



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*

Dennis P. Whalen  
*Executive Deputy Commissioner*

PUBLIC

May 10, 2004

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Richard Joseph Kienzle, M.D.  
168 Eastwood Drive  
Cooperhill, Tennessee 37317

Richard Joseph Kienzle, M.D.  
107 Ocoee Street  
Box 1285  
Cooperhill, Tennessee 37317

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 Richard Joseph Kienzle, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 04-99) 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), 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.

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**

**AND**

**ORDER**

BPMC No. 04-99

**IN THE MATTER**  
**OF**  
**RICHARD JOSEPH KIENZLE, M.D.**

A Notice of Referral Proceeding and Statement of Charges, both dated March 16, 2004, were served upon the Respondent, **RICHARD JOSEPH KIENZLE, M.D.**. **JOEL H. PAULL, D.D.S., M.D.**, Chairperson, **SHELDON H. PUTTERMANN, M.D.** and **MS. FRANCES TARLTON**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. **STEPHEN L. FRY, ESQ.**, Administrative Law Judge, served as the Administrative Officer.

A hearing was held on April 21, 2004, at the Offices of the New York State Department of Health, Hedley Park Place, 433 River Street, Troy, New York. The Department appeared by **DONALD P. BERENS, JR., ESQ.**, General Counsel, by **ROBERT BOGAN, ESQ.** and **PAUL ROBERT MAHER, ESQ.**, of Counsel. The Respondent appeared in person.

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 where 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 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 Sections 6530(9)(b) and (d), based upon actions constituting violations of subdivisions (2), (3), (4), (5) (6) (20) and (32). A copy of the Notice of Referral Proceeding and Statement of Charges is attached to this Determination and Order as Appendix 1.

**WITNESSES**

For the Petitioner:	None
For the Respondent:	Respondent

**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 unless otherwise specified.

- 1). **RICHARD JOSEPH KIENZLE, M.D.**, the Respondent, was authorized to practice medicine in New York State on August 29, 1989, by the issuance of license number 179719 by the New York State Education Department (Ex. 4).
- 2). On February 4, 2000 (erroneously dated, in the statement of charges, February 4, 2003), Respondent and the Composite State Board of Medical Examiners of the State of Georgia ("the Georgia Board") entered into a Consent Order, wherein Respondent admitted that he had, on nine occasions, prescribed non-controlled substances for himself under the name of another physician without said physician's knowledge. Respondent agreed to accept a public reprimand, to take a continuing education course in "Appropriate Prescribing of Controlled Substances" and to pay a \$1,500 fine (Ex. 5).
- 3). On November 7, 2003, Respondent and the Georgia Board entered into a Public Consent Order, wherein Respondent admitted to various factual allegations and agreed to accept, as discipline, a five-year period of probation, payment of a \$5,000 fine, completion of Continuing Medical Education ("CME") courses in bariatric medicine and ethics, the prospective use of a triplicate prescription system and log for all controlled substances, completion of a mini-residency in "Appropriate Prescribing of Controlled Substances", and the meeting of other requirements (Ex. 5).
- 4). The fact findings agreed to in the November 7, 2003 Order were that Respondent

had, for a number of patients: failed to keep medical records sufficient to provide a legitimate indication for treatments and prescriptions provided; failed to conduct physical examinations, take medical histories or perform laboratory tests before prescribing controlled substances; prescribed medications without any valid rationale for their use; failed to record vital signs; prescribed controlled substances in dosages above those recommended by the manufacturers without any medically valid rationale; and/or treated patients for obesity by prescribing anorectic agents without the concomitant use of dietary, behavioral and exercise intervention (Ex. 5).

### **HEARING COMMITTEE CONCLUSIONS**

The hearing Committee concludes that the conduct resulting in the Georgia Board's disciplinary actions against Respondent would constitute misconduct under the laws of New York State, pursuant to:

- New York Education Law §6530(2) (practicing the profession fraudulently);
- New York Education Law §6530(3) (negligence on more than one occasion);
- New York Education Law §6530(20) (committing acts evincing moral unfitness); and
- New York Education Law §6530(32) (failure to maintain a record for each patient that accurately reflects the patient's evaluation and treatment);<sup>1</sup>

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<sup>1</sup> The Hearing Committee finds no support in the Georgia documents for the allegations in the Statement of charges in the instant case that Respondent's conduct would have constituted gross negligence, incompetence or gross incompetence, had it been committed in New York.

## **VOTE OF THE HEARING COMMITTEE**

### **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.

**VOTE: SUSTAINED (3-0)**

#### **SECOND SPECIFICATION**

Respondent violated New York Education Law §6530(9)(d) by having had disciplinary action taken by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the disciplinary action 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 record in this case establishes that Respondent has twice been disciplined by the Georgia Board, as set forth above. Since the acts covered by the consent orders would have constituted misconduct in New York, had they been committed here, the only issue remaining to be decided is the penalty to be imposed in this state.

The essence of Respondent's case was that his involvement in the acts leading to the Georgia orders was minimal. With regard to the first order, it was Respondent's contention that he actually signed the prescriptions at issue (for Paxil) on group practice

prescription forms, for his own use, but that he let the pharmacist list his partner as the prescriber so Respondent's insurance would cover it. This contention is inconsistent with the finding in the first Georgia order that he "prescribed these substances for himself under the name of another physician", and it cannot be considered further because the finding in the order is binding on this tribunal. Furthermore, the Hearing Committee is troubled by Respondent's testimony that he maintained himself on Paxil samples for years before writing the scripts at issue.

With regard to the second order, it was Respondent's testimony that the order covered his work at a weight loss clinic that was essentially a "pill mill" (fen-phen), that he had to keep this job to support himself, that he had no control over the patient records, and that he tried, in fact, to reform the clinics practices. Again, this testimony is inconsistent with the fact-findings he agreed to in the second Georgia order that he had committed all the acts and omissions cited, and it cannot be considered further.

The Hearing Committee concludes that a significant sanction is appropriate in this case, given Appellant's apparent inability to accept responsibility for his own actions, and his apparent attitude that he does not need the assistance of others, such as another practitioner to monitor his use of psychotropic medication or an attorney to represent him in disciplinary proceedings against him (he was not represented by counsel for either Georgia matter or at the instant proceeding). The Hearing Committee feels that Respondent underestimates the significance of misconduct proceedings.

Although the Hearing Committee does not conclude that revocation or suspension of Respondent's New York license is necessary, the following sanctions are appropriate: the issuance of a censure and reprimand, as well as a five-year period of probation to run upon Respondent's return to New York to practice, should he do so. The terms of this probation,

including a requirement that Respondent successfully complete the conditions imposed upon him under the terms of the second Georgia order, are set forth in the attached order.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. A **CENSURE AND REPRIMAND** are hereby issued against Respondent's New York medical license.
2. Respondent is placed on **PROBATION** for a period of **FIVE (5)** years, to commence upon Respondent's return to New York State to practice, should he determine do so. At least 30 days prior to resuming practice in New York, Respondent shall submit written notice of his intention 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.
3. The specific terms of Respondent's probation are as follows:
  - A. 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/her profession.
  - B. Respondent shall immediately submit written notification to the New York State Department of Health addressed to the Director, Office of Professional Medical Conduct at the address set forth above; 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.
  - C. 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.
  - D. 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.

- E. 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.
- F. Respondent shall maintain legible and complete medical records that accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations regarding controlled substances.
- G. Respondent shall comply fully with the November 7, 2003 consent Order of the Georgia Board and any extension or modification thereof.
- H. Respondent shall provide a written authorization for the Georgia Board to provide the Director of OPMC with any/all information or documentation as requested by OPMC to enable OPMC to determine whether Respondent is in compliance with its November 7, 2003 Order.
- I. Respondent shall submit quarterly a signed Compliance Declaration to the Director of OPMC, which truthfully attests whether Respondent has been in compliance with the Georgia Order during the declaration period specified.
- J. 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.

The **ORDER** shall be effective upon service on the Respondent or the Respondent's attorney by personal service or by certified or registered mail.

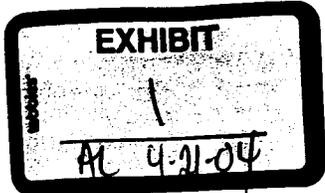
DATED: Eggertsville, New York

5/7, 2004

  
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JOEL H. PAULL, D.D.S., M.D.  
Chairperson

SHELDON H. PUTTERMANN, M.D.  
MS. FRANCES TARLTON

# APPENDIX 1



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

**IN THE MATTER**  
**OF**  
**RICHARD JOSEPH KIENZLE, M.D.**  
**CO-04-01-0173-A**

**NOTICE OF**  
**REFERRAL**  
**PROCEEDING**

**TO:** RICHARD JOSEPH KIENZLE, M.D.  
168 Eastwood Drive  
Cooperhill, TN 37317

RICHARD JOSEPH KIENZLE, M.D.  
107 Ocoee Street  
P.O. Box 1285  
Copperhill, TN 37317

**PLEASE TAKE NOTICE THAT:**

An adjudicatory proceeding will be held pursuant to the provisions of N.Y. Pub. Health Law § 230(10)(p) and N.Y. State Admin. Proc. 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 21<sup>st</sup> day of April 2004, at 10:00 in the forenoon of that day at the Hedley Park Place, 433 River Street, 4<sup>th</sup> Floor, Board Room, 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, 5<sup>th</sup> 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 April 12, 2004.

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 April 12, 2004, 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

*March 16*, 2004



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

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IN THE MATTER

OF

RICHARD JOSEPH KIENZLE, M.D.  
CO-04-01-0173-A

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STATEMENT

OF

CHARGES

RICHARD JOSEPH KIENZLE, M.D., the Respondent, was authorized to practice medicine in New York state on August 29, 1989, by the issuance of license number 179719 by the New York State Education Department.

**FACTUAL ALLEGATIONS**

A. On or about February 4, 2003, the State of Georgia Composite State Board of Medical Examiners (hereinafter "Georgia Board"), by a Consent Order (hereinafter "Georgia Order 1"), required Respondent to complete a course entitled "Appropriate Prescribing of Controlled Substances," to pay a \$1,500.00 fine, and publicly reprimanded him, based on prescribing non-controlled substances for himself under the name of another physician without that physician's knowledge.

B. On or about November 7, 2003, the Georgia Board, by a Public Consent Order (hereinafter "Georgia Order 2"), placed Respondent's medical license on five (5) years probation, imposed a \$5,000.00 fine, required him to complete twenty (20) hours of CME in Bariatric Medicine and five (5) hours of CME in Ethics, required him to complete a Mini-Residency entitled "Appropriate Prescribing of Controlled Substances," and imposed other conditions, based on prescribing controlled substances to patients without keeping proper medical records, including physical exams, taking medical histories, performing laboratory exams, and with no valid rationale for their use.

C. The conduct resulting in the Georgia Board disciplinary actions 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(2) (practicing the profession fraudulently);
2. New York Education Law §6530(3) (negligence on more than one occasion);
3. New York Education Law §6530(4) (gross negligence);
4. New York Education Law §6530(5) (incompetence on more than one occasion);
5. New York Education Law §6530(6) (gross incompetence);
6. New York Education Law §6530(20) (moral unfitness); and/or
7. New York Education Law §6530(32) (failure to maintain a record for each patient

which accurately reflects the evaluation and treatment of the patient).

### **SPECIFICATIONS**

#### **FIRST AND SECOND SPECIFICATIONS**

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

#### **THIRD AND FOURTH SPECIFICATIONS**

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

3. The facts in Paragraphs A and/or C.
4. The facts in Paragraphs B and/or C.

DATED: *March 16*, 2004  
Albany, New York

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