

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

BRYAN DOUGLAS GESCUK, M.D.,

Physician and Surgeon's Certificate No. A
65762

Respondent.

Case No. 03-2006-177574

OAH No. 2008010076

PROPOSED DECISION

Administrative Law Judge Ruth S. Astle, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on July 28, 2008.

Lawrence Mercer, Deputy Attorney General, represented complainant.

Edward Hinshaw, Attorney at Law, represented respondent, who was present.

The matter was submitted on July 28, 2008.

FACTUAL FINDINGS

1. Barbara Johnston made the accusation in her official capacity as the Executive Director of the Medical Board of California.

2. On June 26, 1998, the Medical Board of California (Board) issued Physician and Surgeon's Certificate Number G65762 to Bryan Douglas Gescuk, M.D. (respondent). The Certificate was in full force and effect at all times relevant to this matter and will expire on February 29, 2008, unless renewed.

3. Respondent entered a plea of guilty to a violation of 21 U.S.C. §331(a), (causing delivery of an adulterated and misbranded drug for introduction into interstate commerce) a misdemeanor and a federal statute regulating dangerous drugs, and was convicted on February 8, 2007. The conviction of this misdemeanor is substantially related to the duties, qualifications and function of the practice of medicine.

4. On October 12, 2005, respondent was arrested on charges of trafficking in illicit supplies of human growth hormone (hGH). His arrest was the result of an investigation that began on February 4, 2004, when Customs officials discovered over 100 vials of hGH in a package sent from China and addressed to respondent. The customs declaration accompanying the shipment falsely stated that the package contained "Zinc Powder Samples." A second similar shipment was intercepted by customs officials on April 28, 2005.

5. Federal agents determined that respondent was a physician with a license to practice medicine in California. The delivery address was the San Mateo Medical Center, where respondent was (and is) employed. Agents also determined that respondent was the founder and owner of two clinics that offered "lipotherapy," which was advertised as "safe and effective solutions that enhance the body's overall appearance."

6. An undercover investigation followed. Respondent was contacted by federal agents posing as interested in his therapy. He explained his "lipotherapy" treatment to them as involving a series of injections of FDA-approved medications and a dietary supplement called lecithin into the skin's "middle layer" which gradually breaks down and dissolves fatty deposits." Respondent sold five unlabeled vials of hGH to a federal agent for \$160 and he injected himself in the area over his stomach to demonstrate to the agent how he should self-administer the drug. Respondent also provided the agent with two vials of sterile water, 33 alcohol swabs and 100 syringes.

7. On July 13, 2006 respondent entered into a plea agreement with the U.S. Attorney and admitted that he was guilty of the offense of trafficking in a dangerous drug. Respondent ordered the hGH from China which arrived in unlabeled vials. He did not tell his patients that the drug was from China, instead he specifically represented to the federal agent that the drug was manufactured in the United States, in response to concerns expressed to him about using drugs imported from China. Respondent also failed to conduct a good faith medical examination on the federal agent before he gave her the hGH.

8. Respondent was sentenced to three months in a halfway house and three months home detention. He was placed on probation for one year after his release. He has met all the terms and conditions of his probation including restitution of over \$14,000. He was discharged from probation in February 2008.

9. Upon respondent's arrest, his contract with San Mateo Medical Center (a county run facility for indigent patients) was terminated. He was unable to practice medicine for 10 months¹. After respondent entered into a plea agreement with the U.S. Attorney's office, respondent's contract was reinstated with certain conditions including an agreement to not practice cosmetic medicine in the future. He has been working at San Mateo Medical Center as an internist and rheumatologist since his contract was reinstated. Respondent

¹ No further suspension is warranted, nor would it serve any purpose but to punish respondent.

presented testimony at the hearing from his present supervisor, the chief of staff at the clinic. He testified that respondent is a kind, compassionate and talented physician. The chief of staff knows about the circumstance of respondent's arrest and conviction and is willing to continue to supervise respondent. The chief of staff also wrote a reference letter for respondent stating that respondent is "an exemplary physician in his work at San Mateo Medical Center." The letter goes on to state that "Dr. Gescuk daily contributes to the lives of the underserved and the disadvantaged . . .". Respondent also submitted a letter of reference from the former chief of staff of the San Mateo Medical Center. He attests that respondent's conduct has been excellent since he returned to work at the center. Respondent also presented 13 additional letters that were provided to the Federal Court prior to respondent's sentencing. The letters are from staff, colleagues, friends and supervisors all attesting to respondent's positive contributions to the patients and staff of the medical center and his excellence as a physician.

Respondent is sufficiently monitored by the physicians and administration at the medical center pursuant to his contract with them. As long as respondent remains employed at the San Mateo Medical Center he does not need further monitoring. Respondent did not deviate from the standard of care in any of his practices, including prescribing practices, at San Mateo Medical Center.

10. Respondent is not presently married. He has one daughter for which he has shared (50-50) custody with his ex-wife. He is responsible for his daughter's support. His finances are now stable after having had financial difficulties while he could not work as a physician and had to pay attorney's fees.

11. Respondent takes full responsibility for his criminal actions. He has never been involved in criminal activity before or after this incident. He became convinced that he was helping people attain wellness. Respondent recognizes that his behavior was a product of disordered thinking. He sought mental health guidance during the time his marriage was breaking up. He has continued to see a psychiatrist for four years now. He has worked with his psychiatrist to help him understand his criminal behavior and is making great progress. Respondent's psychiatrist testified at the hearing that respondent has great insight into his problems and has worked hard to assure that nothing like this will ever happen again. Respondent's psychiatrist testified at the hearing that respondent poses no risk to patients and he has no reservation recommending respondent retain his license. Respondent's psychiatrist also wrote a letter on respondent's behalf. He states that respondent understands the reprehensible nature of his actions and lives with deep remorse in full consciousness every day. Respondent also testified that he thinks about what he did every day. He wants to be worthy of the trust given to him by his patients.

12. Respondent was credible, honest, forthright and complete in his testimony. He demonstrated genuine remorse for his actions. He was not just sorry that he was caught, but truly cognizant of the potential harm he created for his patients. He clearly understands his responsibility and it is extremely unlikely that he will be involved in any marginal medical activities in the future. He understands his responsibility as a trained physician to perform

his duties in an appropriate manner. As long as respondent remains employed at San Mateo Medical Center (or a similar institution) a practice monitor is not necessary unless recommended by a psychiatric evaluation.

13. Respondent received his undergraduate degree from Harvard. He pursued and received a Ph.D. in Pharmacology in 1994 from Boston University. He transferred to the Medical School at Boston University in 1993 and graduated in 1996 (he was given credit for one year based on his pharmacology class work). Respondent did his residency at U.C.S.F. and a three-year rheumatology fellowship there. Respondent was an excellent student and received the Amgen Fellowship Award during his rheumatology fellowship at U.C.S.F. Respondent worked hard to become a competent physician.

LEGAL CONCLUSIONS

1. By reason of the matters set forth in Findings 3 through 8, cause for disciplinary action exists pursuant to Business and Professions Code sections 2236 (conviction of a substantially related crime) and 2237 (violation of drug laws).

2. The matters set forth in Findings 9 through 13 have been considered in making the following order. Respondent has demonstrated significant rehabilitation. Pursuant to Business and Professions Code section 2229, subdivision (a), protection of the public shall be the highest priority. Pursuant to Business and Professions Code section 2229, subdivision (b), whenever possible, action shall be taken that is calculated to aid in the rehabilitation of the licensee. Respondent is safe to practice medicine under the terms and conditions of probation as set forth below. It would not be against the public safety to allow respondent to practice medicine under terms and conditions designed to assure his adherence to the ethical principals and proscribing practices expected of a physician.

ORDER

Physician and Surgeon's Certificate Number A 65762 issued to Bryan Douglas Gescuk, M.D., is hereby revoked. However, the revocation is stayed for a period of three (3) years upon the following terms and conditions:

1. Prescribing Practices Course - Within 60 calendar days of the effective date of this Decision, respondent shall enroll in a course in prescribing practices, at respondent's expense, approved in advance by the Board or its designee. Failure to successfully complete the course during the first 6 months of probation is a violation of probation.

Respondent shall submit a certification of successful completion to the Board or its designee not later than 15 calendar days after successfully completing the course, or not later than 15 calendar days after the effective date of the Decision, whichever is later.

2. Ethics Course - Within 60 calendar days of the effective date of this Decision, respondent shall enroll in a course in ethics, at respondent's expense, approved in advance by the Board or its designee. Failure to successfully complete the course during the first year of probation is a violation of probation.

Respondent shall submit a certification of successful completion to the Board or its designee not later than 15 calendar days after successfully completing the course, or not later than 15 calendar days after the effective date of the Decision, whichever is later.

3. Limit Practice - During probation, respondent is limited to practicing at San Mateo Medical Center or a similar institution, and prohibited from practicing cosmetic medicine. After the effective date of this Decision, the first time that a patient seeking the prohibited services makes an appointment, orally notify the patient that respondent does not practice cosmetic medicine. Respondent shall maintain a log of all patients to whom the required oral notification was made. The log shall contain the: 1) patient's name, address and phone number; 2) patient's medical record number, if available; 3) the full name of the person making the notification; 4) the date the notification was made; and 5) a description of the notification given. Respondent shall keep this log in a separate file or ledger, in chronological order, shall make the log available for immediate inspection and copying on the premises at all times during business hours by the Board or its designee, and shall retain the log for the entire term of probation. Failure to maintain a log as defined in the section, or to make the log available for immediate inspection and copying on the premises during business hours is a violation of probation.

In addition to the required oral notification, after the effective date of this Decision, the first time that a patient who seeks the prohibited services presents to respondent, respondent shall provide a written notification to the patient stating that respondent does not practice cosmetic medicine. Respondent shall maintain a copy of the written notification in the patient's file, shall make the notification available for immediate inspection and copying on the premises at all times during business hours by the Board or its designee, and shall retain the notification for the entire term of probation. Failure to maintain the written notification as defined in the section, or to make the notification available for immediate inspection and copying on the premises during business hours is a violation of probation.

4. Psychiatric Evaluation - Within 30 calendar days of the effective date of this Decision, and on whatever periodic basis thereafter may be required by the Board or its designee, respondent shall undergo and complete a psychiatric evaluation (and psychological testing, if deemed necessary) by a Board-appointed board certified psychiatrist, who shall consider any information

provided by the Board or designee and any other information the psychiatrist deems relevant, and shall furnish a written evaluation report to the Board or its designee. Psychiatric evaluations conducted prior to the effective date of the Decision shall not be accepted towards the fulfillment of this requirement. Respondent shall pay the cost of all psychiatric evaluations and psychological testing.

Respondent shall comply with all restrictions or conditions recommended by the evaluating psychiatrist² within 15 calendar days after being notified by the Board or its designee. Failure to undergo and complete a psychiatric evaluation and psychological testing, or comply with the required additional conditions or restrictions, is a violation of probation.

5. Psychotherapy - Within 60 calendar days of the effective date of this Decision, respondent shall submit to the Board or its designee for prior approval the name and qualifications of a board certified psychiatrist or a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders. Respondent's present psychiatrist, Frederick B. Steele is approved. Upon approval, respondent shall undergo and continue psychotherapy treatment, including any modifications to the frequency of psychotherapy, until the Board or its designee deems that no further psychotherapy is necessary.

The psychotherapist shall consider any information provided by the Board or its designee and any other information the psychotherapist deems relevant and shall furnish a written evaluation report to the Board or its designee. Respondent shall cooperate in providing the psychotherapist any information and documents that the psychotherapist may deem pertinent. Respondent shall have the treating psychotherapist submit quarterly status reports to the Board or its designee. The Board or its designee may require respondent to undergo psychiatric evaluations by a Board-appointed board certified psychiatrist.

If, prior to the completion of probation, respondent is found to be mentally unfit to resume the practice of medicine without restrictions, the Board shall retain continuing jurisdiction over respondent's license and the period of probation shall be extended until the Board determines that respondent is mentally fit to resume the practice of medicine without restrictions. Respondent shall pay the cost of all psychotherapy and psychiatric evaluations.

² Including having a practice monitor if necessary.

Failure to undergo and continue psychotherapy treatment, or comply with any required modification in the frequency of psychotherapy, is a violation of probation.

6. Monitoring – Practice - If respondent remains employed by San Mateo Medical Center or a similar institution, no practice monitor is required unless recommended by a psychiatric evaluation. If respondent leaves his position at San Mateo Medical Center or a similar institution, he must, within 30 calendar days of the effective date of this Decision, submit to the Board or its designee for prior approval as a practice monitor, the name and qualifications of one or more licensed physicians and surgeons whose licenses are valid and in good standing, and who are preferably American Board of Medical Specialties (ABMS) certified. A monitor shall have no prior or current business or personal relationship with respondent, or other relationship that could reasonably be expected to compromise the ability of the monitor to render fair and unbiased reports to the Division, including but not limited to any form of bartering, shall be in respondent's field of practice, and must agree to serve as respondent's monitor. Respondent shall pay all monitoring costs.

The Board or its designee shall provide the approved monitor with copies of the Decision(s) and Accusation(s), and a proposed monitoring plan. Within 15 calendar days of receipt of the Decision(s), Accusation(s), and proposed monitoring plan, the monitor shall submit a signed statement that the monitor has read the Decision(s) and Accusation(s), fully understands the role of a monitor, and agrees or disagrees with the proposed monitoring plan. If the monitor disagrees with the proposed monitoring plan, the monitor shall submit a revised monitoring plan with the signed statement.

If respondent leaves his position with San Mateo Medical Center or a similar institution, within 60 calendar days of the effective date of this Decision, and continuing throughout probation, respondent's practice shall be monitored by the approved monitor. Respondent shall make all records available for immediate inspection and copying on the premises by the monitor at all times during business hours and shall retain the records for the entire term of probation.

The monitor(s) shall submit a quarterly written report to the Division or its designee which includes an evaluation of respondent's performance, indicating whether respondent's practices are within the standards of practice of medicine or billing, or both, and whether respondent is practicing medicine safely, billing appropriately or both.

It shall be the sole responsibility of respondent to ensure that the monitor submits the quarterly written reports to the Division or its designee within 10 calendar days after the end of the preceding quarter.

If the monitor resigns or is no longer available, respondent shall, within 5 calendar days of such resignation or unavailability, submit to the Division or its designee, for prior approval, the name and qualifications of a replacement monitor who will be assuming that responsibility within 15 calendar days. If respondent fails to obtain approval of a replacement monitor within 60 days of the resignation or unavailability of the monitor, respondent shall be suspended from the practice of medicine until a replacement monitor is approved and prepared to assume immediate monitoring responsibility. Respondent shall cease the practice of medicine within 3 calendar days after being so notified by the Division or designee.

In lieu of a monitor, respondent may participate in a professional enhancement program equivalent to the one offered by the Physician Assessment and Clinical Education Program at the University of California, San Diego School of Medicine, that includes, at minimum, quarterly chart review, semi-annual practice assessment, and semi-annual review of professional growth and education. Respondent shall participate in the professional enhancement program at respondent's expense during the term of probation.

Failure to maintain all records, or to make all appropriate records available for immediate inspection and copying on the premises, or to comply with this condition as outlined above is a violation of probation.

7. Solo Practice - Respondent is prohibited from engaging in the solo practice of medicine.
8. Notification - Prior to engaging in the practice of medicine the respondent shall provide a true copy of the Decision(s) and Accusation(s) to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to respondent, at any other facility where respondent engages in the practice of medicine, including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to respondent. Respondent shall submit proof of compliance to the Board or its designee within 15 calendar days.

This condition shall apply to any change(s) in hospitals, other facilities or insurance carrier.

9. Supervision of Physician Assistants - During probation, respondent is prohibited from supervising physician assistants.
10. Obey All Laws - Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full

compliance with any court ordered criminal probation, payments, and other orders.

11. Quarterly Declarations - Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation. Respondent shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.
12. Probation Unit Compliance - Respondent shall comply with the Board's probation unit. Respondent shall, at all times, keep the Board informed of respondent's business and residence addresses. Changes of such addresses shall be immediately communicated in writing to the Board or its designee. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code section 2021(b).

Respondent shall not engage in the practice of medicine in respondent's place of residence. Respondent shall maintain a current and renewed California physician's and surgeon's license.

Respondent shall immediately inform the Board or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) calendar days.

13. Interview with the Board or its Designee - Respondent shall be available in person for interviews either at respondent's place of business or at the probation unit office, with the Board or its designee upon request at various intervals and either with or without prior notice throughout the term of probation.
14. Residing or Practicing Out-of-State - In the event respondent should leave the State of California to reside or to practice respondent shall notify the Board or its designee in writing 30 calendar days prior to the dates of departure and return. Non-practice is defined as any period of time exceeding thirty calendar days in which respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program outside the State of California which has been approved by the Board or its designee shall be considered as time spent in the practice of medicine within the State. A Board-ordered suspension of practice shall not be considered as a period of non-practice. Periods of temporary or permanent residence or practice outside California will not apply to the reduction of the probationary term. Periods of temporary or permanent residence or practice outside California will relieve respondent of the responsibility to comply with the probationary terms and conditions

with the exception of this condition and the following terms and conditions of probation: Obey All Laws; Probation Unit Compliance; and Cost Recovery.

Respondent's license shall be automatically cancelled if respondent's periods of temporary or permanent residence or practice outside California totals two years. However, respondent's license shall not be cancelled as long as respondent is residing and practicing medicine in another state of the United States and is on active probation with the medical licensing authority of that state, in which case the two year period shall begin on the date probation is completed or terminated in that state.

15. Failure to Practice Medicine - California Resident - In the event respondent resides in the State of California and for any reason respondent stops practicing medicine in California, respondent shall notify the Board or its designee in writing within 30 calendar days prior to the dates of non-practice and return to practice. Any period of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary term and does not relieve respondent of the responsibility to comply with the terms and conditions of probation. Non-practice is defined as any period of time exceeding thirty calendar days in which respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program which has been approved by the Board or its designee shall be considered time spent in the practice of medicine. For purposes of this condition, non-practice due to a Board-ordered suspension or in compliance with any other condition of probation, shall not be considered a period of non-practice.

Respondent's license shall be automatically cancelled if respondent resides in California and for a total of two years, fails to engage in California in any of the activities described in Business and Professions Code sections 2051 and 2052.

16. Completion of Probation - Respondent shall comply with all financial obligations (e.g., probation costs) not later than 120 calendar days prior to the completion of probation. Upon completion successful of probation, respondent's certificate shall be fully restored.
17. Violation of Probation - Failure to fully comply with any term or condition of probation is a violation of probation. If respondent violates probation in any respect, the Board, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation or Petition to Revoke Probation, or an Interim Suspension Order is filed against respondent during probation, the Board shall

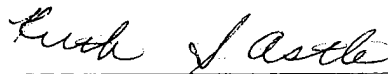
have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

18. License Surrender - Following the effective date of this Decision, if respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, respondent may request the voluntary surrender of respondent's license. The Board reserves the right to evaluate respondent's request and to exercise its discretion whether or not to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the surrender, respondent shall within 15 calendar days deliver respondent's wallet and wall certificate to the Board or its designee and respondent shall no longer practice medicine. Respondent will no longer be subject to the terms and conditions of probation and the surrender of respondent's license shall be deemed disciplinary action.

If respondent re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

19. Probation Monitoring Costs - Respondent shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Board, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of California and delivered to the Board or its designee no later than January 31 of each calendar year. Failure to pay costs within 30 calendar days of the due date is a violation of probation.

DATED: 7/30/08



RUTH S. ASTLE
Administrative Law Judge
Office of Administrative Hearings