



Department of Health

ANDREW M. CUOMO
Governor

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

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

January 15, 2019

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Thor Van Diver, M.D.



Amy Kulb, Esq.
Jacobson Goldberg & Kulb, LLP
585 Stewart Avenue, Suite 500
Garden City, New York 11530

Pooja Rawal, Esq.
Bureau of Professional Medical Conduct
Corning Tower Building – Room 2512
Empire State Plaza
Albany, New York 12237

RE: In the Matter of Thor Van Diver, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No.19-010) 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), (McKinney Supp. 2015) and §230-c subdivisions 1 through 5, (McKinney Supp. 2015), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the Respondent 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:

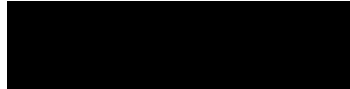
James F. Horan, Esq., Chief Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Riverview Center
150 Broadway – Suite 510
Albany, New York 12204

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 Judge 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: cmg
Enclosure

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

-----X
: IN THE MATTER :
:

DETERMINATION

OF :

AND

THOR VAN DIVER, M.D. :
:

ORDER

19-010
-----X

A hearing was held on November 14, 2018, at the offices of the New York State Department of Health (Department), 150 Broadway, Menands, New York. Pursuant to §230(10)(e) of the New York State Public Health Law (PHL), **MARY E. RAPPAZZO, M.D.**, Chairperson, **PROSPERE REMY, M.D.**, and **DAVID F. IRVINE, DHSc, P.A.**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter. **JEAN T. CARNEY, ADMINISTRATIVE LAW JUDGE (ALJ)**, served as the Administrative Officer.

The Department appeared by Senior Attorney Pooja Rawal. A Notice of Referral Proceeding and Statement of Charges, dated June 21, 2018, were duly served pursuant to PHL §230(10)(d)(i) upon Thor Van Diver, M.D. (Respondent), who appeared in person and through his attorney, Amy Kulb, Esq. The Hearing Committee received and examined documents from the Department (DOH Exhibits 1-4), and from the Respondent (Respondent Exhibits A and B). The Department did not present any witnesses. The Respondent testified in his own behalf, and a stenographic reporter prepared a transcript of the proceeding. After consideration of the entire record, the Hearing Committee does not sustain the charge.

BACKGROUND

The Department has brought the case pursuant to PHL §230(10)(p), which provides for a hearing when a licensee is charged solely with a violation of Educ. Law §6530(9). The Respondent is charged with professional misconduct pursuant to Educ. Law §6530(9)(a)(iii), having been convicted of committing an act constituting a crime under another jurisdiction, which, if committed in New York State, would have constituted a crime under New York State Law. Specifically, the department alleges that the Respondent pled guilty to Battery, in violation of Florida Statutes Section 784.03-1(a)(1); Tampering with or Harassing a Witness, in violation of Florida Statutes section 914.22-1(b); and Violation of an Injunction for Protection against Domestic Violence pursuant to Florida Statutes Section 741.31-4(a). (DOH Exhibit 3). Under PHL §230(10), the Department has the burden of proving its case by a preponderance of the evidence.

FINDINGS OF FACT

The following findings and conclusions are the unanimous determinations of the Hearing Committee:

1. The Respondent was authorized to practice medicine in New York State on October 8, 1991, by the issuance of license number 1872270. (Exhibit 2).
2. On January 19, 2006, the Respondent pleaded "No Contest" to the charges of Battery 2nd, Tampering with Witness/victim/info, and Harassing a Witness, and was sentenced to 12 months' probation, which was reduced to six months. (DOH Exhibit 4; Respondent's testimony).
3. On September 6, 2006, the Respondent pleaded in absentia to violating an injunction, and was sentenced to 12 months' probation. The probation was terminated on March 13, 2007, approximately six months early. (DOH Exhibit 4; Respondent's Exhibit B).

4. The Florida Board of Medicine did not take any disciplinary action against the Respondent. (Respondent's testimony).

VOTE OF THE HEARING COMMITTEE

FIRST SPECIFICATION

The Hearing Committee concluded that the evidence does not support sustaining the charge of having committed misconduct as defined in Educ. Law §6530(9)(a)(iii).

VOTE: Denied (3-0)

CONCLUSIONS OF LAW

The Hearing Committee noted that the Florida Board of Medicine took no action against the Respondent; the conduct complained of by the Department occurred 12 years before these charges were brought; and the Respondent's record is otherwise clear, with no subsequent charges. The Hearing Committee also noted that the Respondent was forthright and honest in his testimony.

The Department has failed to meet its burden to show that the convictions under the Florida Statutes would have constituted a crime if committed in New York State. The Department presented no evidence showing a nexus between the Florida criminal statutes under which the Respondent was convicted, and the New York statutes cited by the Department. Most notably, the Department relied on the New York State Family Court Act (FCA) as being "the closest statute that New York State has" to the Florida Statute for violating an injunction. (Tr. at p. 16-17). However, the FCA is not a criminal statute, and conduct in violation of the FCA are not crimes. Consequently, the Hearing Committee determined that the Department failed to prove by a preponderance of the evidence that the

APPENDIX I

IN THE MATTER
OF
THOR VAN DIVER, M.D.

STATEMENT
OF
CHARGES

THOR VAN DIVER, M.D., the Respondent, was authorized to practice medicine in New York State on or about October 8, 1991, by the issuance of license number 187270 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about January 19, 2006, in the Circuit Court of Collier County, Florida ("Florida Court"), the Respondent was found guilty, upon a guilty plea for Battery [Section 784.03-1(a)(1), Florida Statutes] and Tampering with or Harassing a Witness, Victim, or Informant [Section 914.22-1(b), Florida Statutes], both misdemeanors. Both pleas were based off the Respondent being arrested for domestic violence resulting from a fight between the Respondent and his then spouse. The Respondent was sentenced to twelve months' probation for each charge, to be terminated after 6 months upon successful completion of the following conditions: The Respondent was ordered to complete a parenting class, participate in a Batterers' Intervention Program, and ordered to have no contact with the victim. The Respondent was required to pay

prosecution costs, court costs, and investigation costs, totaling \$800.50. On or about September 8, 2006, the Respondent's probation was successfully terminated.

On or about the same day, September 8, 2006, the Respondent was found guilty, upon a guilty plea to a Violation of an Injunction for Protection against Domestic Violence [Section 741.31-4(a), Florida Statutes], a misdemeanor. The Respondent was sentenced to six months' probation, required to undergo a psychological evaluation, and have no contact with the victim. The Respondent was ordered to pay prosecution costs, court costs, and investigation costs, totaling \$225.00.

B. The conduct resulting in the Florida Court convictions against the Respondent would constitute a crime under the laws of New York State pursuant to the following section of New York State Law:

1. New York Penal Law § 215.15 (Intimidating a victim or witness in the third degree) and/or;
2. New York Penal Law § 120.00 (Assault in the third degree) and/or;
3. New York Family Court Act § 842(a) (Violation of an order of protection).

SPECIFICATION OF CHARGES

CRIMINAL CONVICTION (Other Jurisdiction)

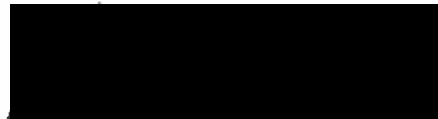
Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(9)(a)(iii) by having been convicted of committing an act constituting a crime under the law of another jurisdiction and which, if committed within this state, would

have constituted a crime under New York state law [namely N.Y. Pen. Law §§ 215.15 and 120.00; N.Y. Family Court Act § 842(a)] as alleged in the facts of the following:

1. The facts in Paragraphs A, B, and/or B1 and/or B2 and/or B3.

DATE: June 20, 2018

Albany, New York



MICHAEL A. HISER
Deputy Counsel
Bureau of Professional Medical Conduct