



STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Antonia C. Novello, M.D., M.P.H., Dr.P.H.
Commissioner

Public

Dennis P. Whalen
Executive Deputy Commissioner

August 1, 2005

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mary Ann Duke, M.D.
10260 Democracy Boulevard
Potomac, Maryland 20854-4438

Robert Bogan, Esq.
NYS Department of Health
Office of Professional Medical
Conduct
433 River Street – Suite 303
Troy, New York 12180

RE: In the Matter of Mary Ann Duke, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 05-158) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine together with the registration certificate. Delivery shall be by either certified mail or in person to:

Office of Professional Medical Conduct
New York State Department of Health
Hedley Park Place
433 River Street - Fourth Floor
Troy, New York 12180

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

Request for review of the Committee's determination by the Administrative Review Board stays penalties other than suspension or revocation until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

All notices of review must be served, by certified mail, upon the Administrative Review Board and the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Hedley Park Place
433 River Street, Fifth Floor
Troy, New York 12180

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,



Sean D. O'Brien, Director
Bureau of Adjudication

SDO:djh

Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

COPY
DETERMINATION

IN THE MATTER
OF
MARY ANN DUKE, M.D.

AND
ORDER

BPMC No. 05-158

A hearing was held on July 21, 2005, at the offices of the New York State Department of Health ("the Petitioner"). A Notice of Referral Proceeding and a Statement of Charges, both dated June 13, 2005, were served upon the Respondent, **Mary Ann Duke, M.D.** Pursuant to Section 230(10)(e) of the Public Health Law, **Joseph A. Messina, M.D.**, Chairperson, **Jinil Yoo, M.D.**, and **Ms. Carmela Torrelli**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter. **John Wiley, Esq.**, Administrative Law Judge, served as the Administrative Officer.

The Petitioner appeared by **Donald P. Berens, Jr., Esq.**, General Counsel, by **Robert Bogan, Esq.**, of Counsel. The Respondent did not appear at the hearing, either in person or by counsel.

Evidence was received and transcripts of these proceedings were made.

After consideration of the entire record, the Hearing Committee issues this Determination and Order.

BACKGROUND

This case was brought pursuant to Public Health Law Section 230(10)(p). The statute provides for an expedited hearing when a licensee is charged solely with a

violation of Education Law Section 6530(9). In such cases, a licensee is charged with misconduct based upon a prior criminal conviction in New York State or another jurisdiction, or upon a prior administrative adjudication regarding conduct that would amount to professional misconduct, if committed in New York. The scope of an expedited hearing is limited to a determination of the nature and severity of the penalty to be imposed upon the licensee.

In the instant case, the Respondent is charged with professional misconduct pursuant to Education Law Section 6530(9)(b) and (d). Copies of the Notice of Referral Proceeding and the Statement of Charges are attached to this Determination and Order as Appendix 1.

WITNESSES

For the Petitioner: None

For the Respondent: None

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers below in parentheses refer to exhibits, denoted by the prefix "Ex." These citations refer to evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence. All Hearing Committee findings were unanimous.

1. Mary Ann Duke, M.D., the Respondent, was authorized to practice medicine in New York State on July 14, 1986, by the issuance of license number 166948 by the New York State Education Department (Petitioner's Ex. 7).

2. On November 30, 2004, the Maryland Board of Physicians ("Maryland Board"), by an Order for Summary Suspension of License to Practice Medicine, suspended the Respondent's license to practice medicine, based on negligence and

practicing the profession while impaired by alcohol, drugs, physical disability or mental disability (Petitioner's Ex. 8).

3. On May 25, 2005, the Maryland Board, by a Consent Order, suspended the Respondent's license to practice medicine for a minimum of five years with conditions to take effect upon the lifting of the suspension, based on unprofessional conduct, habitual intoxication, providing professional services while under the influence of alcohol, and engaging in the unauthorized practice of medicine (Petitioner's Ex. 9).

HEARING COMMITTEE CONCLUSIONS

The Hearing Committee concludes that the conduct of the Respondent would constitute professional misconduct under the laws of New York State, had the conduct occurred in New York State, pursuant to:

- New York Education Law Section 6530(3) - "Practicing the profession with negligence on more than one occasion;"
- New York Education Law Section 6530(4) - "Practicing the profession with gross negligence on a particular occasion;"
- New York Education Law Section 6530(7) - "Practicing the profession while impaired by alcohol, drugs, physical disability, or mental disability;"
- New York Education Law Section 6530(8) - "Being a habitual abuser of alcohol, or being dependent on or a habitual user of narcotics, barbiturates, amphetamines, hallucinogens, or other drugs having similar effects, except for a licensee who is maintained on an approved therapeutic regimen which does not impair the ability to practice, or having a psychiatric condition which impairs the licensee's ability to practice;" and
- New York Education Law Section 6530(12) - "Practicing the profession while the license is suspended..."

In the Statement of Charges, the Petitioner also alleged that the Respondent's acts in Maryland, had they been committed in New York State, would have constituted professional misconduct pursuant to New York Education Law Section 6530(32) - "Failing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient..." The Hearing Committee concludes that the evidence is insufficient to sustain this allegation. The hearing record discloses one instance of one patient visit for which the Respondent did not make an entry in the patient's chart (paragraph 66 of the Maryland Consent Order). It is extremely unlikely that the New York State Legislature, when enacting the statutory definitions of professional misconduct found in Education Law Section 6530, intended that a single oversight in a physician's record keeping responsibilities be a sufficient reason for taking the devastating action of labeling a physician guilty of professional misconduct. It will not be concluded that such serious negative action can be taken for a single record keeping omission, absent some extraordinary factual circumstance.

VOTE OF THE HEARING COMMITTEE

FIRST SPECIFICATION

"Respondent violated New York Education Law Section 6530(9)(b) by having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state..."

VOTE: Sustained (3-0)

SECOND SPECIFICATION

"Respondent violated New York Education Law Section 6530(9)(d) by having her license to practice medicine suspended or having other disciplinary action taken by a duly

authorized professional disciplinary agency of another state, where the conduct resulting in the suspension would, if committed in New York state, constitute professional misconduct under the laws of New York state..."

VOTE: Sustained (3-0)

HEARING COMMITTEE DETERMINATION

The Maryland Consent Order demonstrates that the Maryland Board had more than adequate reason for concluding that the Respondent was a danger to her patients and needed to be prohibited from practicing medicine. A few quotes from the Consent Order will illustrate how serious the situation was. On May 3, 2003:

...the Montgomery County Police responded to a 911 call from the Respondent's home...According to the police report, when police entered the Respondent's home, they found her naked and sitting on the floor, "screaming wildly" into the telephone. The Respondent's nine-month old baby was found crying on the floor several feet from the Respondent. There was no one else in the house. After the officers provided the Respondent with a coat, she "stormed into the kitchen" and made a telephone call to an unidentified person. The Respondent "screamed" "in a rage" into the telephone for several minutes. The reporting officer heard the Respondent repeat several times during the call that she will "kill them all." ... The reporting officer, who had responded to calls at the Respondent's home in the past, had observed her to be severely intoxicated on those occasions...The officer completed a Petition for Emergency Evaluation and accompanied the Respondent to Suburban Hospital...the Respondent arrived at Suburban Hospital in restraints and was reported to be "combative, yelling profanities at EMS/police/nurse." ...The Respondent refused to submit to a breathalyzer test or blood sample upon admission; however, a urine sample indicated that her alcohol level was 0.22. (Petitioner's Ex. 9, pp. 4-5).

The following incident occurred on December 8, 2003:

...the Respondent was scheduled for two (2) surgeries at Suburban Hospital [in the morning]. The pre-op nurses observed that the Respondent appeared to be unsteady and had a smell of alcohol about her...The Respondent was confronted by hospital officials. She denied drinking alcohol or using drugs other than a glass of wine the previous evening...After the surgeries were cancelled, the Respondent submitted to a blood test for alcohol and a urine screen for drugs...The results of the Respondent's blood alcohol test was 0.085. Her urine screen was positive for benzodiazepines and opiates, specifically: Temazepam, Nordiazepam,

Alprozalam, hydrocodone, hydromorphone and oxycodone...When hospital authorities advised the Respondent of the results of her blood alcohol test, the Respondent continued to deny alcohol use and asserted that the hospital had "rigged" the test. (Petitioner's Ex. 9, p. 7).

In September and October of 2004:

...the Respondent's then office manager observed the Respondent drinking wine before and after treating patients in her Potomac office. On one occasion, the office manager observed the Respondent drinking wine after she had dilated a patient's pupils. On another occasion, the Respondent left her office in between patients to "run some errands." The office manager discovered that the Respondent had bought wine, which she drank during the remainder of her work day. On several occasions, the office manager cancelled patients' appointments because of her concern regarding the Respondent's sobriety. (Petitioner's Ex. 9, p. 10).

In November of 2004:

...the Respondent's boyfriend telephoned the office manager and requested that she come to his house to assist him with the Respondent. The office manager found the Respondent lying unconscious on the bathroom floor. The Respondent was taken by ambulance to Suburban Hospital...Upon admission to Suburban Hospital, the Respondent's blood alcohol level was reported to be 0.431. She had reportedly been binge drinking for the previous ten (10) days. The Respondent was assessed as having agitated delirium secondary to acute alcohol intoxication. (Petitioner's Ex. 9, pp. 11-12).

These are four examples of many in the Maryland Consent Order. In addition to the numerous instances of intoxication and practicing medicine while impaired, the Respondent was also resistant to the Maryland Board's efforts to remedy the problem, as evidenced by the Respondent's practice of medicine while her license was suspended by the Order of Summary Suspension (Petitioner's Ex. 9, pp. 19-20).

Because the Respondent did not appear at the hearing, there is no evidence in the hearing record of remorse, mitigating circumstances or, most importantly, rehabilitation. There is no reason to conclude that there is any penalty available to this Hearing Committee, other than revocation of the Respondent's license to practice medicine, that will provide adequate protection to the people of New York State against a physician who

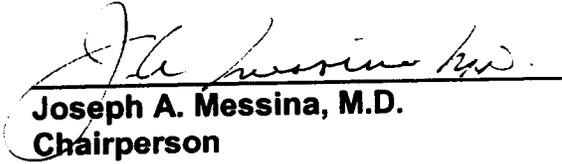
is totally out of control and a severe danger to any patient whom she treats. A revocation of her license, therefore, will be imposed.

ORDER

IT IS HEREBY ORDERED THAT:

1. The license of the Respondent to practice medicine in the State of New York is revoked.
2. This Order shall be effective upon service on the Respondent in accordance with the requirements of Public Health Law Section 230(10)(h).

DATED: Rochester, New York
7/27, 2005


Joseph A. Messina, M.D.
Chairperson

Jinil Yoo, M.D.
Carmela Torrelli

APPENDIX I

STATE OF NEW YORK DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT



IN THE MATTER
OF
MARY ANN DUKE, M.D.
CO-05-01-0320-A

NOTICE OF
REFERRAL
PROCEEDING

TO: MARY ANN DUKE, M.D.
10220 Democracy Blvd.
Potomac, MD 20854

PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of New York Public Health Law § 230(10)(p) and New York State Administrative Procedure Act Sections 301-307 and 401. The proceeding will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct (Committee) on the 21st day of July 2005, at 10:00 in the forenoon of that day at the Hedley Park Place, 5th Floor, 433 River Street, Troy, New York 12180.

At the proceeding, evidence will be received concerning the allegations set forth in the attached Statement of Charges. A stenographic record of the proceeding will be made and the witnesses at the proceeding will be sworn and examined.

You may appear in person at the proceeding and may be represented by counsel. You may produce evidence or sworn testimony on your behalf. Such evidence or sworn testimony shall be strictly limited to evidence and testimony relating to the nature and severity of the penalty to be imposed upon the licensee. Where the charges are based on the conviction of state law crimes in other jurisdictions, evidence may be offered that would show that the conviction would not be a crime in New York state. The Committee also may limit the number of witnesses whose testimony will be received, as well as the length of time any witness will be permitted to testify.

If you intend to present sworn testimony, the number of witnesses and an estimate of the time necessary for their direct examination must be submitted to the New York State Department of Health, Division of Legal Affairs, Bureau of Adjudication, Hedley Park Place, 5th Floor, 433 River Street, Troy, New York, ATTENTION: HON. SEAN O' BRIEN, DIRECTOR, BUREAU OF ADJUDICATION, (hereinafter "Bureau of Adjudication") as well as the Department of Health attorney indicated below, on or before July 11, 2005.

Pursuant to the provisions of N.Y. Public Health Law §230(10)(p), you shall file a written answer to each of the Charges and Allegations in the Statement of Charges no later than ten days prior to the hearing. Any Charge of Allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such an answer. The answer shall be filed with the Bureau of Adjudication, at the address indicated above, and a copy shall be forwarded to the attorney for the Department of Health whose name appears below. You may file a brief and affidavits with the Committee. Six copies of all such papers you wish to submit must be filed with the Bureau of Adjudication at the address indicated above on or before July 11, 2005, and a copy of all papers must be served on the same date on the Department of Health attorney indicated below. Pursuant to Section 301(5) of the State Administrative Procedure Act, the Department, upon reasonable notice, will provide at no charge a qualified interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person.

The proceeding may be held whether or not you appear. Please note that requests for adjournments must be made in writing to the Bureau of Adjudication, at the address indicated above, with a copy of the request to the attorney for the Department of Health, whose name appears below, at least five days prior to the scheduled date of the proceeding. Adjournment requests are not routinely granted. Claims of court engagement will require detailed affidavits of actual engagement. Claims of illness will require medical documentation. Failure to obtain an attorney within a reasonable period of time prior to the proceeding will not be grounds for an adjournment.

The Committee will make a written report of its findings, conclusions as to guilt, and a determination. Such determination may be reviewed by the Administrative Review Board for Professional Medical Conduct.

SINCE THESE PROCEEDINGS MAY RESULT IN A DETERMINATION
THAT SUSPENDS OR REVOKES YOUR LICENSE TO PRACTICE
MEDICINE IN NEW YORK STATE AND/OR IMPOSES A FINE FOR
EACH OFFENSE CHARGED, YOU ARE URGED TO OBTAIN AN
ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: Albany, New York

June 13, 2005



PETER D. VAN BUREN

Deputy Counsel

Bureau of Professional Medical Conduct

Inquiries should be addressed to:

Robert Bogan
Associate Counsel
New York State Department of Health
Office of Professional Medical Conduct
433 River Street – Suite 303
Troy, New York 12180
(518) 402-0828

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER
OF
MARY ANN DUKE, M.D.
CO-05-01-0320-A

STATEMENT
OF
CHARGES

MARY ANN DUKE, M.D., the Respondent, was authorized to practice medicine in New York state on July 14, 1986, by the issuance of license number 166948 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about November 30, 2004, the Maryland Board of Physicians, (hereinafter "Maryland Board"), by an Order for Summary Suspension of License to Practice Medicine (hereinafter "Maryland Order 1"), SUMMARILY SUSPENDED Respondent's license to practice medicine, based on negligence and practicing the profession while impaired by alcohol, drugs, physical disability or mental disability;

B. On or about May 25, 2005, the Maryland Board, by a Consent Order (hereinafter "Maryland Order 2"), SUSPENDED Respondent's license to practice medicine for a minimum of FIVE (5) YEARS with conditions, thereafter, beginning on the date the suspension is lifted, Respondent shall be placed on PROBATION for a MINIMUM of FIVE (5) YEARS and UNTIL she fully and satisfactorily completes specific requirements, based on immoral or unprofessional conduct, habitual intoxication, providing professional services while under the influence of alcohol, and engaging in the unauthorized practice of medicine.

C. The conduct resulting in the Maryland Board disciplinary action against Respondent would constitute misconduct under the laws of New York State, pursuant to the following sections of New York State law:

1. New York Education Law §6530(3) (negligence on more than one occasion);
2. New York Education Law §6530(4) (gross negligence);

3. New York Education Law §6530(7) (practicing the profession while impaired by alcohol, drugs, physical disability or mental disability);
4. New York Education Law §6530(8) (being a habitual abuser of alcohol, or being dependent on or a habitual abuser of narcotics, barbiturates, amphetamines, hallucinogens, or other drugs having similar effects);
5. New York Education Law §6530(12) (practicing the profession while the license is suspended); and/or
6. New York Education Law §6530(32) (failing to maintain a record for each patient which accurately reflects the evaluation, care, and treatment).

SPECIFICATIONS
FIRST SPECIFICATION

Respondent violated New York Education Law §6530(9)(b) by having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state, in that Petitioner charges:

1. The facts in Paragraphs A, B, and/or C.

SECOND SPECIFICATION

Respondent violated New York Education Law §6530(9)(d) by having her license to practice medicine suspended or having other disciplinary action taken by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the suspension or other disciplinary action would, if committed in New York State, constitute professional misconduct under the laws of New York state, in that Petitioner charges:

2. The facts in Paragraphs A, B, and/or C.

DATED: June 13, 2005
Albany, New York


PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional Medical Conduct