

Nirav R. Shah, M.D., M.P.H.
Commissioner

NEW YORK
state department of
HEALTH

Public

Sue Kelly
Executive Deputy Commissioner

November 9, 2012

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

James D'Agostino, M.D.
Prey Sar Prison
Kom Reang Village
Sangkat Prey Veng Khan Dang Kor
Phnom Penh, Cambodia

Joel E. Abelove, Esq.
NYS Department of Health
ESP-Corning Tower-Room 2512
Albany, New York 12237-0032

RE: In the Matter of James D'Agostino, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 12-238) 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. 2007) and §230-c subdivisions 1 through 5, (McKinney Supp. 2007), "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,

REDACTED

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH:cah

Enclosure

STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER
OF
JAMES D'AGOSTINO, M.D.

DECISION
AND
ORDER

BPMC #12-238

COPY

A hearing was held on September 12, 2012, at the offices of the New York State Department of Health, 150 Broadway, Albany, New York. The State Board of Professional Medical Conduct obtained jurisdiction over, **JAMES D'AGOSTINO, M.D.** ("Respondent") and the Notice of Referral Proceeding and Statement of Charges, both dated July 11, 2012, were received by Respondent. Pursuant to Section 230(10)(e) of the Public Health Law, Chairperson, **PETER B. KANE, M.D.**, **STEVEN I. SHERMAN, D.O.**, and **WILLIAM W. WALENCE, PH. D.** duly designated members of the State Board for Professional Medical Conduct ("Board"), served as the Hearing Committee ("Committee") in this matter. **KIMBERLY A. O'BRIEN, ESQ.**, Administrative Law Judge, served as the Administrative Officer.

The Petitioner appeared by **JAMES E. DERING ESQ.**, General Counsel, by **JOEL ABELOVE, ESQ.**, of Counsel ("Department"). The Respondent did not appear at the hearing in person or by Counsel. Evidence was received 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 when 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 State 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 and the decision must be supported by a preponderance of the evidence.

In the instant case, Respondent, James D'Agostino, M.D. is charged with one specification of professional misconduct pursuant to Education Law §6530(9) (a) (iii). Copies of the Notice of Referral Proceeding and the Statement of Charges are attached to this Determination and Order as Appendix 1. No witnesses were presented by the Department or Respondent.

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 transcript page numbers or exhibits, denoted by the prefixes "Tr." or "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. James D' Agostino M.D., Respondent was authorized to practice medicine in New York State on July 22, 1992, by the issuance of license number 189886 by the New York State Education Department (Ex. 3).
2. James D'Agostino M.D., Respondent was served with the Notice of Referral Proceeding, Statement of Charges and Summary of Department of Health Hearing Rules and acknowledged receipt of these by e-mail (Ex. 1&2, Tr. 3-4).

3. On or about November 4, 2011, in the Kingdom of Cambodia, Phnom Penh Preliminary Court ("Cambodian Court" or "Court"), Respondent was convicted of one count of Child Prostitution and Exploitation, and sentenced to serve four years in jail and after serving his jail sentence shall be banished from Cambodia (Ex. 4 - Court Transcript In Vietnamese and Certified English Translation "pages 3- 34"), and if the conduct occurred in New York State it would constitute a crime

4. The Cambodian Court transcript reveals that the alleged victims testified that they were coerced to make statements against Respondent and recanted their statements (Ex. 4 at pages 22-24). The prosecution concluded that there was Insufficient evidence to prove the charges against the Respondent (Ex. 4 at page 32- paragraph 5).

VOTE OF THE HEARING COMMITTEE

SPECIFICATION

"Respondent violated New York Education Law Section 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 ..."

VOTE: Sustained (3-0)

HEARING COMMITTEE DETERMINATION & CONCLUSIONS

The Respondent did not appear at the hearing either in person or by counsel. The Respondent was served with the Notice of Referral Proceeding and Statement of Charges. While the Respondent did not appear at the hearing, he contacted the Department via e-mail to confirm receipt of the charges and notify them that he would not be attending the hearing because he is imprisoned in Cambodia (Tr.3-4). The Department presented the

Hearing Committee with the transcript and record of the Cambodian Court proceeding including the conviction for one count of "Child Prostitution and Exploitation" (Ex.4).

While the Department presented un refuted documentary evidence of the criminal conviction in Cambodia, for which Respondent is now serving a four year sentence and banishment from Cambodia upon his release, the Committee's review of the record lead them to seriously question the valldity of the conviction in that Respondent was convicted after the alleged victims testified about being coerced by police and teacher(s) to provide false testimony about the Respondent and the prosecution sought to withdraw the charges. Based on the evidence of the criminal conviction and sentence, and the fact that Respondent offered no mitigating evidence, the Hearing Committee had no choice but to sustain the Department's factual allegations and specification of misconduct, in that there was a criminal conviction in another jurisdiction and had the conduct occurred in New York State it would have constituted a crime.

In making a penalty determination the Hearing Committee was required to weigh the nature of the crime and criminal penalty against any mitigating evidence, and determine what if any penalty is necessary to protect the people of the State of New York. In this case, while the crime and penalty are serious and there was nothing offered in mitigation of the conduct, the Committee could not ignore the face of the Cambodian Court transcript where alleged victims denied the conduct and the prosecution "concluded" that there was "not sufficient evidence to show that defendant committed the offense as accused," and for these reasons the Committee determined that justice requires Respondent be afforded an opportunity to appear before the State Board for Professional Medical Conduct should he seek to practice medicine in New York State

(Ex. 4 at page 32). While Respondent has been convicted of a very serious crime, he is not currently registered to practice medicine in New York State and is in prison in Cambodia. Based on the foregoing the Committee shall suspend the Respondent's license to practice medicine in New York State and upon Respondent's return to New York State he shall appear before the Board and offer any mitigating evidence.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Factual Allegations and Specification set forth in the Statement of Charges against the Respondent are **SUSTAINED** (Appendix 1); and
2. Respondent's New York State Medical License 189886 is **SUSPENDED** until the licensee complies with the conditions of this Order; and
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: LAZARUS, New York
11/2, 2012

REDACTED

PETER B. KANE, M.D., Chair
STEVEN I. SHERMAN, M.D.
WILLIAM W. WALENCE, PH. D.

To: James D' Agostino M.D.
Prey Sar Prison
Kom Reang Village
Sangkat Prey Veng Khan Dang Kor
Phnom Penh, Cambodia

Joel E. Abelove, Esq.
Bureau of Professional Medical Conduct
Empire State Plaza
Corning Tower Room 2512
Albany, New York 12237-0032

APPENDIX 1

STATE OF NEW YORK
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

DEPARTMENT OF HEALTH

EXHIBIT

100

IN THE MATTER

OF

JAMES D'AGOSTINO, M.D.
CO-11-11-6074-A

NOTICE OF

REFERRAL

PROCEEDING

TO: James D'Agostino, M.D.
Prey Sar Prison
Kom Reang Village
Sangkat Prey Veng Khan Dang Kor
Phnom Penh, Cambodia

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 Procedures 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 12th day of September, 2012, at 10:30 a.m., at the offices of the New York State Department of Health, Riverview Center, 150 Broadway – Suite 510, Albany, NY 12204-2719.


At the proceeding, evidence will be received concerning the allegations set forth in the Statement of Charges, that 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 and/or sworn testimony on your behalf. Such evidence and/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, Riverview Center, 150 Broadway – Suite 510, Albany, NY 12204-2719, ATTENTION: HON. JAMES F. HORAN, ACTING 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 ten (10) days prior to the scheduled date of the Referral Proceeding, as indicated above.

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 not less than ten (10) 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 (6) copies of all papers you submit must be filed with the Bureau of Adjudication at the address indicated above, no later than fourteen (14) 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 New York State Administrative Procedure Act §401 and 10 N.Y.C.R.R. §51.8(b), the Petitioner demands, hereby, disclosure of the evidence that 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 and/or other evidence that cannot be photocopied.

YOU ARE ADVISED, HEREBY, THAT THE ATTACHED CHARGES WILL BE MADE PUBLIC FIVE (5) 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 (5) 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

July 11, 2012

REDACTED

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

Inquiries should be addressed to:

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

STATE OF NEW YORK

DEPARTMENT OF HEALTH

STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER

OF

JAMES D'AGOSTINO, M.D.
CO-11-11-6074-A

STATEMENT

OF

CHARGES

JAMES D'AGOSTINO, M.D., Respondent, was authorized to practice medicine in New York state on July 22, 1992, by the issuance of license number 189886 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about November 4, 2011, in the Kingdom of Cambodia, Phnom Penh Preliminary Court, Respondent was convicted of (1) one count of Child Prostitution and Exploitation, and sentenced to (4) four years incarceration and banishment from Cambodia .

SPECIFICATION

Respondent violated New York Education Law §6530(9)(a)(iii) by being 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, in that Petitioner charges:

1. The facts in Paragraphs A.

DATED: *July 11*, 2012
Albany, New York

REDACTED

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