



Department
of Health

Public

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Acting Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

April 8, 2015

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Paul Tsui, Esq.
NYS Department of Health
ESP-Corning Tower-Room 2512
Albany, New York 12237

Michael D. Berger, M.D.
[REDACTED]

Michael D. Berger, M.D.
29458 Miller Road
Valley Center, California 92082

Michael D. Berger, M.D.
[REDACTED]

Michael D. Berger, M.D.
[REDACTED]

RE: In the Matter of Michael D. Berger, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 15-089) 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
Office of Professional Medical Conduct
Riverview Center
150 Broadway - Suite 355
Albany, New York 12204

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), (McKinney Supp. 2013) and §230-c subdivisions 1 through 5, (McKinney Supp. 2013), "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., Chief Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Riverview Center
150 Broadway – Suite 510
Albany, New York 12204

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,


James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH:cah
Enclosure

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

IN THE MATTER
OF
MICHAEL D. BERGER, M.D.
PM-14-05-2537-A

DETERMINATION

AND

COPY

ORDER

BPMC #15-089

A hearing was held on March 19, 2015, at the offices of the New York State Department of Health ("the Petitioner"). A Notice of Referral Proceeding and Statement of Charges, dated January 26, 2015, were served upon the Respondent, **Michael D. Berger, M.D.**

Pursuant to Section 230(10)(e) of the Public Health Law, **Robert A. Catalano, M.D., M.B.A.**, Chair, **Thomas T. Lee, M.D., M.B.A.**, and **Dennis P. Zimmerman, M.S., CRC.**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter. **David A. Lenihan, Esq.**, Administrative Law Judge, served as the Administrative Officer. The Petitioner appeared by **James E. Dering, Esq.**, General Counsel, by **Paul Tsui, Esq.**, of Counsel. The Respondent, **Michael D. Berger, M.D.**, did not appear although duly served. Evidence was received and transcripts of these proceedings were made. After consideration of the entire record, the Hearing Committee issues this Determination and Order.

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. The Respondent, Michael D. Berger, M.D., did not appear, although served with notice of this hearing by substituted service. (Petitioner's Exhibit 2)
2. Respondent was authorized to practice medicine in New York State on October 8, 1976, by the issuance of license number 128896 by the New York State Education Department. (Petitioner's Exhibit 3)
3. On or about May 19, 2008, the Medical Board of California, Department of Consumer Affairs (hereinafter "California Board"), by a Decision and Order, *inter alia*, revoked Respondent's Physician's and Surgeon's Certificate No. G 21264, stayed the revocation, and placed Respondent on probation for a period of seven years with certain terms and conditions to be completed in May 2015. (Petitioner's Exhibit 4)
4. On or about April 17, 2014, effective May 16, 2014, the California Board, by a Decision and Order (hereinafter, "California Decision"), revoked Respondent's Physician's and Surgeon's Certificate No. G 21264 based on Respondent's violation of the terms and conditions of probation by failing to submit to random drug and/or alcohol tests, failing to pay probation monitoring costs, failing to submit quarterly reports in a timely manner,

and failing to comply with an order of abatement to make full payment of probation monitoring costs issued by the California Board. (Petitioner's Exhibit 4)

5. In addition to the above, the Respondent committed acts of dishonesty or corruption in that he submitted quarterly reports, under penalties of perjury, attesting that he had complied with the terms and conditions of probation; in truth and in fact, he had not complied, and he knew that he had not complied. (Petitioner's Exhibit 4)

6. Respondent petitioned for reconsideration of the decision and execution was stayed until May 26, 2014. On or about May 26, 2014, no action had been taken on the petition by the Respondent, and the petition was deemed denied by operation of law and the Petitioner's license to practice medicine was revoked. (Petitioner's Exhibit 4)

VOTE OF THE HEARING COMMITTEE

SPECIFICATION

"Respondent violated New York Education Law §6530(9)(d)(ii) by having his license to practice medicine revoked after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state where the conduct resulting in the revocation of the license 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 Respondent did not appear at the hearing, either in person or by counsel. The Administrative Officer, after considering the documentary evidence, which included an affidavit of mailing and attempted service (Petitioner's Exhibit 2), ruled that the Petitioner had met the requirements of law for due diligence in the service of process, that jurisdiction had been established over the Respondent, and that the hearing could proceed on the merits notwithstanding the Respondent's absence.

It is noted that, in addition to the affidavits of service in the record, the Department's attorney also submitted the envelope and documents mailed to the Respondent's New York Registration address, 211 East 18th Street, New York, New York 10003. This mailing was returned by the U.S. Post Office to the Department, with the notation, "Unable to Forward, Return to Sender." Furthermore, the Department did not rest with this attempt to contact the Respondent at his New York Registration address and went on to send the documents to three other locations in California, all to no avail. On review of the attempts at service, the Administrative Law Judge found that due diligence was established. (T. 6)

The record in this case shows that back in the year 2008, the Medical Board of California, Department of Consumer Affairs, by a Decision and Order, *inter alia*, revoked Respondent's Physician's and Surgeon's Certificate, stayed the revocation, and placed Respondent on probation for a period of seven years with certain terms and conditions to be completed in May 2015.

The record goes on to show that the Respondent did not comply with the terms and conditions of his probation and that on or about April 17, 2014, effective May 16, 2014, the

California Board, by a Decision and Order, revoked Respondent's Physician's and Surgeon's Certificate No. G 21264 based on Respondent's clear violation of the terms and conditions of probation by failing to submit to random drug and/or alcohol tests, failing to pay probation monitoring costs, failing to submit quarterly reports in a timely manner, and failing to comply with an order of abatement to make full payment of probation monitoring costs issued by the California Board.

Moreover, the California documents demonstrate that the Respondent committed acts of dishonesty or corruption in that he submitted quarterly reports, under penalties of perjury, attesting that he had complied with the terms and conditions of probation. The California board concluded that the Respondent did not comply and that he knew that he had not complied. Accordingly, California revoked the Respondent's license to practice medicine.

The record goes on to show that the Respondent petitioned for reconsideration of the decision and the revocation was stayed until May 26, 2014. However no action had been taken on this petition by the Respondent and the petition was deemed denied by operation of law by the California Board and the Respondent's license to practice medicine in that state was revoked.

It is clear from the documentary record and the evidence submitted at the hearing by the Department that the basis of the California action was certain conduct that eventually resulted in the California Board of Medicine taking disciplinary action against Respondent. Respondent did not appear at the hearing, and the record does not contain any evidence of mitigating circumstances or remorse. The panel noted that there were multiple attempts to serve the Respondent personally with notice of this matter and that he was not living at the

address on file with the Department. The Administrative Officer ruled that there was due diligence at service and that the Department had met its obligation under due process. Accordingly, the Respondent was found to be in default and the hearing proceeded to a determination of penalty.

The Department's attorney, Mr. Tsui, stated that, given the nature of the revocation of the Respondent's license in California, there is no other appropriate outcome in New York State but to revoke the Respondent's license. The panel, unanimously, agreed with the Department on this recommendation. As to the penalty, therefore, the Hearing Committee determined that the people of New York State would be protected by a revocation of the Respondent's license. Accordingly, the panel decided, unanimously, to revoke the Respondent's license.

ORDER

IT IS HEREBY ORDERED THAT:

1. The specification of professional misconduct, as set forth in the Statement of Charges, is **SUSTAINED**.
2. The license of the Respondent to practice medicine in New York State is hereby **REVOKED**.
3. This Order shall be effective upon service on the Respondent in accordance with the requirements of Public Health Law Section 230(10)(h).

DATED: Delmar, New York

April 3, 2015

[REDACTED]

Robert A. Catalano, M.D., M.B.A., Chair

Thomas T. Lee, M.D., M.B.A.

Dennis P. Zimmerman, M.S., CRC.

To:

Michael D. Berger, M.D.
Respondent

[REDACTED]

Michael D. Berger, M.D.:
Respondent
29458 Miller Road
Valley Center, CA 92082

Michael D. Berger, M.D.
Respondent

[REDACTED]

Michael D. Berger, M.D.
Respondent

[REDACTED]

Paul Tsui, Esq.
Attorney for Petitioner
Associate Counsel
NYS Department of Health
Bureau of Professional Medical Conduct
Coming Tower, Room 2512
Empire State Plaza
Albany, New York 12237

APPENDIX 1

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

IN THE MATTER
OF
MICHAEL D. BERGER, M.D.

NOTICE OF
REFERRAL
PROCEEDING

TO:

Michael D. Berger, M.D.
[REDACTED]

Michael D. Berger, M.D.
[REDACTED]

Michael D. Berger, M.D.
29458 Miller Road
Valley Center, CA 92082

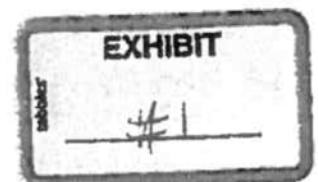
Michael D. Berger, M.D.
[REDACTED]

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 §§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 19th day of March, 2015, at 10:30 a.m., at the offices of the New York State Department of Health, Riverview Center, 150 Broadway, Suite 355, Albany, New York 12204-2719.

At the proceeding, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. 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 who shall be an attorney admitted to practice in New York state. 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 which 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, Riverview Center, 150 Broadway - Suite 510, Albany, NY 12204-2719, ATTENTION: HON. JAMES HORAN, DIRECTOR, BUREAU OF ADJUDICATION (Telephone: (518-402-0748), (henceforth "Bureau of Adjudication") as well as the Department of Health attorney indicated below, no later than twenty days prior to the scheduled date of the Referral Proceeding, as indicated above.

Pursuant to the provisions of N.Y. Pub. Health Law §230(10)(p), you shall file a written answer to each of the charges and allegations in the Statement of Charges not less than ten days prior to the date of the hearing. Any charge or allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such 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 written brief and affidavits with the Committee. Six copies of all papers you submit must be filed with the Bureau of Adjudication at the address indicated above, no later than fourteen days prior to the scheduled date of the Referral

Proceeding, and a copy of all papers must be served on the same date on the Department of Health attorney indicated below. 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. Pursuant to the terms of N.Y. State Admin. Proc. Act §401 and 10 N.Y.C.R.R. §51.8(b), the Petitioner hereby demands disclosure of the evidence that the Respondent intends to introduce at the hearing, including the names of witnesses, a list of and copies of documentary evidence and a description of physical or other evidence which cannot be photocopied.

YOU ARE HEREBY ADVISED THAT THE ATTACHED CHARGES WILL BE MADE PUBLIC FIVE BUSINESS DAYS AFTER THEY ARE SERVED.

Department attorney: Initial here 

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
January, 26 2015



MICHAEL A. HISER
Deputy Counsel
Bureau of Professional Medical Conduct

Inquiries should be addressed to:

Paul Tsui,
Associate Counsel
Bureau of Professional Medical Conduct
Corning Tower – Room 2512
Empire State Plaza
Albany, NY 12237
(518) 473-4282

STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER
OF
MICHAEL D. BERGER, M.D.
PM-14-05-2537-A

STATEMENT
OF
CHARGES

MICHAEL D. BERGER, M.D., Respondent, was authorized to practice medicine in New York State on October 8, 1976, by the issuance of license number 128896 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. In a prior disciplinary action, effective May 19, 2008, the Medical Board of California, Department of Consumer Affairs (hereinafter "California Board"), by a Decision and Order, inter alia, revoked Respondent's Physician's and Surgeon's Certificate No. G 21264, stayed the revocation, and placed Respondent on probation for a period of seven years with certain terms and conditions to be completed in May 2015.
- B. On or about April 17, 2014, effective May 16, 2014, the California Board, by a Decision and Order (hereinafter, "California Decision"), revoked Respondent's Physician's and Surgeon's Certificate No. G 21264 based on Respondent's violation of the terms of conditions of probation by failing to submit to random drug and/or alcohol tests, failing to pay probation monitoring costs, failing to submit quarterly reports in a timely manner, and failing to comply with an order of abatement to make full payment of probation monitoring costs issued by the California Board. Moreover, Respondent committed acts of dishonesty or corruption in that he submitted quarterly reports, under penalties of perjury, attesting that he had complied with the terms and conditions of probation; in truth and in fact, he had not complied, and he knew that he had not complied. Respondent petitioned for reconsideration of the decision and execution was stayed until May 26, 2014. On or about May 26, 2014, no action had been taken on the petition, and the petition was deemed denied by operation of law.

C. The conduct resulting in the California 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(29) (Violating any term of probation or condition or limitation imposed on Licensee).

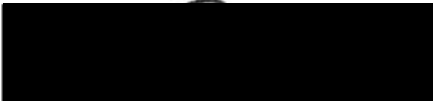
SPECIFICATIONS

FIRST SPECIFICATION

Respondent violated New York Education Law §6530(9)(d) by having his license to practice medicine revoked after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation of the license would, if committed in New York State, constitute professional misconduct under the laws New York State, in that Petitioner charges:

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

DATED: January 26, 2015
Albany, New York


MICHAEL A. HISER
Deputy Counsel
Bureau of Professional Medical Conduct