



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

Public

Dennis P. Whalen
Executive Deputy Commissioner

December 2, 2005

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Earl Melvin Simmons, M.D.
1507 Rancho Encinitas
Encinitas, California 92024

Earl Melvin Simmons, M.D.
267 North El Camino Real
Suite 1
Encinitas, California 92024

Robert Bogan, Esq.
NYS Department of Health
433 River Street - 4th Floor
Troy, New York 12180

RE: In the Matter of Earl Melvin Simmons, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 05-277) 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
Hedley Park Place
433 River Street - Fourth Floor
Troy, New York 12180

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), 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.

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.

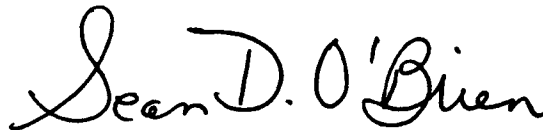
The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., 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:cah

Enclosure

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

IN THE MATTER
OF
EARL MELVIN SIMMONS, M.D.

DETERMINATION
AND
ORDER
BPMC #05-277

COPY

A Notice of Referral Proceeding and Statement of Charges, both dated September 13, 2005, were served upon the Respondent, **EARL MELVIN SIMMONS, M.D.** **MICHAEL R. GOLDING, M.D.**, Chairperson, **JAMES D. HAYES, M.D.** and **THOMAS W. KING, JR., M.P.A, P.E.**, 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 November 17, 2005, 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.**, of Counsel. The Respondent, although duly notified of the hearing, did not appear and submitted no evidence.

Evidence was received on behalf of the Department 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 (3), (4), (5), (6), (21) and (29). 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: None

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. **EARL MELVIN SIMMONS, M.D.**, the Respondent, was authorized to practice medicine in New York State on August 24, 1965, by the issuance of license number 95194 by the New York State Education Department. (Ex. 4)
2. On September 24, 2004, the Medical Board of California ("the California Board") entered a Decision and Order accepting and adopting a Stipulated Settlement and Disciplinary Order agreed to by the Attorney General of California and Respondent. This settlement was in satisfaction of a First Amended Accusation, wherein Respondent was accused of having committed acts of gross negligence, repeated negligence, incompetence, and failure to maintain adequate and accurate records. (Ex 5)
3. The First Amended Accusation also alleged that Respondent was guilty of unprofessional conduct by reason of his failure to take and pass a Special Purpose Examination as required by the California Division of Medical Quality and his failure to provide assurances that he was not practicing medicine while the ocular problems he had been suffering existed. (Ex. 5)
4. Although not admitting the allegations in the First Amended Accusation in the Stipulated Settlement, Respondent agreed to accept discipline, including a stayed revocation of his license and a 3-year term of probation. The terms of probation included: enrollment in (within 30 days of the Order) and completion of (within 90 days) the Physician Assessment and Clinical Education ("PACE") Program, the passage of an examination, and compliance with all of the PACE Program's recommendations; at least 2 years of practice monitoring; 15 hours per year of extra Continuing Medical Education;

and a prohibition of his supervision of physician's assistants. The Order specified that if Respondent did not successfully complete the PACE Program within the time limits outlined, he would be automatically suspended from the practice of medicine (Ex. 5)

5. On March 2, 2005, the California Board's Chief of Enforcement issued a Suspension Order immediately suspending Respondent's license to practice based upon his failure to enroll in and successfully complete the PACE Program within the time limits set by the Board. This suspension was to remain in effect until written notification of the successful completion was provided to the Division of Medical Quality. (Ex. 6)

HEARING COMMITTEE CONCLUSIONS

The hearing Committee concludes that the conduct resulting in the California Board's disciplinary actions against Respondent would constitute misconduct under the laws of New York State, pursuant to New York Education Law §6530(9)(b) and (d), in that the conduct would have constituted misconduct in New York, had it been committed here, under:

- New York Education Law §6530(3) (practicing with negligence on more than one occasion);
- New York Education Law §6530(4) (practicing with gross negligence);
- New York Education Law §6530(5) (practicing with incompetence on more than one occasion)¹;
- New York Education Law §6530(21) (willful failure to file a report required by the department of health or education [the physician monitoring and licensing agencies]); and

¹ The California orders made no findings of gross incompetence, and the Department's charge that Respondent's conduct would have constituted gross incompetence, had it been committed here, is not upheld.

- New York Education Law §6530(29) (violating any term of probation or condition or limitation imposed on the licensee).

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)

JURISDICTION AND RESPONDENT'S FAILURE TO APPEAR AT THE HEARING

The Department caused Respondent to be personally served on September 20, 2005 with the notice and statement of charges regarding the initial hearing date in this matter. This gave the Department jurisdiction over Respondent pursuant to Public Health Law §230(10)(d). Following is a statement of the developments that led up to the conducting of this hearing on November 17, 2005. This statement is based upon the

representations of Mr. Bogan, the Department's attorney who prosecuted this matter, and upon documentary evidence, as cited herein.

The hearing date specified in the notice of hearing was October 19, 2005. Prior to that date, Respondent's original attorney requested an adjournment of the hearing, but indicated that he no longer represented Respondent and that the request was made on Respondent's behalf. Mr. Bogan sent a letter to the attorney stating that since the attorney no longer represented Respondent, he was not authorized to act on Respondent's behalf, and that Respondent would need to request an adjournment himself.

On October 11, 2005, the Department received a letter from a Dr. Greisman, Respondent's urologist, stating that Respondent was suffering from "side effects" of intensive chemotherapy for prostate cancer that made it impossible for Respondent to travel to New York for a hearing. (Ex. 7) On October 12, 2005, Mr. Bogan sent a letter to Dr. Greisman, with a copy to Respondent, stating again that only Respondent or his attorney could request an adjournment of this proceeding, and that the hearing would proceed on the scheduled date unless an adjournment was validly requested and granted. (Ex. 8)

On October 17, 2005, Mr. Bogan had a telephone conversation with Respondent during which Respondent requested an adjournment of the initial hearing date so he could obtain an attorney and prepare for the hearing. Mr. Bogan consented to the adjournment, and the hearing was adjourned to the instant hearing date. (Ex. 9) Respondent did not indicate that he had any medical problems at that time that prevented him from attending a hearing in New York.

On November 18, 2005, the day before the instant hearing, and after Mr. Bogan undertook a series of efforts to locate Respondent and ascertain if he was coming to the

hearing, Respondent called Mr. Bogan and indicated that he could not attend the hearing because he had no money to hire a lawyer or to travel to New York. Mr. Bogan told Respondent that that was not, in his opinion, a valid basis for an adjournment; that only a documented medical problem that prevented his attendance would constitute a valid reason for an adjournment; and that, as far as he was concerned, Respondent had to attend the hearing, although Respondent could have his request and any supporting documentation submitted to and considered by the Administrative Law Judge and/or the Hearing Committee. Then Respondent told Mr. Bogan that his medical problems did prevent his attendance, and stated that he would have his cardiologist send a letter. Respondent stated that he was, at that time, "at work".

On November 17, 2005 (the date of this hearing), Mr. Bogan received a faxed copy of a letter from a Dr. Bessudo, an internist and medical oncologist (not, as far as this record reveals, a cardiologist), stating that Respondent was on chemotherapy, that he had been found to have active coronary disease that required "immediate treatment", and that for these reasons Respondent could not travel at this time.

When presented with these facts, the Administrative Law Judge and the Hearing Committee each declined to adjourn the hearing. The Notice of Referral Proceeding served upon to Respondent specifically stated as follows:

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 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. (emphasis in original)

The notice also stated that Respondent could file a brief and affidavits with the Hearing Committee. Respondent did not request an adjournment in accordance with these instructions, nor did he file any documents for consideration by the Hearing Committee. The requests that were received to adjourn the instant hearing date were made only after Mr. Bogan tracked down Respondent to ascertain if he planned to attend. There is little doubt that had Mr. Bogan not made these extraordinary contacts, Respondent would not have attended the hearing or contacted the Department to request an adjournment.

Furthermore, the reasons Respondent gave at various times to adjourn the hearing dates in this matter were not consistent, nor were the medical excuses convincing, especially in light of Respondent's statement that he was working at the time of his last phone conversation with Mr. Bogan, and in light of his failure to bring his alleged inability to travel to the Department's attention in a timely manner and without prompting. The letter from Respondent's oncologist gives no details as to the specific nature of the problems Respondent has that allegedly prevented his traveling on the date of this hearing, and Respondent's failure to provide such information in a timely fashion prevented the Department's attorney and the Hearing Committee from ascertaining further details in order to make an educated assessment of his claim.

Respondent's claims that he is medically and/or financially unable to travel to New York for a hearing were unaccompanied by any evidence as to when, if ever, he will be able to do so. Therefore, there is no way for the Hearing Committee to determine that any adjournment would lead to Respondent's ultimate attendance at a hearing. Under these circumstances, the Hearing Committee concludes that there is no basis for delaying the hearing any further.

The Hearing Committee also notes that Respondent's behavior is that of a physician attempting to avoid adjudication of his case, not of a physician who has evidence to show that he should be allowed to keep his New York license. Had the latter been the case, and had Respondent taken seriously the warning that the hearing could proceed even if he did not appear, he would at the least have provided documentary evidence to support his case.

The Hearing Committee unanimously concludes that Respondent is not entitled to another adjournment, that his failure to appear at the hearing was not justified and that the adjudication of his case should proceed at this time.

HEARING COMMITTEE DETERMINATION

The record in this case establishes that in satisfaction of various allegations made against Respondent regarding his practice of medicine, including accusations that he had committed acts of gross negligence and repeated negligence, that he had practiced with incompetence, that he had failed to maintain adequate and accurate records, that he had failed to take and pass a Special Purpose Examination as required by the California Division of Medical Quality, and that he had failed to provide assurances that he was not practicing medicine while the ocular problems he had been suffering existed, Respondent agreed to accept discipline, including a stayed revocation of his license and a 3-year term of probation, with extensive conditions. Although Respondent did not admit that the allegations were true, his agreement to accept a stayed revocation of his license and 3 years of probation is sufficient to raise in the minds of the Hearing Committee members an inference that there was substance to the allegations.

Thereafter, Respondent's license was suspended indefinitely based upon his failure to enroll in and successfully complete the PACE Program within the time limits set by the Board.

Respondent presented no evidence at this hearing that he has since that time enrolled in or completed the PACE Program, or that he has complied with any of the other conditions for practice set by the California Board. As far as this record reveals, Respondent's license to practice medicine has not been restored, nor is there any evidence that it is likely to be restored. The record is also devoid of any evidence that Respondent is able to practice medicine safely or that he has any interest in maintaining a license in either California or New York.

Under these circumstances, this Hearing Committee feels that it has no choice but to revoke Respondent's New York License. The New York medical misconduct disciplinary sanction statute (Public Health Law §230-a) does not allow for indefinite license suspensions like that meted out by the California Board, and revocation is the only way to adequately protect New York residents against the possibility of Respondent's return to New York to practice medicine.

ORDER

IT IS HEREBY ORDERED THAT:

1. The New York medical license of **EARL MELVIN SIMMONS, M.D.** is hereby **REVOKED.**

This **ORDER** shall be effective upon service on the Respondent pursuant to Public Health Law section 230(10)(h).

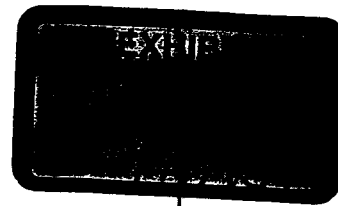
DATED: ^{New York, N.Y.} ~~Morristown, New Jersey~~
30 November 2005


MICHAEL R. GOLDING, M.D.
Chairperson

JAMES D. HAYES, M.D.
THOMAS W. KING, JR., M.P.A, P.E.

APPENDIX 1

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



IN THE MATTER
OF
EARL MELVIN SIMMONS, M.D.
CO-04-11-5711-A

NOTICE OF
REFERRAL
PROCEEDING

TO: EARL MELVIN SIMMONS, M.D.
1507 Rancho Encinitas
Encinitas, CA 92024

EARL MELVIN SIMMONS, M.D.
267 N. El Camino Real
Suite I
Encinitas, CA 92024

PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of New York Public Health Law § 230(10)(p) and New York State Administrative Procedure 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 19th day of October 2005, at 10:00 in the forenoon of that day at the Hedley Park Place, 5th Floor, 433 River Street, 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, 5th 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 October 10, 2005.

Pursuant to the provisions of New York 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 October 10, 2005, 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

September 13, 2005

Peter D. Van Buren

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

IN THE MATTER
OF
EARL MELVIN SIMMONS, M.D.
CO-04-11-5711-A

STATEMENT
OF
CHARGES

EARL MELVIN SIMMONS, M.D., the Respondent, was authorized to practice medicine in New York state on August 24, 1965, by the issuance of license number 095194 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about September 24, 2004, the Division of Medical Quality, Medical Board of California, Department of Consumer Affairs, State of California, (hereinafter "California Board"), by a Decision and Order (hereinafter "California Order 1"), revoked Respondent's license to practice of medicine, stayed the revocation, and placed him on three (3) years probation, subject to terms and conditions, based on gross negligence, repeated negligent acts, incompetence, and unprofessional conduct.

B. On or about March 25, 2005, the California Board, by a Suspension Order (hereinafter "California Order 2"), suspended Respondent's license to practice medicine until Respondent successfully completes the PACE Program, based upon a violation of the terms and conditions set forth in California Order 1, set forth in Paragraph A above.

C. The conduct resulting in the California 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(3) (negligence on more than one occasion);
2. New York Education Law §6530(4) (gross negligence);
3. New York Education Law §6530(5) (incompetence on more than one occasion);
4. New York Education Law §6530(6) (gross incompetence);

5. New York Education Law §65309(21) (failing to file a report required by the department of health or the education department); and/or

6. 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)(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, B, and/or C.

SECOND AND THIRD SPECIFICATIONS

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

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

DATED: *Sept. 13*, 2005
Albany, New York

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