

# WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN  
BEFORE THE MEDICAL EXAMINING BOARD

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IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
A. HERTSEL ZACKAI, M.D.,	:	LS0506162MED
RESPONDENT.	:	

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Division of Enforcement Case Nos. 02MED260; 03MED355

The State of Wisconsin, Medical Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Medical Examining Board.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 25<sup>th</sup> day of January, 2006.

Bhupinder Saini MD  
Member of the Board  
Medical Examining Board



- a. Reprimanded the Respondent;
- b. Directed that Respondent abstain from alcohol and all mood-altering chemicals unless prescribed by a physician or dentist who was aware of the Respondent's drug abuse history;
- c. Prohibited Respondent from prescribing or administering any prescription drug or drug sample for Respondent's own use or Respondent's family members' use;
- d. Ordered Respondent to obtain a treating psychiatrist to provide medication management and to oversee the Respondent's mental health status. The psychiatrist was required to file quarterly reports with the Board;
- e. Required Respondent to engage in therapy with a psychiatrist or therapist;
- f. Required Respondent to practice in an approved group setting;
- g. Required quarterly reports from a work quality assessor assessing Respondent's overall work quality;
- h. Required quarterly meetings with a designated member of the Board to review Respondent's progress under the Amended Stipulation and Order;
- i. Provided that the Amended Stipulation and Order remain in effect for a minimum of three years after which the Respondent can petition for reinstatement upon proof of stability and documented, uninterrupted compliance with the terms of the Order.
- j. Ordered Respondent within 10 days of the signing of the Amended Stipulation and Order to provide the Board with a list of all hospitals and skilled nursing facilities at which he currently held medical privileges, a list of all states in which he was licensed or had applied for licensure, and the addresses and telephone numbers of his residences and all work sites;
- k. Required Respondent to notify the Board in writing of the location of his residence and work sites if he practiced outside of the state of Minnesota. Practice outside of the state of Minnesota would not be credited toward satisfaction of the terms of the Amended Stipulation and Order unless Respondent demonstrates that the practice in another state conforms completely with the terms of the Respondent's license in Minnesota.

5. Respondent's license to practice medicine in Minnesota expired on 6/30/02 and Respondent did not renew the license.

#### COUNT II

6. Respondent at all times relevant to the complaint was licensed to practice medicine in the state of New York, said license having been issued on 6/09/92.

7. On 8/28/02, the New York Department of Health, State Board for Professional Medical Conduct entered a Consent Order indefinitely suspending Respondent's license to practice medicine in New York for at least 1 year and until his license to practice medicine in Minnesota is fully restored without conditions. The basis for the Consent Order was the adverse action taken against Respondent's license in Minnesota on 3/9/02.

8. Respondent's license to practice medicine in New York is currently suspended.

#### COUNT III

9. Respondent at all times relevant to the complaint was licensed to practice medicine in the state of Michigan, said license having been issued on 8/13/99.

10. On 3/21/03, the State of Michigan, Department of Consumer & Industry Services, Bureau of Health Services, Board of Medicine Disciplinary Subcommittee entered an Order Of Summary Suspension summarily suspending the Respondent's license to practice medicine in the state of Michigan. On 6/17/03, the Michigan Board of Medicine Disciplinary Subcommittee entered a Final Order dissolving the Order of Summary Suspension and suspending Respondent's license to practice medicine in Michigan for a minimum period of 6 months and 1 day. Reinstatement of a license suspended for more than 6 months is not automatic and Respondent was required to demonstrate by clear and convincing evidence that he is of good moral character, is able to practice the profession with reasonable skill and safety and that it is in the public interest for Respondent to resume the practice. The Order of Summary Suspension and the Final Order were based on the adverse actions taken against Respondent's licenses in Minnesota and New York and on Respondent's failure to respond to a request that he participate in a non-disciplinary treatment and monitoring program with the Michigan Health Professional Recovery Corporation. The Michigan Board of Medicine Disciplinary Subcommittee in the Final Order found that Respondent's conduct constitutes a conduct, practice, or condition which impairs, or may impair, the ability to safely and skillfully practice the health profession; and indicates that Respondent suffers from a mental or physical inability reasonably related to an adversely affecting Respondent's ability to practice in a safe and competent manner. The Michigan Board of Medicine Disciplinary Subcommittee in the Final Order further found that Respondent had had adverse administrative actions taken against his licenses in Minnesota and New York; and that Respondent had failed to notify the Michigan Department of Consumer & Industry Services of the disciplinary actions taken against him in Minnesota and New York.

11. Respondent's license to practice medicine in Michigan is suspended.

## COUNT IV

12. Respondent at all times relevant to the complaint was licensed to practice medicine in the state of Pennsylvania, said license having expired on 12/31/00, Respondent having retained the right to renew the license upon the filing of the appropriate documentation and the payment of the necessary fees.

13. On 12/02/04, the Pennsylvania State Board of Medicine entered an Order indefinitely suspending Respondent's license to practice medicine in the state of Pennsylvania until such time as Respondent can affirmatively show that his license in Minnesota is in good standing and has been restored to unrestricted status. The bases for the Pennsylvania State Board of Medicine's Order were the adverse actions taken against Respondent's license in Minnesota on 3/9/02 and 9/14/02, in New York on 8/22/02 and in Michigan on 3/21/03.

14. Respondent's license to practice medicine in Pennsylvania is suspended.

## CONCLUSIONS OF LAW

1. The Medical Examining Board has jurisdiction in this matter pursuant to Wis. Stat. § 448.02(3).
2. By failing to file an Answer as required by Wis. Adm. Code § RL 2.09, and by failing to appear at the hearing, the respondent is in default under Wis. Adm. Code § RL 2.14, and the Medical Examining Board may make findings and enter an order on the basis of the Complaint and the evidence presented at the hearing.
3. The conduct described in the findings of fact constitutes a violation of Wis. Stat. § 448.02(3), and Wis. Adm. Code § Med 10.02(2)(q).

## ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the license of the respondent, A. Hertsel Zackai, license number 41034, to practice medicine and surgery in the State of Wisconsin is REVOKED, costs awarded to Complainant.

IT IS FURTHER ORDERED that costs are assessed against the respondent, A. Hertsel Zackai.

## OPINION

Section RL 2.14 of the Wisconsin Administrative Code provides that a respondent who fails to answer a complaint or fails to appear at a hearing is in default.

Exhibit 2, offered and admitted in this case discloses that on August 16, 2005, Gilbert C. Lubcke spoke by telephone with a person who identified himself as Dr. Zackai. Dr. Zackai said that he had not filed an answer and that he did not intend to appear at the hearing scheduled for August 31, 2005.

If found to be in default, the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence against the respondent. In this case, the respondent did not file an answer to the above-captioned complaint, nor did he appear at the scheduled hearing. As a result, the respondent is in default.

1. Violation of Wis. Adm. Code § Med 10.02(2)(q)

“(q) Having a license, certificate, permit, registration, or other practice credential granted by another state or by any agency of the federal government to practice medicine and surgery or treat the sick, which becomes limited, restricted, suspended, or revoked, or having been subject to other adverse action by the state licensing authority or by any agency of the federal government, including but not limited to the denial or limitation of an original credential, or the surrender of a credential, whether or not accompanied by findings of negligence or unprofessional conduct.”

The findings of fact establish that the Respondent has violated Wis. Admn. Code § Med 10.02(2)(q). Exhibits three through seven, admitted into the record, establish the violation, as do the allegations of the Complaint which are deemed

admitted.

On September 1, 2005, the undersigned received correspondence from the Respondent. It was postmarked August 29, 2005, and date stamped as received at the department on "5 AUG 32". This correspondence was delivered to the undersigned following the evidentiary hearing of this matter. In his correspondence, the Respondent states in part, "I contest none of the counts. I desire to move to the next level. I propose a monitoring program done by other states." My recommendation is that the next level for the Respondent be revocation.

Revocation of the respondent's license has been recommended. It is well established that the objectives of professional discipline include the following: (1) to promote the rehabilitation of the licensee; (2) to protect the public; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 209 (1976). Punishment of the licensee is not an appropriate consideration. *State v. McIntyre*. 41 Wis. 2d 481, 485 (1969).

There is nothing in the record to suggest that imposing any discipline short of revocation would have a rehabilitative effect on the Respondent or that he even has an interest in being rehabilitated. My review of the complaint and the exhibits introduced at hearing lead me to conclude that the Respondent is not taking his impairment issues seriously.

Escaping the Minnesota order by letting his license expire on June 30, 2002, evidences potential forum skipping, perhaps indicative of the Respondent attempting to stay one step ahead of regulators. Therefore, when the Respondent now states that he, "proposes a monitoring program done by other states", I question his commitment and seriousness to follow through on establishing yet another program similar to Minnesota, where he has let his license lapse.

The Respondent is residing in Illinois currently and it is not clear whether he is practicing medicine and surgery in that state, or has a license to do so. However, in a cascade effect, subsequent states, New York, Michigan and Pennsylvania all have restricted the Respondent's license based upon the Minnesota discipline. Ironically, Pennsylvania has suspended him until he is in good standing in Minnesota yet the Respondent's Minnesota license is expired.

I agree with the Division of Enforcement's view that the Respondent allowed his license to lapse in Minnesota so that he didn't need to come into compliance with all the treatment and monitoring requirements of the Minnesota order. His current offer to this board of an ill defined program evidences a halfhearted effort to maintain the ability to practice in this state. I am of the opinion that he is not taking this matter seriously, evidenced by the lack of participation by him or his purported treaters in communicating with this board in a meaningful manner, and by the casual monitoring proposal he offers. Added to this his failure to maintain a license in Minnesota under that Board's limitations and monitoring program further evidences a person who is not taking responsibility for his actions.

Absent some mitigating evidence (of which none has been presented), imposing anything less than revocation would not aid in deterrence. To not revoke the Respondent's license would instead wrongly signal others to engage in similar conduct without consequence. Revocation remains as the only way in which to safeguard the public. By revoking the Respondent's license the public will be adequately protected from any further misconduct by him.

## Costs

Section 440.22(2), Stats., provides in relevant part as follows:

In any disciplinary proceeding against a holder of a credential in which the department or an examining board, affiliated credentialing board or board in the department orders suspension, limitation or revocation of the credential or reprimands the holder, the department, examining board, affiliated credentialing board or board may, in addition to imposing discipline, assess all or part of the costs of the proceeding against the holder. Costs assessed under this subsection are payable to the department.

The presence of the word "may" in the statute is a clear indication that the decision whether to assess the costs of this disciplinary proceeding against the respondent is a discretionary decision on the part of the Medical Examining Board, and that the board's discretion extends to the decision whether to assess the full costs or only a portion of the costs.

The ALJ's recommendation that the full costs of the proceeding be assessed is based on two factors. First, the Department of Regulation and Licensing is a "program revenue" agency, which means that the costs of its operations are funded by the revenue received from its licensees. Moreover, licensing fees are calculated based upon costs attributable to the regulation of each of the licensed professions, and are proportionate to those costs. This budget structure means that the costs of prosecuting cases for a particular licensed profession will be borne by the licensed members of that profession. It is fundamentally unfair to impose the costs of prosecuting a few members of the profession on the vast majority of the licensees who have not engaged in misconduct. Rather, to the extent that misconduct by a licensee is found to have occurred following a full evidentiary hearing, that licensee should bear the costs of the proceeding.

Date: November 30, 2005

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William Anderson Black  
Administrative Law Judge