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BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	
[redacted]	Case No. [redacted]
Physician's and Surgeon's Certificate No. [redacted]	OAH No. [redacted]
Respondent.	

PROPOSED DECISION

This matter was heard before Ruth S. Astle, Administrative Law Judge of the Office of Administrative Hearings, State of California on August 29 and 30, 2003 in Oakland, California

Kerry Weisel, Deputy Attorney General, represented the complainant.

Albert J. Garcia, Attorney at Law, represented the respondent who was present.

Submission of the matter was deferred to October 7, 2003, for receipt of final argument, which was received and considered.

FACTUAL FINDINGS

1. Ronald Joseph (complainant made this accusation in his official capacity as the Executive Director of the Medical Board of California (Board), and not otherwise.

2. On August 1, 1977, the Board issued Physician and Surgeon's Certificate [redacted] o respondent [redacted] (respondent). Respondent's license was in full force and effect at all times relevant to this accusation and is currently valid, with an expiration date of March 31, 2004.

3. It was stipulated by the parties that respondent's conviction on July 10, 2000, for misdemeanor violation of Vehicle Code section 23152(a) (Driving under the influence) is substantially related to his duties, qualification and functions as a licensee and that there is cause to impose disciplinary action. The issue is to determine what is an appropriate disciplinary order in this matter.

4. Respondent has a significant history of alcohol abuse. Respondent was involved in an automobile accident while under the influence of alcohol. After the incident he enrolled in the MPI Alcohol Treatment Program in Oakland. He also contacted the Medical Board Diversion Program. He completed an outpatient program at MPI that included group and individual therapy and the attendance at AA meetings. In March of 2000 respondent entered an inpatient program in Oregon at the request of the Diversion Program. After the initial inpatient hospital program, respondent entered a monitored residential living program. Respondent successfully completed the program in July 2000.

5. In February 2001 respondent relapsed. He reported his relapse to the Diversion Program. The Diversion Program asked respondent to return to the inpatient program in Oregon. Respondent did not want to return, in large part due to his responsibility for his two teenaged daughters. It was a great hardship for him to be away from them for so long the first time. He proposed an alternative program including AA, outpatient treatment, random testing and therapy, but Diversion turned him down and insisted on Springbrook. Respondent refused and ultimately was terminated from diversion.

6. It was not established by clear and convincing evidence that respondent was under the influence of alcohol and/or impaired by the use of alcohol in connection with any shift at any emergency room. Nor is there any evidence that respondent ever endangered patients or others under his supervision and care.

7. At the request of the Medical Board respondent was examined and evaluated by [redacted] M.D. Dr. [redacted] found that with respondent's history of alcohol abuse that there is no guarantee under any program that respondent would be completely successful. However, Dr. [redacted] concluded that a program constructed by the respondent that would protect the public would have a greater chance of success because patient acceptance tends to increase patient compliance.

8. Respondent is presently serving as a Regional Medical Director for [redacted] a company that he founded. He has three hospitals under his administration. The company supplies emergency room physicians to hospitals in California. At the time of the incident set forth in Finding 3, above, respondent was running the company. He was under a great deal of stress. By taking on less responsibility respondent has reduced his stress level considerably.

9. Respondent has never been charged with harming a patient as a result of his alcohol abuse. He has excellent clinical skills and gets along well with his staff. He has never been under the influence of alcohol at work. He works four to six 24-hour shifts a month.

10. Respondent expressed concern for his past behavior. He is willing to be tested for alcohol at the beginning of every shift. He underwent this extensive testing at the request of his company to assure the hospitals that respondent was safe to practice. All of the tests

were negative. He has continued to participate in AA twice a week. He has been sober since February of 2001.

11. Respondent received his BA in Chemistry and Theater from McAlester College in St. Paul, Minnesota. He graduated from Harvard Medical School in 1976. Respondent did his internship at San Francisco General Hospital and is Board Certified in emergency Medicine.

12. The cost for Investigation and Prosecution requested in this matter is $1,165.17 for investigative services. This amount is reasonable. The cost for expert review is $3,090.17. This amount is reasonable. The cost requested for attorney services is from 2001 to present. The amount of $14,728.00 is high based on the stipulation and other factors concerning the facts of this case including failure to establish two of the causes for discipline. $7,500 is allowed. The total costs allowed for investigation and prosecution of this matter is $11,755.34. This amount may be paid over the term of probation.

13. Termination from diversion is not, in and of itself, grounds for disciplinary action.

14. It would not be against the public interest to allow respondent to practice medicine under the terms and conditions set forth below.

LEGAL CONCLUSIONS

1. By reason of the matters set forth in Findings 3, 4 and 5, cause for disciplinary action exists pursuant to Business and Professions Code sections 2236(a), 2234 (conviction of a substantially related crime), and 2239(a) (Use of Alcohol).

2. By reason of the matters set forth in Finding 6, cause for disciplinary action does not exist under Business and Professions Code section 2234(b) (gross negligence).

3. By reason of the matters set forth in Finding 13, cause for disciplinary action does not exist pursuant to Business and Professions Code section 2354. Termination from the Diversion Program is not a separate ground for disciplinary action. See *Medical Board of California v. Superior Court* (Liskey) 03 C.D.O.S. 7379 (2003). While the complainant attempts to distinguish this case from that of *Liskey,* it appears clear that it is the underlying problems that are, and should be, the cause for disciplinary action not the termination from diversion, alone.

4. The matters set forth in Findings 7 though 11 and 14 in mitigation, extenuation and mitigation have been considered in making the following order. It must be noted that the mandate of the Board is to protect the public not to what they may believe is best for the respondent. The public can be protected by placing respondent on probation for a considerable period of time under terms and conditions that will assure that he does not make medical decisions under the influence of alcohol. As Dr. [redacted] observed (complainant's

expert witness), the respondent may never have complete control of his problem with alcohol, but if the public can be protected, there is no reason the respondent should have to be supervised by the diversion program. Further, the complainant argues that the diversion committee is made up of experts in their field and is best able to decide what is best. While they may be able to decide what is best for the individual, they don't have any special knowledge about what is required to protect the public.

5. Costs in the amount of $11,755.34 as set forth in Finding 12 are allowed pursuant to Business and Professions Code section 125.3.

ORDER

Physician's and Surgeon's Certificate [redacted] issued to [redacted], M.D., is hereby revoked. However, the revocation is stayed for a period of 10 years upon the following terms and conditions: Within 15 days after the effective date of this decision the respondent shall provide the Division, or its designee, proof of service that respondent has served a true copy of this decision on the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to respondent or at any other facility where respondent engages in the practice of medicine and on the Chief Executive Officer at every insurance carrier where malpractice insurance coverage is extended to respondent.

1. Alcohol - Abstain From Use

   Respondent shall abstain completely from the use of alcoholic beverages.

2. Biological Fluid Testing

   Respondent shall immediately submit to biological fluid testing, at respondent's cost, upon the request of the Division or its designee. Respondent shall also be tested before and after every shift.

3. Psychotherapy

   Within 60 days of the effective date of this decision, respondent shall submit to the Division or its designee for its prior approval the name and qualifications of a psychotherapist of respondent's choice. Upon approval, respondent shall undergo and continue treatment until the Division or its designee deems that no further psychotherapy is necessary. Respondent must follow all recommendations of the treating psychotherapist. Respondent shall have the treating psychotherapist submit quarterly status reports to the Division or its designee. The Division or its designee may require respondent to undergo psychiatric evaluations by a Division-appointed psychiatrist.

If, prior to the termination of probation, respondent is found not to be mentally fit to resume the practice of medicine without restrictions, the Division shall retain continuing jurisdiction over the respondent's license and the period of probation shall be extended until the Division determines that the respondent is mentally fit to resume the practice of medicine without restrictions.

4. Monitoring

Within 30 days of the effective date of this decision, respondent shall submit to the Division or its designee for its prior approval a plan of practice in which respondent's practice shall be monitored by another physician in respondent's field of practice, who shall provide periodic reports to the Division or its designee.

If the monitor resigns or is no longer available, respondent shall, within 15 days, move to have a new monitor appointed, through nomination by respondent and approval by the Division or its designee.

Respondent is prohibited from engaging in solo practice.

5. Obey All Laws

Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full compliance with any court ordered criminal probation, payments and other orders.

6. Quarterly Reports

Respondent shall submit quarterly declarations under penalty of perjury on forms provide by the Division, stating whether there has been compliance with all the conditions of probation.

7. Probation Surveillance Program Compliance

Respondent shall comply with the Division's probation surveillance program. His addresses of business and residence which shall both serve as addresses of record. Changes of such addresses shall be immediately communicated in writing to the Division. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code Section 2021(b).

Respondent shall, at all times, maintain a current and renewed physician and surgeon license.

Respondent shall also immediately inform the Division, in writing, of any travel to any areas outside the jurisdiction of California, which lasts, or is contemplated to last, more than thirty (30) days.

8. Interview with the Division, its designee or its designated physician(s)

Respondent shall appear in person for interviews with the Division, its designee or its designated physician(s) upon request at various intervals and with reasonable notice.

9. Tolling of Probation

In the event respondent should leave California to reside or to practice outside the State or for any reason should respondent stop practicing medicine in California, respondent shall notify the Division or its designee in writing within ten days of the dates of departure and return or the dates of non-practice within California. Non-practice is defined as any period of time exceeding thirty days in which respondent is not engaging in any activities defined in Sections 2051 and 2052 of the Business and Professions Code. All time spent in an intensive training program approved by the Division or its designee shall be considered as time spent in the practice of medicine. A Board ordered suspension of practice shall not be considered as a period of non-practice. Periods of temporary or permanent residence or practice outside California or of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary order.

10. Completion of Probation

Upon successful completion of probation, respondent's certificate shall be fully restored.

11. Violation of Probation

If respondent violates probation in any respect, the Division, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an accusation or petition to revoke probation is filed against respondent during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

12. Cost Recovery

The respondent is hereby ordered to reimburse the Division the amount of $11,755.34 in equal monthly payments over the first five years of probation for its investigative costs. Failure to reimburse the Division's cost of its investigation shall constitute a violation of the probation order, unless the Division agrees in writing to payment by an installment plan because of financial hardship. The filing of bankruptcy by the respondent shall not relieve the respondent of his/her responsibility to reimburse the Division for its investigative costs.

13. License Surrender

Following the effective date of this decision, if respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, respondent may voluntarily tender his/her certificate to the Board. The Division reserves the right to evaluate the respondent's request and to exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the tendered license, respondent will no longer be subject to the terms and conditions of probation.

14. Probation Monitoring Costs

The respondent shall pay the costs associated with probation monitoring each and every year of probation. Such costs shall be payable to the Division of Medical Quality and delivered to the designated probation surveillance monitor no later that January 31 of each calendar year. Failure to pay costs within 30 days of the due date shall constitute a violation of probation.

DATED: October 24, 2003

Ruth S Astle

RUTH S. ASTLE
Administrative Law Judge
Office of Administrative Hearings