

STATE OF MAINE BOARD OF LICENSURE IN MEDICINE

In Re: Marshall Hubsher, M.D.)
Denial of Application for Licensure) **DECISION AND ORDER**

I. PROCEDURAL HISTORY

Pursuant to the authority found in 32 M.R.S. § 3271, 32 M.R.S. § 3282-A, and 10 M.R.S. § 8003(5), the State of Maine Board of Licensure in Medicine (“Board”) met in public session at its offices in Augusta, Maine, on June 11, 2013. The purpose of the meeting was to conduct an adjudicatory hearing to determine whether grounds existed to deny the application for licensure of Marshall Hubsher, M.D.

A quorum of the Board was in attendance during all stages of the proceedings. Participating and voting Board members were David Andrews, M.D.; Louisa Barnhart, M.D.; Cheryl Clukey; David Dumont, M.D.; Dana Dyer; Maroulla Gleaton, M.D.; David Jones, M.D.; David Nyberg, Ph.D.; and Chair Gary Hatfield, M.D. Dr. Hubsher was not present. Dennis Smith, Esq., Assistant Attorney General, represented the State of Maine. Rebekah J. Smith, Esq., served as Presiding Officer. The hearing was held in accordance with the requirements of the Administrative Procedures Act, 5 M.R.S. § 9051 et seq.

State Exhibits #1 to #29 were admitted. The Board took notice of its statutes and rules and confirmed that no members had any conflict of interest or bias that would prevent them from rendering an impartial decision in this matter. The State presented an opening statement. The State presented Maureen Lathrop, Secretary for the Board; Tracy Morrison, Licensing Specialist for the Board; James Gioia, Detective with the Office of the Attorney General; and Timothy Terranova, Consumer Assistant for the Board, as witnesses. The State made a closing statement. The Board

then deliberated and made the following findings of fact and conclusions of law by a preponderance of the credible evidence regarding Dr. Hubsher's application for licensure.

II. FINDINGS OF FACTS

Historical Facts

1. The Applicant was granted a medical license in the State of New York in 1976. (State Exh. #7.)
2. In 1988, the New York Board for Medicine suspended the Applicant's medical license for a period of five years, stayed the last 42 months of the suspension, and placed the Applicant on probation for 42 months following the suspension. (State Exh. #11; State Exh. #5.) The disciplinary action was based on the Applicant's 1982 federal criminal conviction for possession of 2000 quaaludes, his 1983 conviction for issuance of a triplicate prescription with a false date, and his 1987 conviction for Medicaid fraud. (State Exh. #11.) The period of suspension ran from April 1988, until October 1989, followed by a period of probation from October 1989 through April 1993. (State Exh. #11.)
3. On April 15, 1994, the New York Board for Professional Medical Conduct charged the Applicant with practicing medicine while his license was suspended, failing to maintain records, and practicing the profession fraudulently. (State Exh. #12.) In January 1995, following a hearing, a Hearing Committee of the New York Department of Health revoked the Applicant's license to practice medicine. (State Exh. #12.) The Hearing Committee found the Applicant guilty of providing medical treatment to patients during the time that his license was suspended, failing to maintain records, and practicing the profession of medicine fraudulently. (State Exh. #12.) The Hearing Committee determined that during his suspension the Applicant had knowingly and intentionally misled his patients,

pharmacies, and insurance carriers; manipulated circumstances to intentionally conceal that he was practicing medicine while his license was suspended; and perjured himself. (State Exh. #12.) Following denial of a request for reconsideration, the Applicant's license was revoked by the New York Department of Health on May 16, 1995. (State Exh. #11; State Exh. #5.)

4. On May 17, 1996, the Applicant petitioned for the restoration of his New York medical license. (State Exh. #11.) In the application, the applicant disclosed his 1988 suspension and probation but referenced only the 1987 Medicaid fraud as a basis, not the other two convictions upon which the disciplinary action was also based. (State Exh. #11.) Following hearing, the Applicant's request for reinstatement was denied. (State Exh. #11.) The Peer Committee reviewing the request noted that no professional testimony had been provided regarding any changes in the Applicant character since the problems began in 1980. (State Exh. #11.) The Peer Committee noted that the Applicant committed three serious offenses directly related to his practice within a short time of being licensed and then schemed before, during, and after his suspension to try to minimize any disruption to his practice. (State Exh. #11.) The Peer Committee's recommendation to deny the Applicant's request for reinstatement, seconded by the Committee on the Professions, was affirmed by the Board of Regents of the University of the State of New York Education Department. (State Exh. #10.)
5. On April 18, 2006, the Applicant's New York medical license was reinstated. (State Exh. #5; State Exh. #9.) The Peer Committee of the New York Medical Board and the Committee on the Professions concluded that there was almost no chance that the Applicant would ever again commit misconduct of the sort that led to his loss of licensure; that the

Applicant had undergone sufficient therapy to achieve insight into his behavior; that the Applicant had undergone a spiritual awakening; and that the Applicant was sincerely remorseful. (State Exh. #9.)

6. On April 18, 2012, the Applicant was arrested on charges of rape in the third degree and criminal sexual act in the third degree. (State Exh. #17; Testimony of Gioia.) On April 19, 2012, the Applicant was arraigned on the two charges in Nassau County, New York, based on allegations that on April 3, 2012, the Applicant engaged in sexual intercourse with a female patient during a treatment session. (State Exh. #17; State Exh. #24.) The Applicant's arrest was covered by the news media. (State Exh. #24; State Exh. #26 (including video that is linked in article)).
7. A May 11, 2012, Statement of Charges filed by the New York Board for Professional Medical Conduct alleged that the Applicant had committed professional misconduct by a wide-ranging set of actions beginning in 2008 that included fraudulent practice, false report, failure to maintain records, moral unfitness, negligence, incompetence, gross negligence, willful patient harassment, abuse or intimidation, and exercising undue influence on a patient. (State Exh. #8.)
8. By Order dated June 28, 2012, the Applicant was placed on probation pending the effective date of his surrender of his medical license on July 31, 2012. (State Exh. #5.) By letter dated June 28, 2012, the New York State Department of Health provided the Applicant with a copy of the New York State Board for Professional Medical Conduct Order No. 12-131, indicating that the order and penalty provided there in went into effect June 28, 2012. (State Exh. #8.) By Surrender Order dated June 28, 2012, the State Board for Professional Medical Conduct ordered that the Applicant would surrender his medical license effective

July 31, 2012. (State Exh. #8.) The Applicant had entered into the Surrender and Consent Agreement and Order on the basis that he could not successfully defend against at least one of the allegations, in full satisfaction of the charges against him. (State Exh. #8.) Pursuant to the Surrender and Consent Agreement and Order, the Applicant was placed on probation as of June 26, 2012, pending the surrender of his license on July 31, 2012. (State Exh. #8.)

Procedural Facts

9. On July 18, 2012, the Applicant submitted a Uniform Application for Physician Licensure to the Board. (State Exh. #4.) The application included an affidavit in which the Applicant certified under oath that all the statements made within the application were true, that he had answered all questions in the application truthfully and completely, and that he acknowledged that failure on his part to answer questions truthfully and completely could lead to prosecution under federal or state law. (State Exh. #4.)
10. In the application, the Applicant was asked if he had ever had any licensing authority deny his application for any type of license, or take any disciplinary action against the license issued to him in that jurisdiction, including but not limited to a warning, fine, suspension, revocation, restrictions on permitted practice, or probation with or without monitoring. (State Exh. #4.) In response, the Applicant referenced his 1988 suspension, indicating that because he had accepted \$35 from a Medicaid patient for making house calls each week for three years, while also accepting \$30 from Medicaid each week, he had had to plead guilty to Medicaid fraud, resulting in a license suspension for 18 months and a suspension from Medicaid program participation for two years. (State Exh. #4.) The Applicant also indicated that, six years later, his license had been revoked as a result of allegations of

practicing medicine with his brother who was also a psychiatrist because officials believed he was telling his brother what prescriptions to prescribe to patients. (State Exh. #4.)

11. In the application for Maine licensure, the Applicant indicated that he had not been notified of the existence of allegations filed by any licensing authority that remained open as of the date of the application. (State Exh. #4.) Also in the application, when asked if he had ever been charged, summons, indicted, arrested, or convicted of any criminal offense, the Applicant indicated yes but his written explanation referenced only his prior admission of the 1987 guilty plea to Medicaid fraud. (State Exh. #4.)
12. In the application, the Applicant did not indicate that the 1988 suspension of his New York license was based on two convictions in addition to that for Medicaid fraud. (State Exh. #4.) The Applicant also failed to explain that the 1998 suspension was followed by 42 months of probation. (State Exh. #4.) The Applicant did not disclose the denial of his 1990 petition for licensure in Connecticut. (State Exh. #4.) The Applicant did not indicate that his petition for reinstatement of his New York license following his 1995 revocation was denied in 1996. (State Exh. #4.) Finally, the Applicant did not disclose that he was arrested and charged with two crimes in April 2012 or that in June 2012 he had entered into a Surrender and Consent Agreement and Order placing him on probation as of June 28, 2012, pending the surrender of his New York license on July 31, 2012. (State Exh. #4.)
13. On November 13, 2012, the Board voted to preliminarily deny the Applicant's request for permanent Maine licensure. (State Exh. #22.)
14. On November 16, 2012, the Applicant submitted a request to the Board that it reconsider its initial decision to deny his medical license. (State Exh. #3.) The Applicant apologized for failing to mention his July 2012 surrender of his New York license because during the

month of July, he was stressed by seeing all his disappointed patients and transitioning them to new care providers, he was depressed and anxious, his wife was suffering from a severe illness, and his father-in-law required assistance obtaining medical care for Alzheimer's disease, and thus he had too little time to read the application questions carefully. (State Exh. #3.)

15. On December 21, 2012, the Board issued notice to the Applicant that on November 13, 2012, it had voted to preliminarily deny his application for permanent licensure. (State Exh. #22.)
16. By notice of hearing dated March 29, 2013, the Applicant received notice of the May 14, 2013, hearing date. (State Exh. #1; State Exh. #1A.)
17. On May 9, 2013, the Applicant requested a continuance of the hearing scheduled for May 14, 2013, on the basis of family problems. (Conference Order of May 14, 2013.) A conference call was held and the continuance request was denied by the Hearing Officer. (Conference Order of May 14, 2013.)
18. By letter dated May 10, 2013, the Applicant asked the Board to grant his application for licensure. (State Exh. #27.)
19. By a second amended notice of hearing dated May 7, 2013, the Applicant was notified that the events of 2012 would be included in the allegations that would be the subject of hearing on May 14, 2013. (State Exh. #1B.) On May 13, 2013, after the close of business, the Applicant presented a new continuance request on the basis that he had received the amended notice of hearing earlier that day and that he did not have time to respond to the new allegations. (Conference Order of May 14, 2013.) On May 14, 2013, a conference call was convened. (Conference Order of May 14, 2013.) Pursuant to the notice requirements

of the Administrative Procedures Act, at 5 M.R.S. § 9052, the Applicant's continuance request was granted. (Conference Order of May 14, 2013.) During that conference call, the Applicant was informed that the hearing would very likely be held on June 11, 2013. (Conference Order of May 14, 2013.)¹

20. The Applicant was sent a second amended notice of hearing on May 15, 2013, rescheduling the hearing for June 11, 2013. (State Exh. #1C.) The notice was sent via first class and certified mail. (State Exh. #1C.) Although the certified letter was returned to the Board unclaimed, the letter sent via first class was not returned as undeliverable. (Testimony of Lathrop.)
21. By letter received by the Board on May 30, 2013, the Applicant sought to withdraw his application for licensure. (State Exh. #28.) On June 3, 2013, the Assistant Attorney General filed an objection to the Applicant's request to withdraw. (State Exh. #29.) On June 10, 2013, the Applicant left three voicemail messages for Maureen Lathrop, Secretary for the Board. (Testimony of Lathrop.) In his messages, the Applicant indicated that he would not attend the hearing on June 11 because of his wife's medical issues. (Testimony of Lathrop.) In the messages, the Applicant did not request a continuance of the hearing, but asked that the Board review his request to withdraw his application for licensure prior to holding the hearing. (Testimony of Lathrop.)
22. On June 11, 2013, just prior to the start of hearing, the Board voted unanimously not to accept the Applicant's request to withdraw his application for licensure.

¹ The Board Secretary testified that she did not have a record that the Conference Order of May 14, 2013, was provided to the Applicant. (Testimony of Lathrop.)

III. GOVERNING STATUTES AND RULES

1. The Board may not grant an application for licensure unless the Board finds that the applicant is qualified and no cause exists, as set forth in 32 M.R.S. § 3282-A, that could be considered grounds for disciplinary action against a licensed physician or surgeon. 32 M.R.S. § 3271(5). When an individual applies for a license, the Board may investigate the professional record of that individual, including professional records that the individual may have as a licensee in other states. 32 M.R.S. § 3282-A(1).
2. The Board may refuse to issue a license or impose discipline on a licensee if the Board finds that the applicant or licensee engaged in the practice of fraud or deceit in obtaining a license or in connection with service rendered within the scope of the license. 32 M.R.S. § 3282-A(2)(A).
3. The Board may refuse to issue a license or impose discipline on a licensee if the Board finds that the applicant or licensee displayed incompetence in the practice of medicine. 32 M.R.S. § 3282-A(2)(E). A licensee is considered incompetent in the practice if the licensee has engaged in conduct that evidences a lack of ability or fitness to discharge the duty owed by the licensee to a client or patient or the general public or engaged in conduct that evidences a lack of knowledge or inability to apply principles or skills to carry out the practice for which the licensee is licensed. 32 M.R.S. § 3282-A(2)(E).
4. The Board may refuse to issue a license or impose discipline on a licensee if the Board finds that the applicant or licensee committed unprofessional conduct. 32 M.R.S. § 3282-A(2)(F). A licensee is considered to have engaged in unprofessional conduct if the licensee violates a standard of professional behavior, including engaging in disruptive behavior, that

has been established in the practice for which the licensee is licensed. 32 M.R.S. § 3282-A(2)(F).

5. Subject to the limitations of Title 5, chapter 341, of the Maine Revised Statutes, the Board may refuse to issue a license or impose discipline on a licensee if the Board finds that the applicant or licensee was convicted of a crime that involved dishonesty or false statement or related directly to the practice for which the licensee was licensed, or conviction of a crime for which incarceration for one year or more could have been imposed. 32 M.R.S. § 3282-A(2)(G).
6. The Board may refuse to issue a license or impose discipline on a licensee if the Board finds that the applicant or licensee was subject to revocation, suspension, or restriction of a license to practice medicine or other disciplinary action; denial of an application for a license; or surrender of a license to practice medicine following the institution of disciplinary action by another state or territory of the United State or a foreign country if the conduct resulting in the disciplinary or other action involving the license would, if committed in Maine, constitute grounds for discipline under the laws or rules of the state. 32 M.R.S. § 3282-A(2)(M).

IV. CONCLUSIONS OF LAW

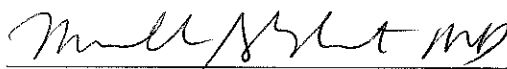
The Board, considering the above facts and those alluded to in the record but not referred to herein, determined as follows:

1. By a vote of 9-0, that Dr. Marshall Hubsher had committed the practice of fraud or deceit in attempting to obtain a license and in connection with service rendered within the scope of a license from another state. 32 M.R.S. § 3282-A(2)(A).

2. By a vote of 9-0, that Dr. Marshall Hubsher had committed incompetence in the practice of medicine by engaging in conduct that evidences a lack of ability or fitness to discharge the duty owed to a patient or the general public. 32 M.R.S. § 3282-A(2)(E).
3. By a vote of 9-0, that Dr. Marshall Hubsher engaged in unprofessional conduct. 32 M.R.S. § 3282-A(2)(F).
4. By a vote of 9-0, that Dr. Marshall Hubsher was convicted of a crime that involved dishonesty or false statement and related directly to the practice for which he was licensed. 32 M.R.S. § 3282-A(2)(G).
5. By a vote of 9-0, that Dr. Marshall Hubsher had his license to practice medicine revoked, suspended, or restricted and surrendered his license to practice medicine following the institution of disciplinary action by another state due to conduct that would have constituted grounds for discipline in the State of Maine. 32 M.R.S. § 3282-A(2)(M).
6. By a vote of 9-0, because grounds existed that could be grounds for disciplinary action against him were he licensed in Maine, denied the application of Dr. Marshall Hubsher to become licensed to practice medicine in the State of Maine. 32 M.R.S. § 3271(5).

So Ordered.

Dated: July 11, 2013



Maroulla Gleaton, M.D.

Chair, State of Maine Board of Licensure in Medicine

V. APPEAL RIGHTS

Pursuant to the provisions of 10 M.R.S. § 8003(5) and 5 M.R.S. § 11002(3), any party that appeals this Decision and Order must file a Petition for Review in the Superior Court within 30 days of receipt of this Order. The petition shall specify the person seeking review, the manner in which they are aggrieved and the final agency action which they wish reviewed. It shall also

contain a concise statement as to the nature of the action or inaction to be reviewed, the grounds upon which relief is sought and a demand for relief. Copies of the Petition for Review shall be served by certified mail, return receipt requested, upon the State of Maine Board of Licensure in Medicine, all parties to the agency proceedings, and the Attorney General.