



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower

The Governor Nelson A. Rockefeller Empire State Plaza

Albany, New York 12237

Barbara A. DeBuono, M.D., M.P.H.
Commissioner

October 7, 1996

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Marcia E. Kaplan, Esq.
NYS Department of Health
5 Penn Plaza-Sixth Floor
New York, New York 10001

Herman Hugh Fudenberg, M.D.
1070 Hunt Club Lane
Spartanburg, SC 29301

Herman Hugh Fudenberg, M.D.
1092 Boiling Springs Road
Spartanburg, SC 29301

Richard A. Jaffe, Esq.
5 Greenway Plaza-Suite 1710
Houston, Texas 77046

Effective Date: 10/14/96

RE: In the Matter of Herman Hugh Fudenberg, M.D.

Dear Ms. Kaplan, Dr. Fudenberg and Mr. Jaffe:

Enclosed please find the Determination and Order (No. 96-237) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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
Corning Tower - Fourth Floor (Room 438)
Empire State Plaza
Albany, New York 12237

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
Empire State Plaza
Corning Tower, Room 2503
Albany, New York 12237-0030

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,

A handwritten signature in black ink that reads "Tyrone T. Butler". The signature is written in a cursive style with a large initial 'T'.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm
Enclosure

COPY

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

-----X
IN THE MATTER : DETERMINATION
OF : AND
HERMAN HUGH FUDENBERG, M.D. : ORDER
-----X

BPMC-96-237

A Notice of Referral Proceeding and Statement of Charges, both dated July 1, 1996, were served upon the Respondent, RESPONDENT, M.D. **RICHARD PIERSON, Jr., M.D. (Chair), ANTHONY CLEMENDOR, M.D., and EUGENIA HERBST,** 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. **LARRY G. STORCH, ESQ., ADMINISTRATIVE LAW JUDGE,** served as the Administrative Officer. The Department of Health appeared by Marcia E. Kaplan, Esq., Associate Counsel. The Respondent appeared by Richard A. Jaffe, Esq. A hearing was held on September 10, 1996. Evidence was received and witnesses sworn and heard 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 §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 which 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, Respondent is charged with professional misconduct pursuant to Education Law §6530(9)(d). A copy of the Notice of Referral Proceeding and Statement of Charges is attached to this Determination and Order in Appendix I.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers in parentheses refer to transcript page numbers or exhibits. These citations represent 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.

1. Herman Hugh Fudenberg, M.D. (hereinafter, "Respondent"), was authorized to practice medicine in New York

State on January 20, 1959 by the issuance of license number 081446 by the New York State Education Department. (Pet. Ex. #2).

2. By a Final Order dated November 6, 1995, the South Carolina State Board of Medical Examiners (hereinafter the "South Carolina Board") indefinitely suspended Respondent's medical license and provided for a stay of the suspension and reinstatement in a probationary status after having satisfied pre-conditions including: payment of a \$10,000 fine; permanent surrender of his controlled substances registration; and examination by neuropsychiatrist regarding his fitness to practice medicine safely. (Pet. Ex. #3A).

3. The South Carolina Board found that Respondent has sustained a physical or mental disability which rendered further practice dangerous to the public as evidenced by his medical condition of chronic fatigue immune dysregulation syndrome (CFIDS) which, at times, physically impairs Respondent such that he is unable to practice medicine, in violation of S.C. Code Ann. Sections 40-47-400(F)(6). (Pet. Ex. #3A).

4. The South Carolina Board further found that Respondent had not shown respect for the law as evidenced by his unlawfully obtaining controlled substances and issuing prescriptions for controlled substances for a person with whom he had no bona fide physician-patient relationship, in violation of S.C. Code Ann. Sections 40-47-200(F)(7) and Regulation 81-60(C). (Pet. Ex. #3A).

5. The South Carolina Board further found that

Respondent was guilty of engaging in dishonorable, unethical, or unprofessional conduct that is likely to deceive, defraud, or harm the public as evidenced by his unlawfully obtaining controlled substances; treating himself with medications outside of a bona fide physician-patient relationship; and issuing prescriptions for controlled substances for a person with whom he had no bona fide physician-patient relationship, in violation of S.C. Code Ann. Sections 40-47-200(F)(8). (Pet. Ex. #3A).

6. The South Carolina Board further found that Respondent lacked the ethical or professional competence to practice medicine as evidenced by his unlawfully obtaining controlled substances; treating himself with medications outside of a bona fide physician-patient relationship; and issuing prescriptions for controlled substances for a person with whom he had no bona fide physician-patient relationship, in violation of S.C. Code Ann. Sections 40-47-200(F)(12). (Pet. Ex. #3A).

7. On or about March 26, 1996, the South Carolina Board reinstated Respondent's medical license and placed him on indefinite probation until further Order of the Board. The terms of probation include: quarterly reports to the Board of his medical condition by his treating physician; that he not prescribe, dispense or administer any medications; periodic review of his medical records, and that he appear and report to the Board as requested. (Pet. Ex. #3B).

8. Respondent submitted a letter, dated September 5, 1996, written by George L. Bass, M.D. Dr. Bass is Respondent's treating physician. Dr. Bass noted that Respondent's previous

lapses of cognitive function have improved considerably and that he is alert and comprehensive of both medical and social facts. He indicated that Respondent does get tired easily and that working 40 to 45 hours per week is adequate for him. He also indicated that Respondent had not experienced any exacerbations related to chronic fatigue syndrome in the past few months. (Resp. Ex. C).

CONCLUSIONS OF LAW

The following conclusions were made pursuant to the Findings of Fact listed above. All conclusions resulted from a unanimous vote of the Hearing Committee unless noted otherwise.

The Hearing Committee concluded that the Department has sustained its burden of proof in this matter. The preponderance of the evidence demonstrates that the South Carolina Board suspended Respondent's medical license following the institution of a disciplinary proceeding. Moreover, the conduct which resulted in the suspension would, if committed in New York State, constitute professional misconduct in violation of Education Law §6530(2) [practicing the profession fraudulently], §6530(7) [practicing while impaired by physical or mental disability], and §6530(20) [conduct in the practice of medicine which evidences moral unfitness to practice the profession]. Accordingly, the Hearing Committee voted to sustain the specification of professional misconduct.

DETERMINATION AS TO PENALTY

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, unanimously determined that Respondent's license to practice medicine in New York State should be suspended until such time as Respondent seeks to return to the active practice of medicine in New York State. Respondent shall be required to notify the Director of the Office of Professional Medical Conduct ninety days before returning to the practice of medicine in this state. Thereafter, the suspension shall be stayed and Respondent shall be placed on probation for a period of five years. During the period of probation, Respondent shall be monitored under terms determined by the Director of the Office of Professional Medical Conduct in accordance with Public Health Law §230(18)(a). This determination was reached upon due consideration of the full spectrum of penalties available pursuant to statute, including revocation, suspension and/or probation, censure and reprimand, and the imposition of monetary penalties.

In determining the sanction to be imposed, the Hearing Committee took several factors into consideration. First, the Committee took notice of the fact that Respondent has had a long and distinguished career as one of the foremost immunologists in the country. (See, Resp. Ex. B). The Committee also considered the fact that the underlying South Carolina disciplinary action primarily addressed a small number of prescriptions (including several for sleeping pills) which Respondent wrote in an attempt to self-treat his chronic fatigue syndrome. In addition,

Respondent also improperly wrote one prescription for Demerol for one patient. Although this conduct represented a significant lapse in judgement, there is no indication that any of his actions were undertaken willfully, and there was no attempt at any financial gain on his part.

Respondent has admitted full responsibility for his actions and acknowledged that his conduct was improper. He has indicated that at this stage in his career, he has little intention of returning to the active practice of medicine in New York, but does not wish to surrender his license. In accordance with the terms and conditions of the South Carolina Board, Respondent is now receiving treatment for chronic fatigue syndrome (and other conditions) from another physician.

The Hearing Committee considered the possibility of revocation of licensure, as requested by the Petitioner. The Committee unanimously determined that this sanction would be unduly harsh and unwarranted by the circumstances. The Committee believes that a suspension, to be stayed in the event that Respondent seeks to return to practice in New York, coupled with a period of monitored probation, will adequately safeguard the interests of the people of this state.

ORDER

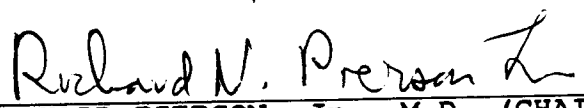
Based upon the foregoing, **IT IS HEREBY ORDERED THAT:**

1. The Specification of professional misconduct, as set forth in the Statement of Charges (Petitioner's Exhibit # 1) is **SUSTAINED;**

2. Respondent's license to practice medicine in New York State be and hereby is **SUSPENDED**, until such time as Respondent seeks to return to the active practice of medicine in New York State. Respondent shall be required to notify the Director of the Office of Professional Medical Conduct ninety days before returning to the practice of medicine in this state. Thereafter, the suspension shall be stayed and Respondent shall be placed on probation for a period of five years. During the period of probation, Respondent shall be monitored under terms determined by the Director of the Office of Professional Medical Conduct in accordance with Public Health Law §230(18)(a).

3. This Determination and Order shall be effective upon service. Service shall be either by certified mail upon Respondent at Respondent's last known address and such service shall be effective upon receipt or seven days after mailing by certified mail, whichever is earlier, or by personal service and such service shall be effective upon receipt.

DATED: Albany, New York
10/4/96, 1996


RICHARD PIERSON, Jr., M.D. (CHAIR)

ANTHONY CLEMENDOR
EUGENIA HERBST

TO: Marcia E. Kaplan, Esq.
Associate Counsel
New York State Department of Health
5 Penn Plaza - 6th Floor
New York, New York 10001

Herman Hugh Fudenberg, M.D.
1070 Hunt Club Lane
Spartanburg, SC 29301

1092 Boiling Springs Road
Spartanburg, SC 29301

Richard A. Jaffe, Esq.
5 Greenway Plaza - Suite 1710
Houston, Texas 77046

APPENDIX I

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

IN THE MATTER
OF
HERMAN HUGH FUDENBERG, M.D.

NOTICE OF
REFERRAL
PROCEEDING

TO: Herman Hugh Fudenberg, M.D.
1070 Hunt Club Lane 1092 Boiling Springs Road
Spartanburg, SC 29301 Spartanburg, SC 29301

PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of N.Y. Pub. Health Law §§230(10)(p) (McKinney Supp. 1996) and N.Y. State Admin. Proc. Act §§301-307 and 401 (McKinney 1984 and Supp. 1996). The proceeding will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct (Committee) on August 6, 1996, at 10:00 a.m., at the offices of the New York State Department of Health, 5 Penn Plaza, Sixth Floor, New York, New York 10001.

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. 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, Corning Tower Building, 25th Floor, Empire State Plaza, Albany, New York 12237, ATTENTION: HON. TYRONE BUTLER, DIRECTOR, BUREAU OF ADJUDICATION, (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.

You may file a written answer, brief, and affidavits with the Committee. Six copies of all papers you wish to 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.

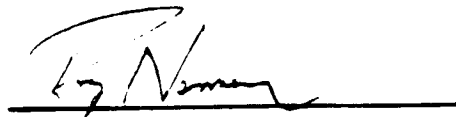
The proceeding may be held whether or not you appear. Please note that requests for adjournments must be made in writing to the Bureau of Adjudication, at the address indicated above, with a copy of the request to the attorney for the Department of Health, whose name appears below, at least five days 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: New York, New York
2017 11 1996



ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct

Inquiries should be addressed to:

Marcia E. Kaplan
Associate Counsel
NYS Department of Health
Division of Legal Affairs
5 Penn Plaza, Suite 601
New York, New York 10001
(212) 613-2615

IN THE MATTER
OF
HERMAN HUGH FUDENBERG, M.D.

STATEMENT
OF
CHARGES

Herman Hugh Fudenberg, M.D., the Respondent, was authorized to practice medicine in New York State on or about January 20, 1959 by the issuance of license number 081446 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. On or about March 26, 1996, the South Carolina State Board of Medical Examiners reinstated Respondent's medical license and placed him on indefinite probation until further Order of the Board, with terms of probation including: quarterly reports to the Board of his medical condition by his treating physician; that he not prescribe, dispense or administer any medications; periodic review of his medical records and that he appear and report to the Board as requested. Respondent's license was reinstated pursuant to the terms and conditions of a Final Order dated November 6, 1995 which indefinitely suspended Respondent's license and provided for a stay of the suspension and reinstatement of license in a probationary status after having satisfied pre-conditions including: payment of a \$10,000 fine; permanent surrender of his controlled substances registration; and examination by a neuropsychiatrist regarding his fitness to practice medicine safely. The Order found that Respondent had violated S.C. Code Ann. Sections 40-47-200(F)(6)(7)(8) and (12) (Supp. 1994) and Regulation 81-60(C)(Supp. 1994), as follows:

1. Respondent has sustained a physical or mental disability which renders further practice dangerous to the public as evidenced by his medical condition of chronic fatigue immune dysregulation syndrome which, at times, physically impairs the Respondent such that he is unable to practice medicine, in violation of S.C. Code Ann. Sections 40-47-200(F)(6);
2. Respondent has not shown respect for the law as evidenced by his unlawfully obtaining controlled substances and issuing prescriptions for controlled substances for a person with whom he had no bona fide physician-patient relationship, in violation of S.C. Code Ann. Sections 40-47-200(F)(7) and Regulation 81-60(C);
3. Respondent is guilty of engaging in dishonorable, unethical, or unprofessional conduct that is likely to deceive, defraud, or harm the public as evidenced by his unlawfully obtaining controlled substances; treating himself with medications outside of a bona fide physician-patient relationship; and issuing prescriptions for controlled substances for a person with whom he had no bona fide physician-patient relationship, in violation of S.C. Code Ann. Sections 40-47-200(F)(8);
4. Respondent has been found to lack the ethical or professional competence to practice medicine as evidence by his unlawfully obtaining controlled substances; treating himself with medications outside of a bona fide physician -patient relationship; and issuing prescriptions for controlled substances for a person with whom he had no bona fide physician-patient relationship, in violation of S.C. Code Ann. Sections 40-47-200(F)(12).

The conduct resulting in the suspension or other disciplinary action involving the license would, if committed in New York state, constitute professional misconduct under the laws of New York state, as follows: N.Y. Educ. Law §6530(2)(practicing the profession fraudulently), 6530(7)(practicing the profession while impaired by physical or mental disability and/or 6530(20) (conduct in the practice of medicine which evidences moral unfitness to practice medicine).

SPECIFICATION OF CHARGES

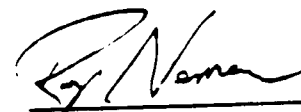
FIRST SPECIFICATION

HAVING HAD DISCIPLINARY ACTION TAKEN

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(9)(d)(McKinney Supp. 1996) by having his license to practice medicine suspended or having other disciplinary action taken, would, if committed in New York state, constitute professional misconduct under the laws of New York state {namely N.Y. Educ. Law §6530(2(7) and/or (20)} as alleged in the facts of the following:

1. Paragraph A.

DATED: July / , 1996
New York, New York



ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct