



STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

Richard F. Daines, M.D.
Commissioner

Wendy E. Saunders
Chief of Staff

October 15, 2008

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Herbert Gaston, M.D.

Redacted Address

Ralph A. Erbaio, Esq.
Kern, Augustine, Conroy et al
420 Lakeville Road
Lake Success, New York 11042

Robert Bogan, Esq.
NYS Department of Health
Bureau of Professional Medical Conduct
433 River Street, Suite 303
Troy, New York 12180-2299

RE: In the Matter of Herbert Gaston, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 08-196) 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.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), (McKinney Supp. 2007) and §230-c subdivisions 1 through 5, (McKinney Supp. 2007), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the Respondent or the Department may seek a review of a committee determination.

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,

Redacted Signature

James F. Horan, Acting Director
Bureau of Adjudication

JFH:djh

Enclosure

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

COPY

IN THE MATTER
OF
HERBERT GASTON, M.D.

DETERMINATION
AND
ORDER

BPMC NO. 08-196

A hearing was held on September 18, 2008, at the offices of the New York State Department of Health ("the Petitioner"). A Commissioner's Order and Notice of Referral Proceeding dated March 28, 2008, and a Statement of Charges, dated March 26, 2008, were served upon the Respondent, **Herbert Gaston, M.D.** Pursuant to Section 230(10)(e) of the Public Health Law, **Scott B. Groudine, M.D.**, Chairperson, **Richard H. Edmonds, Ph.D.**, and **Eileen E. Joyce, M.D.**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter. **William J. Lynch, Esq.**, Administrative Law Judge, served as the Administrative Officer.

The Petitioner appeared by **Thomas Conway, Esq.**, General Counsel, by **Robert Bogan, Esq.**, of Counsel. The Respondent appeared in person and was represented by Kern Augustine Conroy & Schoppmann, P.C., **Ralph A. Erbaio, Jr., Esq.**, of 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.

STATEMENT OF CASE

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)(a)(ii), in that he was convicted of an act constituting a felony under federal law. Pursuant to Public Health Law Section 230(12)(b), the Commissioner ordered a summary suspension of Respondent's license to practice medicine in the State of New York or in any other jurisdiction where that practice is predicated on a valid New York State license to practice medicine. Copies of the Commissioner's Order and 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:

Herbert Gaston, M.D.

Anita Gaston

Dave Simmons

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. Herbert Gaston, M.D., the Respondent, was authorized to practice medicine in New York State on February 22, 1990, by the issuance of license number 181520 by the New York State Education Department (Petitioner's Ex. 4).

2. On January 7, 2008, in the United States District Court, Western District, Respondent was found guilty, based upon a plea of guilty, of one count of destruction, alteration, or falsification of records in Federal investigations, in violation of Title 18, United State Code, Section 1519, a felony, and was sentenced, inter alia, to six months imprisonment, two years supervised release from imprisonment, a \$100 assessment and a \$2000 fine (Petitioner's Ex. 5).

VOTE OF THE HEARING COMMITTEE

FIRST SPECIFICATION

Respondent violated New York Education Law Section 6530(9)(a)(ii) by having been convicted of committing an act constituting a crime under federal law.

VOTE: Sustained (3-0)

HEARING COMMITTEE DETERMINATION

The record indicates that federal agents commenced an investigation which revealed that between March 19, 2003 and March 20, 2003, Respondent subscribed to two websites which the agents later confirmed to contain child pornography among other types of pornographic and non-pornographic images. On October 20, 2005, federal agents went to Respondent's residence and advised him that they were conducting an ongoing child pornography investigation. Agents then followed Respondent to his

medical office. A cursory forensic preview of images and movies on one of Respondent's office computers revealed seven graphic image files that appeared to contain child pornography images or advertisements. A week later, the agents returned to the office and discovered that the hard drives had been destroyed.

In June 2006, Respondent learned that the U.S. Attorney was planning to charge him with a crime and were willing to offer him a plea bargain. In December 2006, Respondent accepted the offer and entered a plea of guilty to the charge of obstruction of justice. Respondent resigned from the hospital in which he was an attending physician at the hospital's request, and he has not practiced medicine since that time. On January 7, 2008, Respondent was convicted of destroying a computer hard drive with the intent to impede, obstruct or influence a federal agency investigation concerning child pornography. The Respondent served a six-month prison term, and his two-year term of supervised release from prison extends until January 2010.

Respondent testified before the Hearing Committee concerning the criminal offense. He admitted that he had viewed pornography after business hours when he was alone at his office location. He contended that he had searched for internet sites containing images of young, adult couples, and he denied intentionally viewing any child pornography. Respondent admitted that he destroyed the hard drive to the computer, and he acknowledged the illegality and foolishness of his actions.

Respondent testified that he has learned from this experience. He stated that he is now aware of how dangerous pornography can be, and that he cannot engage in activities that he feels he must conceal. Regarding his career, he stated that he finds great satisfaction in performing surgery and taking care of his patients. He further stated that he has always maintained a good rapport with his patients, their families and hospital staff. Respondent testified that he was one of only two surgeons practicing in Pen Yan.

Respondent's wife testified generally regarding her eighteen-year marriage to Respondent and more specifically regarding the series of events which began in October 2005 when federal agents appeared in her home to examine the computer which was located in the family kitchen. Respondent's wife also discussed her December 2005 cancer diagnosis and treatment. In the following months, a right mastectomy was performed and six rounds of chemotherapy were administered. She testified that Respondent supported throughout her treatment and that he has been an excellent father to their children. She stated that the family remains intact, and that the children are now ages 16, 14, 12, 10 and 7.

Petitioner recommended that Respondent's license be revoked, contending that no other penalty would sufficiently protect the public. Respondent's counsel contended that his client has already paid a heavy price for his criminal offense.

Based upon the record and Respondent's admissions, the Hearing Committee readily concluded that the specification of misconduct should be sustained. The more difficult issue to determine was the appropriate penalty to impose. The Hearing Committee found Respondent to be remorseful for his actions, and to regret the consequences that his actions have wrought upon his family and community. The record contains a Report of Psychosexual Evaluation and Risk Assessment and a letter written by a licensed psychologist in which he concludes that Respondent is not a pedophile and that he poses little if any risk to children or the general community. The record also establishes that information regarding Respondent's arrest and conviction were published in the local newspapers. In spite of this publication, no allegation was made that Respondent ever exploited a physician-patient relationship in a sexual way. To the contrary, Respondent submitted over 65 letters from individuals who attest to his personal character and competence as a physician.

Based upon the testimony at the hearing and the evidence in the record including the outpouring of support from the community, the Hearing Committee is persuaded that Respondent should be permitted to resume the practice of medicine following a period of license suspension. Before resuming the practice of medicine, however, the Committee feels that Respondent must be evaluated by an independent treatment provider and must comply with any recommended treatment program.

Respondent has not practiced medicine since December 31, 2006. The Hearing Committee finds that Respondent's license should be suspended until December 31, 2011; however, the period of suspension from July 1, 2009 until December 31, 2011 should be stayed so long as Respondent complies with terms of probation including submission to an evaluation by the Committee on Physicians Health ("CPH") for a sexual disorder and compliance with any treatment program which CPH recommends. In addition, Respondent should complete 100 hours of continuing medical education during the period of time between the issuance of this order and before resuming the practice of medicine.

ORDER

IT IS HEREBY ORDERED THAT:

1. The suspension of Respondent's license to practice medicine in the State of New York shall continue until December 31, 2011. The period of suspension from July 1, 2009 until December 31, 2011 shall be stayed provided that Respondent complies with the following terms of probation.
2. Respondent shall be placed on probation until December 31, 2011. As a term of that probation, Respondent shall enroll in the Committee for Physician Health ("CPH") and shall engage in a contract with CPH that defines the terms, conditions and

duration of Respondent's course of therapy and treatment program. Respondent shall comply with the contract. Respondent shall give written authorization for CPH to provide the Director of Office of Professional Medical Conduct ("OPMC") with all information or documentation requested by OPMC to determine whether Respondent is in compliance with the contract and this Order, including full access to all records maintained by CPH with respect to Respondent. Respondent shall cause CPH to report to OPMC promptly if Respondent refuses to comply with the contract or refuses to submit to treatment. Respondent shall also cause CPH to report immediately to OPMC if Respondent is regarded at any time to be an imminent danger to the public. The additional terms of probation are annexed and attached hereto;

3. Respondent shall complete 100 hours of continuing medical education during the period of time between the issuance of this Order and before resuming the practice of medicine;

4. This Order shall be effective upon service on the Respondent in accordance with the requirements of Public Health Law Section 230(10)(h).

DATED: Latham, New York
Oct 15th, 2008

Redacted Signature

Scott B. Groudine, M.D.
Chairperson

Eileen E. Joyce, M.D.
Richard H. Edmonds, Ph.D.

TO: Herbert Gaston, M.D.

Redacted Address

Ralph A. Erbaio, Esq.
Attorney for Respondent
Kern Augustine Conroy & Schoppman, P.C.
420 Lakeville Road
Lake Success, New York 11042

Robert Bogan, Esq.
Attorney for Petitioner
Associate Counsel
NYS Department of Health
Bureau of Professional Medical Conduct
433 River Street, Suite 303
Troy, New York 12180-2299

Additional Terms of Probation

1. Respondent shall conduct himself in all ways in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his profession.
2. Respondent shall submit written notification to the New York State Department of Health addressed to the Director, Office of Professional Medical Conduct (OPMC), Hedley Park Place, 433 River Street Suite 303, Troy, New York 12180-2299; said notice is to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.
3. Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of Respondent's compliance with the terms of this Order. Respondent shall personally meet with a person designated by the Director of OPMC as requested by the Director.
4. The period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director again prior to any change in that status. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon Respondent's return to practice in New York State.
5. Respondent's professional performance may be reviewed by the Director of OPMC. This review may include, but shall not be limited to, a review of office records, patient records and/or hospital charts, interviews with or periodic visits with Respondent and his/her staff at practice locations or OPMC offices.
6. Respondent shall maintain legible and complete medical records which accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations regarding controlled substances.
7. Respondent shall comply with all terms, conditions, restrictions, limitations and penalties to which he or she is subject pursuant to the Order and shall assume and bear all costs related to compliance. Upon receipt of evidence of noncompliance with, or any violation of these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding and/or any such other proceeding against Respondent as may be authorized pursuant to the law.

APPENDIX 1

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



IN THE MATTER
OF
HERBERT GASTON, M.D.
RO-06-12-7031-A

COMMISSIONER'S
ORDER
AND
NOTICE OF
REFERRAL
PROCEEDING

TO: HERBERT GASTON, M.D.
Redacted Address

HERBERT GASTON, M.D.
Surgical Associates
418 North Main Street
Penn Yan, NY 14527

The undersigned, Richard F. Daines, M.D., Commissioner of Health, pursuant to New York Public Health Law §230, upon the recommendation of a Committee on Professional Medical Conduct of the State Board for Professional Medical Conduct, has determined that **HERBERT GASTON, M.D.**, Respondent, licensed to practice medicine in the State of New York on February 22, 1990, by license number 181520, has been convicted of committing an act constituting a felony under federal law, as is more fully set forth in the Statement of Charges attached, hereto, and made a part, hereof.

It is, therefore:

ORDERED, pursuant to New York Public Health Law §230(12)(b), effective immediately **HERBERT GASTON, M.D.**, Respondent, shall not practice medicine in the State of New York or in any other jurisdiction where that practice is predicated on a valid New York State license to practice medicine. This Order shall remain in effect unless modified or vacated by the Commissioner of Health pursuant to New York Public Health Law §230(12).

**ANY PRACTICE OF MEDICINE IN THE STATE OF NEW YORK IN
DEFIANCE OF THIS COMMISSIONER'S ORDER SHALL
CONSTITUTE PROFESSIONAL MISCONDUCT WITHIN THE
MEANING OF NEW YORK EDUCATION LAW §6530(29) AND MAY
CONSTITUTE UNAUTHORIZED MEDICAL PRACTICE, A FELONY,
DEFINED BY NEW YORK EDUCATION LAW §6512.**

PLEASE TAKE NOTICE that a hearing will be held pursuant to the provisions of New York Public Health Law §230 and New York State Administrative Procedure Act §§301-307 and 401 . The hearing will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct on the 15th day of May 2008, at 10:00 a.m., at Hedley Park Place, 433 River Street, 5th Floor, Troy, New York 12180, at the offices of the New York State Health Department and at such other adjourned dates, times, and places as the committee may direct. Respondent may file an answer to the Statement of Charges with the below-named attorney for the Department of Health.

At the hearing, evidence will be received concerning the allegations set forth in the Statement of Charges, that is attached. A stenographic record of the hearing will be made and the witnesses at the hearing will be sworn and examined. Respondent shall appear in person at the hearing and may be represented by counsel. Respondent has the right to produce witnesses and evidence on his behalf, to issue or have subpoenas issued on his behalf for the production of witnesses and documents, and to cross-examine witnesses and examine evidence produced against him. A summary of the Department of Health Hearing Rules is enclosed. Pursuant to §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 hearing will proceed whether or not Respondent appears at the hearing. Scheduled hearing dates are considered dates certain and adjournment requests are not, therefore, routinely granted. Requests for adjournments must be made in writing to the New York State Department of Health, Division of Legal Affairs, Bureau of Adjudication, Hedley Park Place, 433 River Street, Fifth Floor South, Troy, NY 12180, ATTENTION: HON. SEAN D. O'BRIEN, DIRECTOR, BUREAU OF ADJUDICATION, and by telephone (518-402-0748), upon notice to the attorney for the Department of Health whose name appears below, at least five days prior to the scheduled hearing date. Claims of court engagement will require detailed affidavits of actual engagement. Claims of illness will require medical documentation.

At the conclusion of the hearing, the committee shall make findings of fact, conclusions concerning the charges sustained or dismissed, and, in the event any of the charges are sustained, a determination of the penalty or sanction to be imposed or appropriate action to be taken. Such determination may be reviewed by the administrative review board for professional medical conduct.

THESE PROCEEDINGS MAY RESULT IN A DETERMINATION THAT YOUR LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE BE REVOKED OR SUSPENDED AND/OR THAT YOU BE FINED OR SUBJECT TO OTHER SANCTIONS SET FORTH IN NEW YORK PUBLIC HEALTH LAW §230-a. YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: Albany, New York
3/28/2008

Redacted Signature

RICHARD F. DAINES, M.D.
Commissioner of Health

Inquires should be addressed to:

Robert Bogan
Associate Counsel
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
HERBERT GASTON, M.D.
RO-06-12-7031-A

STATEMENT
OF
CHARGES

HERBERT GASTON, M.D., Respondent, was authorized to practice medicine in New York state on February 22, 1990, by the issuance of license number 181520 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about January 7, 2008, in the United States District Court, Western District of New York, Respondent was found guilty, based on a plea of guilty, of one (1) count of destruction, alteration, or falsification of records in Federal investigations, in violation of Title 18, United States Code, §1519, a felony, and was sentenced, inter alia, to six (6) months imprisonment, two (2) years supervised release upon release from imprisonment, a \$100.00 assessment, and a \$2,000.00 fine.

SPECIFICATION

Respondent violated New York Education Law §6530(9)(a)(ii) by being convicted of committing an act constituting a crime under federal law, in that Petitioner Charges:

1. The facts in Paragraph A.

DATED: *March 26*, 2008
Albany, New York

Redacted Signature

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