed the civil suit on the grounds that he could not afford to continue with the suit.

On July 11, 2013, the Board served the First Amended Petition upon Dr. Abbey in which the Board alleges that Dr. Abbey committed an act or acts which justify the imposition of disciplinary action against her license, that being revocation of her license.

The specific allegations against Dr. Abbey, as set forth in the four counts in the First Amended Petition, are as follows.

Count I alleges that Dr. Abbey “committed an act or acts that justify disciplinary action against her license pursuant to K.S.A. § 65-1517(b) and K.S.A. § 65-1516(b)(10), by conspiring to defraud her employer and through the direct or indirect receipt of compensation for professional services not actually and personally rendered, which Licensee (Dr. Abbey) was not legally entitled to receive.”

Count II alleges that Dr. Abbey “committed an act or acts that justify disciplinary action against her license pursuant to K.S.A. § 65-1517(b) and K.S.A. § 65-1516(b)(9), by conspiring to defraud her employer and through obtaining compensation through the use of fraud, deceit and/or misrepresentation.”

Count III alleges that Dr. Abbey “committed an act or acts that justify disciplinary action against her license pursuant to K.S.A. § 65-1517(b) and K.S.A. § 65-1516(b)(8), by conspiring to defraud her employer and through the use of any false or deceptive statement in any document connected with the practice of optometry.”

Count IV alleges that Dr. Abbey “committed an act or acts that justify disciplinary action against her license pursuant to K.S.A. § 65-1517(b) and K.S.A. § 65-1516(b)(3),

by conspiring to defraud her employer and engaging in a pattern of practice and behavior which demonstrates and (sic) manifest incapacity or incompetence to practice optometry.”

Dr. Abbey timely filed her answer.

During discovery, Dr. Abbey was properly served a Notice to Take her deposition on January 23, 2014. She did not appear, invoking her privilege under the Fifth Amendment. As previously stated, Dr. Abbey also did not testify at the hearing in this matter.

#### **Applicable Law**

The Board is the duly constituted and acting agency of the State of Kansas authorized to administer and enforce the provisions of the Kansas Optometry Law, which is codified in Article 15 of Chapter 65 and Article 15 of Chapter 74 of the Kansas Statutes Annotated and Amendments thereto (“Optometry Act”). Pursuant to applicable provisions of Optometry Act and the Kansas Administrative Procedure Act, K.S.A. 77-501 *et seq.* (“KAPA”), whenever it is established that a licensee has committed any acts described in K.S.A. 65-1517, the Board may revoke, suspend, limit and/or censure the licensee’s Kansas license to practice optometry and/or assess a civil fine against the licensee in an amount not in excess of \$10,000.00 under the provisions of K.S.A. 65-1526.

K.S.A. 65-1517 provides, in pertinent part:

A licensee's license may be revoked, suspended or limited, or the licensee may be publicly or privately censured, upon a finding of the existence of any of the following grounds:

....

(b) The licensee has committed an act of unprofessional conduct or professional incompetence.

K.S.A. 65-1516 provides, in pertinent part:

(b) "Unprofessional conduct" means:

....

(3) Conduct likely to deceive, defraud or harm the public.

....

(8) The use of any false, fraudulent or deceptive statement in any document connected with the practice of optometry.

(9) Obtaining any fee by fraud, deceit or misrepresentation.

(10) Directly or indirectly giving or receiving any fee, commission, rebate or other compensation for professional services not actually and personally rendered, other than through the legal functioning of lawful professional partnerships, corporations or associations.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S.C.A. Const. Amend. 5. In *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 369-70 (2001), the Kansas Supreme Court quoted the following from *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995):

A defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege. Not only is it permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege, **but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding.** (Citation omitted.)(Emphasis added.)

The adverse inference against parties to civil actions when they refuse to testify in response to probative evidence offered against them applies with equal force to administrative proceedings. *MacKay v. Drug Enforcement Administration*, 664 F.3d 808, 820 (10th Cir. 2011).

### Discussion

Since Dr. Abbey chose not to testify in this matter, the undersigned may draw adverse inferences from that fact.

The proposed finding of facts submitted by Dr. Abbey were considered by the undersigned but not included in this order since the proposed findings of fact focus on the attempt by Dr. Abbey to excuse her conduct by claiming Dr. Gordon was somehow involved in the fraudulent scheme. The crux of Dr. Abbey's arguments is that Dr. Gordon knew she and her husband were being paid for services they had not performed but that he had significant financial and personal motives for not objecting, in some way benefiting from allowing them to engage in the fraudulent conduct.

Dr. Abbey's arguments are not only baseless in fact but are illogical. The evidence presented during the hearing indicated that Dr. Gordon relied on others, in this case to his detriment, to take care of his finances with regard to his practice. Such

reliance on others, however, does not equate to him acquiescing to the Abbeyes' embezzlement of over a half a million dollars from his practice over a ten year period. In addition, had the Government believed that Dr. Gordon was involved in this scheme, charges would have likely been brought against him.

Dr. Abbey also argued that she and her husband had not been adequately compensated by Dr. Gordon. She retained an expert witness to testify on this issue.

The testimony of Dr. Abbey's expert witness was wholly unpersuasive as it focused on how much Dr. Abbey should have been paid given the gross revenues she generated.

If Dr. Abbey believed she was not adequately compensated for her work with Dr. Gordon, she could have quit or renegotiated her agreement. It was not only illegal but unethical to falsify information to increase her salary.

The expert witness also opined on Dr. Gordon's business practices, i.e., paying family members as employees of the business and not paying his taxes. This testimony again had no relevancy as to whether Dr. Abbey engaged in conduct in violation of the Optometry Act.

Lastly, the expert witness's opinion that Dr. Abbey was not aware of the discrepancies was not persuasive as it was not based on all the evidence but only selected information provided by Dr. Abbey.

While the undersigned did not rely in the ruling herein on Judge Melgren's obvious displeasure with the Government's decision to drop the federal charges against

Dr. Abbey, his statement in open court certainly was telling as to his thoughts on the weight of the evidence regarding her involvement in the fraudulent scheme.

As to each of the counts, the ruling is as follows.

#### Count I

In Count I of the Board's First Amended Petition for Disciplinary Action, the Board alleges acts of unprofessional conduct by Dr. Abbey for directly or indirectly receiving compensation for professional services not actually and personally rendered.

Dr. Abbey clearly engaged in unprofessional conduct in violation of K.S.A. 65-1516(b)(10) by receiving compensation for professional services she did not actually and personally render. For example, for the limited time period of December 23, 2009 to August 17, 2010, Dr. Abbey performed 773 full eye exams for which she was entitled to exam bonus compensation, yet she received exam bonus compensation for 2,785 full eye exams based on the statement of fraudulent exam numbers submitted to Vision Doctors payroll accountant. The total amount of compensation received by Dr. Abbey from 2000 through 2010 for professional services she did not actually and personally render was \$282,487.00.

#### Counts II and III

In Count II of the Board's First Amended Petition for Disciplinary Action, the Board alleges acts of unprofessional conduct by Dr. Abbey by obtaining fees by fraud, deceit or misrepresentation. In Count III, the Board alleges acts of unprofessional conduct by Dr. Abbey by the use of false, fraudulent or deceptive statements in documents connected with the practice of optometry.

Dr. Abbey clearly engaged in unprofessional conduct in violation of K.S.A. 65-1516(b)(9) by obtaining fees by fraud, deceit or misrepresentation, and in violation of K.S.A. 65-1516(b)(8) by the use of false, fraudulent or deceptive statements in documents connected with the practice of optometry.

The compensation arrangement of Dr. Abbey was based on a regular salary plus a formulated bonus payment for full eye exams she performed each bi-weekly pay period. A statement reflecting the number of full eye exams performed by Dr. Abbey for which a bonus would be paid was required to be provided to Vision Doctors' external payroll processing accountant. The statement with the number of exams was normally provided to payroll by Dr. Abbey's husband. From the time period of 2000 through 2010, the statements of falsely inflated exam numbers were used by the payroll agent to compensate Dr. Abbey.

Dr. Abbey's husband admitted and pled guilty to receiving money in the amount of \$583,060.00 from the scheme to defraud, \$282,487.00 of which were fees obtained for Dr. Abbey.

While it appears that Wade Abbey submitted the statements reflecting the number of exams performed by Dr. Abbey to the accountant, it is unfathomable that Dr. Abbey, a well educated and obviously intelligent professional, did not know that her husband was providing statements that were false and inflated beyond the number of full eye exams she was actually performed. The magnitude of the fraudulent inflation was certainly not insignificant.

Dr. Abbey received a paycheck, bi-weekly, that specifically itemized the bonus payment apart from the salary payment. Beginning in early 2009, Dr. Abbey's paychecks specifically and clearly contained the number of exams for which she was being compensated with a bonus payment.

Dr. Abbey's payroll checks from Vision Doctors, which included fraudulent exam bonus payments, were deposited and/or spent by Dr. Abbey. Thomas W. Vastrick, an expert Forensic Document Examiner, concluded with virtual certainty that Dr. Abbey had endorsed some of her payroll checks. Dr. Abbey wrote checks and spent funds from the joint account. Also, Dr. Abbey received W-2s annually from Vision Doctors clearly reflecting her increasing annual compensation.

#### Count IV

In Count IV of the Board's First Amended Petition for Disciplinary Action there is a discrepancy in the language. The count references K.S.A. 65-1516(b)(3) which is "conduct likely to deceive, defraud or harm the public." However, the language after the statute citation is "behavior which demonstrates and (sic) manifest incapacity or incompetence to practice optometry" which is found in K.S.A. 65-1516(a)(3). During the hearing, all the evidence presented by the Board addressed the issue of whether Dr. Abbey's conduct was "likely to deceive, defraud or harm the public." In her proposed finding of fact and law, Dr. Abbey addressed violation of K.S.A. 65-1516(a)(3) rather than K.S.A. 65-1516(b)(3). It was agreed by the parties during a telephone conference call initiated by the undersigned that Dr. Abbey would be granted leave to submit

amended proposed finding of fact and law addressing K.S.A. 65-1516(b)(3), which she submitted.

Initially, there was no evidence presented that would support a finding that Dr. Abbey exhibited a pattern of practice or behavior demonstrating a manifest incapacity or incompetence to practice optometry, thus warranting discipline under K.S.A. 65-1516(a)(3).

The Board alleges that Dr. Abbey violated K.S.A. § 65-1516(b)(3) by engaging in conduct which is likely to deceive, defraud, or harm the public. The Board alleges that Dr. Abbey's conduct clearly harmed members of the public for a considerable period of time, specifically the principals and other employees of Vision Doctors.

Dr. Abbey's argument that she was unaware of the scheme to defraud has already been rejected, as set forth above.

Wade Abbey admitted to having received \$583,060.00 from the fraudulent scheme from Vision Doctors. These are monies that Dr. Abbey knew about and had access to through their joint checking account. Other than one settlement offer, which the undersigned considers was not a good faith offer, there has been no effort taken by Dr. Abbey to reimburse or otherwise make amends to Vision Doctors for the excess and fraudulently obtained compensation she received in the admitted fraudulent scheme. Dr. Abbey argues that she does not have the funds to repay Dr. Gordon, however, she utilized some of her financial resources to vigorously defend the civil case filed by Dr. Gordon, even after Wade Abbey had pled guilty to the long standing fraudulent scheme. This

placed an additional financial burden on Dr. Gordon in addition to that which he suffered as the result of the Abbey's scheme defrauding him out of over a half a million dollars.

### Conclusion

The Board has established by competent and substantial evidence that Dr. Abbey has violated K.S.A. 65-1516(b)(3), K.S.A. 65-1516(b)(8), K.S.A. 65-1516(b)(9) and K.S.A. 65-1516(b)(10) by: 1) directly receiving a fee or other compensation for professional services she did not actually and personally render; (2) obtaining a fee by fraud, deceit or misrepresentation; (3) using false and fraudulent statements in a documents connected with the practice of optometry; and (4) engaging in conduct that caused harm to the public. Dr. Abbey has failed to take responsibility for her own involvement as a beneficiary in the admitted fraudulent scheme.

Accordingly, revocation of Dr. Abbey's license to practice optometry is warranted.

Pursuant to K.S.A. 77-527, either party may request a review of this initial order by filing a petition for review with the Kansas State Board of Examiners in Optometry. A petition for review must be filed within 15 days from the date this initial order was mailed. Failure to timely request a review by the Kansas State Board of Examiners in Optometry may preclude further judicial review. If neither party requests a review by the Kansas State Board of Examiners in Optometry, then pursuant to K.S.A. 77-530, this initial order becomes final and binding on both parties on the 30<sup>th</sup> day following its mailing. The petition for review shall be mailed or personally delivered to: Jan Murray,

Executive Officer, Kansas State Board of Examiners in Optometry, 3109 W 6<sup>th</sup> Street,  
Suite B, Lawrence, Kansas 66049.

A handwritten signature in black ink, appearing to read "Michele L. Tunnell". The signature is written in a cursive style with a large, looping initial "M".

Michele L. Tunnell  
Administrative Law Judge  
Office of Administrative Hearings

CERTIFICATE OF SERVICE

On July 17, 2014, I mailed a copy of this document to:

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Jan Murray  
Executive Officer  
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Lawrence, KS 66049

  
\_\_\_\_\_  
Staff Person  
Office of Administrative Hearings

**BEFORE THE KANSAS BOARD OF EXAMINERS IN OPTOMETRY**

In the Matter of )  
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MINDY L. ABBEY, O.D. )  
Kansas License No. 1416-3 )

Case No. 2012-01  
OAH No. 14BO0001

**ORDER DENYING REVIEW**

On August 18, 2014, the Kansas Board of Examiners in Optometry considered Respondent's Petition for Review of the Initial Order entered July 17, 2014, which was timely filed on August 1, 2014. Pursuant to K.S.A. 77-527(a)(2)(A), the Board determined not to exercise any review of the Initial Order in this matter.

In accordance with K.S.A. 77-530(b)(2), the Initial Order shall become effective as the final order of the Board upon service of this order denying review.

IT IS SO ORDERED.



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Gilan Cockrell, O.D., Vice President  
Kansas Board of Examiners in Optometry

**NOTICE OF ADMINISTRATIVE RELIEF**

Pursuant to K.S.A. 77-529, a party may file with the Board a petition for reconsideration within 15 days from the date noted below in the Certificate of Service. Such petition must state the specific grounds upon which relief is requested. The filing of a petition for reconsideration is not a prerequisite for seeking judicial review.

Pursuant to K.S.A. 77-528, a party may file with the Board a petition for stay of effectiveness prior to the expiration of the time in which to file a petition for judicial review. The filing of a petition for a stay of effectiveness is not a prerequisite for seeking judicial review.

## NOTICE OF JUDICIAL RELIEF

Pursuant to K.S.A. 77-613, a party may file within 30 days from the date noted below in the Certificate of Service a petition for judicial review with the appropriate district court as provided in the Kansas Judicial Review Act, K.S.A. 77-601 *et seq.*

The agency officer who may receive service of a petition for reconsideration, a petition for a stay, or a petition for judicial review on behalf of the Board is:

Jan Murray, Executive Officer  
Kansas Board of Examiners in Optometry  
3109 W. 6<sup>th</sup> St., Suite B  
Lawrence, KS 66049

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 19 day of August, 2014, copies of the above Order Denying Review, Notice of Administrative Relief, and Notice of Judicial Relief were deposited in the U.S. Mail, postage pre-paid, and addressed to:

Tyson C. Langhofer  
Stinson Morrison Hecker, LLP  
1625 N. Waterfront Parkway, Suite 300  
Wichita, KS 67206-6620  
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Jan Murray, Executive Officer  
Kansas Board of Examiners in Optometry