STATE OF MICHIGAN

DEPARTMENT OF LICENSING AND REGULATION

ADMINISTRATIVE LAW SERVICES OFFICE

IN THE MATTER OF:

ROBERT L. ALEXANDER, M.D. Docket No. 89-416

Issued and entered
this 20th day of April, 1990
by Edward F. Rodgers
Administrative Law Judge

OPINION

This matter was properly noticed for a contested case hearing to be held on Wednesday, December 20, 1989 at 1:00 p.m. in the hearing rooms of the Department of Licensing and Regulation (Department), Second Floor, North Ottawa Tower State Office Building, 611 W. Ottawa Street, Lansing, Michigan. The hearing commenced as scheduled at 1:00 p.m. on December 20, 1989.

APPEARANCES:

Mr. Max R. Hoffman, Jr., Esq., Attorney at Law, of Farhat, Story & Kraus, P.C., appeared on behalf of the Respondent herein, Robert L. Alexander, M.D.

Mr. Mark E. Donnelly, Esq., Attorney at Law, appeared on behalf of the State of Michigan (State).

SUMMARY OF PROCEEDINGS:

This matter originated with the filing of a formal Administrative Complaint by the Attorney General's office on behalf of the State on December 15, 1988.

On or about April 17, 1989, Mr. Donnelly, on behalf of the State, filed a "Demand for Hearing." Mr. Donnelly's Demand for Hearing was filed with the Bureau of Health Services, Department of Licensing and Regulation.

On April 25, 1989, Mr. Hoffman filed an Appearance on behalf of the Respondent.

The Department, on May 2, 1989, issued and entered a "Notice of Hearing." The Notice of Hearing indicated that a contested case hearing would be held pursuant to the Administrative Procedures Act of 1969, as amended (APA), being MCLA 24.201 et seq; MSA 3.560(101) et seq, commencing on July 10, 1989. Further, the Notice of Hearing indicated that the contested case hearing was scheduled before the Presiding Administrative Law Judge (Judge) pursuant to the Public Health Code of 1978, as amended (Code), being MCLA 333.1101 et seq; MSA 14.15(1101) et seq.

In addition to the Presiding Judge having authority and jurisdiction over this matter pursuant to the APA and the Code, the Administrative Rules of the Department of Licensing and Regulation as contained within the 1979 Michigan Administrative Code, as amended (Rules), being 1980 AACS R 338.951 et seq, grant the Judge authority and jurisdiction to preside.

In addition to the APA, the Code, and the Rules applying to this matter, the Michigan Court Rules of 1985 (MCR) and the Michigan Rules of Evidence of the 1978 (MRE) shall be applied when practical.

Mr. Hoffman, on behalf of the Respondent, on or about June 1, 1989, filed with the Judge a "Motion to Adjourn Hearing." Further, on or about June 13, 1989, Mr. Donnelly filed a "Response in Opposition to Motion to Adjourn Hearing."

The Judge, on June 14, 1989, issued and entered an Order scheduling oral argument on the Motion to Adjourn, due to the fact that the State's Attorney had objected to the Respondent's first request for adjournment in this matter.

On June 19, 1989, oral argument on the Motion to Adjourn was held before the Judge. Mr. Donnelly appeared on behalf of the State and Mr. Hoffman on behalf of the Respondent.

At the conclusion of the oral argument on the Motion to Adjourn, the Judge determined that it was appropriate to continue this matter for at least ninety (90) days to allow the Respondent to be released from the United States Federal Corrections System to personally appear at his hearing and offer and/or assist in a proper defense against the charges contained in the Complaint.

Mr. Donnelly, in objecting to the adjournment in oral argument, argued that the Respondent could continue to practice medicine if he were granted a long continuance in this matter and given an early release from the Federal Corrections System.

In granting the 90-day continuance, the Presiding Judge was mindful of the State's concern that the Respondent continued to hold an "active" license. The Judge determined during the June 19, 1989 hearing that a lengthy continuance can only be granted if the public health, safety and welfare were protected by the Respondent putting his license in some type of "escrow" during the pendency of this action.

The Judge determined that the July 10, 1989 contested case hearing should be adjourned until September or October to allow for the Respondent's release from the Federal Corrections System so that he may personally appear and assist in defending the charges against him. However, the Judge indicated that the continuance was contingent upon the Respondent voluntarily surrendering his license during the pendency of this contested case hearing.

On July 5, 1989, a telephone conference call was held between Mr. Donnelly, Mr. Hoffman and the Judge. During the telephone conference call, it was understood by all the parties that the July 10, 1989 contested case hearing would be adjourned, and the Michigan Board of Medicine (Board) would be presented with a Stipulation and Consent Order in which the Respondent would voluntarily surrender his license pending the final disposition of this contested case matter.

On July 6, 1989, the Presiding Judge reduced his findings to a written Order. The Judge's July 6th Order rescheduled the contested case hearing to commence on September 19, 1989.

On or about September 15, 1989, a second telephone conference call was held between Mr. Hoffman, Mr. Donnelly and the Judge. During this telephone conference call, the parties indicated that the Stipulation had been or was about to be presented to the Board surrendering the Respondent's license. On or about September 20, 1989, the Judge received a copy of the Stipulation and also a motion to continue this matter to a later date.

The Judge, on October 6, 1989, issued a Scheduling Order granting the second adjournment or continuance of the contested case hearing. The October 6th Order rescheduled the contested case hearing for November 1, 1989.

On or about September 30, 1989, the Judge received from Mr. Hoffman a "Motion for Adjournment." Further, on or about the same date, Mr. Donnelly on behalf of the State filed a "Response to the Motion to Adjourn."

On November 1, 1989, the hearing commenced promptly as scheduled. Mr. Hoffman appearing on behalf of the Respondent and Mr. Donnelly on behalf of the State. After discussions off the record and an agreement on the record, the Presiding Judge indicated that Mr. Hoffman would be granted a third adjournment or continuance with certain restrictions.

The Presiding Judge, during the November 1, 1989 hearing, indicated to Mr. Hoffman that the "release date" referenced in the Respondent's Motion for Adjournment must be documented and presented to the Judge by December 15, 1989. The Judge further

indicated on the record that the November 1, 1989 hearing would be rescheduled to commence approximately two weeks after the release date of the Respondent from the Federal Corrections System. However, the Judge specifically determined that if sufficient documentation was not provided by the December 15, 1989 deadline, establishing the Respondent's release date, the contested case hearing would be tried expediently on December 20, 1989.

The Presiding Judge, on November 7, 1989, reduced his findings from the November 1, 1989 hearing to a "Procedural Order." The transcript of the November 1, 1989 hearing and the Judge's November 7, 1989 Order are hereby incorporated into this Opinion and made a part and parcel of this Opinion by reference.

It should be noted that the transcript from the November 1, 1989 hearing incorrectly lists the hearing date as November 8, 1989.

On or about December 14, 1989, the hearing clerk received from Mr. Hoffman a letter on behalf of Dr. Alexander. In pertinent part, Mr. Hoffman stated in his letter:

> "Pursuant to your Procedural Order, dated November 7, 1989, this letter is to inform you that Dr. Alexander's release date is to be July 3, 1990.

On December 20, 1989, the contested case hearing commenced as previously scheduled pursuant to the Presiding Judge's November 7, 1989 Procedural Order.

At the outset of the December 20, 1989 hearing, Mr. Hoffman, on behalf of the Respondent, requested an adjournment

and/or continuance of this matter until after July 3, 1990. Mr. Donnelly, on behalf of the State, objected to any further adjournment and/or continuances.

This Opinion incorporates into it the transcript from the December 20, 1989 hearing and makes the transcript a part and parcel of this Opinion by reference. At the conclusion of argument by Mr. Hoffman and Mr. Donnelly, the Judge denied the request for additional adjournments and/or continuances on behalf of the Respondent.

The Judge denied the request for adjournment and/or continuance for several reasons, including the following:

(1) The Respondent had not provided information in conformity with the requirements of the Judge's November 7, 1989 Order.

(2) Even the information provided by Mr. Hoffman was uncertain at best.

(3) While it was not Mr. Hoffman's fault that he has had to represent his client "long-distance," it appears that Mr. Hoffman's client has been providing "optimistic" information to this tribunal as to his release date. A continuance to July 3, 1990 and beyond was unreasonable and unfair to the State's case.

After the Judge denied the request for a fourth adjournment or continuance, Mr. Donnelly put in the State's proofs. The State's proofs during the December 20, 1989 hearing consisted of three exhibits.

State Exhibit 1 is a photoelectric copy of an indictment from the United States District Court, Eastern District of Michigan, Southern Division, in the matter of the United States of America v numerous defendants, including Robert L. Alexander, M.D.

State Exhibit 2 is a photoelectric copy of the jury verdict ir the matter of the United States of America v Robert L. Alexander, M.D.

State Exhibit 3 is a copy of the Judgment and Commitment Order from the United States District Court in the matter of the United States v Robert L. Alexander.

After introducing into the record three exhibits, Mr. Donnelly "rested the State's case." The State did not call any witnesses at the December 20, 1989 hearing.

Mr. Hoffman offered no exhibits or testimony on the Respondent's behalf.

Rather than having oral closing arguments, the parties agreed to reduce their closing arguments to a written form.

Further, Mr. Hoffman indicated that he would be filing several Motions for Summary Decision, Summary Disposition and/or Summary Judgment on one or more of the counts contained in the State's Complaint. Mr. Hoffman indicated that he would be willing to file his Motions for Summary Judgment and his closing arguments in one document or post-hearing brief.

Further, Mr. Donnelly indicated he would file his post-hearing brief and/or opposition to any motions in one document.

At the conclusion of the December 20, 1989 contested case hearing, the parties agreed upon a briefing schedule.

On or about December 10, 1989, the hearing clerk received the transcript from the November 1, 1989 hearing.

On January 22, 1990, the hearing clerk received the transcript from the December 20, 1989 hearing.

The hearing clerk, on February 2, 1990, received two documents from Mr. Hoffman on behalf of Dr. Alexander. Document #1 was a "Motion to Dismiss Counts I, III, V and VIII of the Administrative Complaint." Document #2 was a "Brief in Support of Motion to Dismiss, and Closing Arguments."

On February 9, 1990, Mr. Donnelly filed on behalf of the State a document entitled, "The People's Post-Hearing Brief."

ISSUES AND APPLICABLE LAW:

The general issue presented by the State in its Complaint and proofs is whether or not Respondent violated one or more sections of the Code.

The specific issue in this matter is whether or not Respondent violated subsections 16221(1)(a), 16221(1)(b)(i), 16221(1)(b)(v), 16221(1)(b)(vi), 16221(1)(c)(iii), and 16221(1)(c)(iv), being MCL 333.16221 et seq; MSA 14.15(16221) et seq.

The above listed subsections of the Code provide:

> "Sec. 16221. (1) The department may investigate activities related to the practice of a health profession by a licensee, a registrant, or an applicant for licensure or registration. The department may hold hearings, administer oaths, and order relevant testimony to be taken and shall report its findings to the appropriate board or appropriate task force. The board shall proceed under section 16226 when the board finds that any of the following grounds exist:
>
> "(a) A violation of general duty, consisting of negligence or failure to exercise due care, including negligent delegation to or supervision

of employees or other individuals, whether or not injury results, or any conduct, practice, or condition which impairs, or may impair, the ability to safely and skillfully practice the health profession.

"(b) Personal disqualifications, consisting of any of the following:

"(i) Incompetence.

"***

"(v) Conviction of a misdemeanor or felony reasonably related to and adversely affecting the licensee's ability to practice in a safe and competent manner. A certified copy of the court record shall be conclusive evidence of the conviction.

"(vi) Lack of good moral character.

"***

"(c) Prohibited acts, consisting of any of the following:

"***

"(iii) Practice outside the scope of a license.

"(iv) Obtaining, possessing, or attempting to obtain or possess a controlled substance as defined in section 7104 or a drug as defined in section 7105 without lawful authority; or selling, prescribing, giving away, or administering drugs for other than lawful diagnostic or therapeutic purposes.

"***.

MOTIONS:

The Respondent in his Motion to Dismiss and in the accompanying brief makes numerous arguments to dismiss one or more of the counts contained in the State's Complaint. Each argument concerning each count will be analyzed and discussed below. At the

end of each discussion concerning each Motion for Dismissal, a decision or ruling will be made by the Presiding Judge.

When deciding a Motion to Dismiss, the Court must take the evidence in a light most favorable to the non-moving party. Mutual Beneficial Life Insurance Company v Abbott, 9 Mich App 547; 157 NW 2d 806 (1968).

It is a general rule that Summary Decision, Summary Disposition, and Summary Judgment and/or Dismissal is not favored by the Court. Second Denton Harbor Corporation v St. Paul Insurance Company, 126 Mich App 580; 337 NW 2d 585 (1983).

The granting of a Motion to Dismiss or Motion for Summary Judgment is a matter of discretion for the Judge. This decision should be exercised with the rights of both parties protected. Dearborn v Michigan Turnpike Authority, 344 Mich 37; 73 NW 2d 544 (1955).

Count I

In Count I of the Complaint, the State alleges that the Respondent's conduct and conviction constitute a violation of general duty, consisting of negligence or failure to exercise due care, including negligent delegation to or supervision of employees or other individuals whether or not injuries result, contrary to Section 16221(1)(a) of the Code.

A. Failure of Proof

The Respondent argues that the sole proofs offered by the State's attorney in this case were limited to the three exhibits from the Respondent's prior federal court proceedings. The

Respondent states that the only evidence on the record is a copy of the Respondent's indictment, a copy of the jury verdict, and a copy of the Judgment and Commitment Order. See page (p) 2 of the Respondent's brief.

Further, the Respondent reasons that Count IV of the Complaint charges the Respondent with a violation of Section 16221(1)(b)(v), which provides for discipline upon "conviction of a misdemeanor or felony reasonably related to or adversely effecting the licensee's ability to practice in a safe and competent manner." The Respondent further argues that it is possible that Count IV may be supportable by the limited evidence of this record. See p 2 of the Respondent's brief.

The State argues that Exhibits 1 through 3 establish under Count I of its Complaint that the Respondent engaged in an ongoing conspiracy to illegally distribute and to distribute controlled substances for other than a legitimate medical purpose. Clearly, the State reasons such conduct is a violation of Dr. Alexander's duty as a licensed physician. See p 3 of the State's brief.

The Respondent counters that absent evidence other than the mere fact of conviction, Count I cannot be supported. The Respondent argues there must be a factual basis on the record to show by competent, material and substantial evidence that the alleged violations occurred. However, there is no evidence whatsoever to prove the underlying conduct or any other fact for which Respondent is charged. See p 3 of the Respondent's brief.

After examining the exhibits, taking Count I and the motion in the light most favorable to the non-moving party, i.e. the State, a reasonable person must conclude by a preponderance of the evidence that the State's exhibits are sufficient for the State to survive the Motion for Dismissal. Therefore, the Motion to Dismiss Count I based on a lack of proof is denied.

B. The Count is Multiplicitous.

The Respondent argues that Counts I and II both charge Respondent with a violation of section 16221(1)(a) of the Code. Further, the Respondent indicates that the Attorney General relies solely on the fact of Respondent's prior conviction, without more. See p 3-4 of the Respondent's brief.

It is the Respondent's position that since Counts I and II of the Complaint charge Respondent with violations of the same statute, respectively, based upon the same underlying facts, the counts are multiplicitous and should be dismissed.

The State contends that a close reading of section 16221 (1)(a) of the Code should result in a finding that Counts I and II are not multiplicitous.

The State argues that it is conceivable that a [illegible] could violate his general duty as a physician, yet not be engaged in a conduct or practice which impairs his ability to safely and skillfully practice the chosen profession. See p 4 of the State's brief.

The State does concede in its brief at p 4-5 that, "In any event, both counts should not be dismissed. If, in fact, [illegible]

counts are deemed to be multiplicitous, the counts should be joined together as one count and a violation of section 16221(1)(a) should be found."

Federal and State Courts have not looked favorably on "double charging" of offenses based on the same facts. The underlying theme in said situations is that it would be violative of the State and Federal double jeopardy clauses to allow such action.

"Factual" double jeopardy exists where a defendant or Respondent is convicted of or found violating two crimes or statutes for a violation of two separate and distinct statutes, but where the legislature intended that only a single conviction or violation result. People v Seabrooks, 115 Mich App 442; 354 NW 2d 374 (1984).

"Legal" double jeopardy is generally resolved by ascertaining the intent of the legislature; where two separate statutes are violated, legal double jeopardy analysis focuses on whether or not each statute requires a proof of a fact which the other does not, not withstanding substantial overlap of proofs offered to establish the crimes or violations. People v Seabrooks, supra.

The guarantee against double jeopardy protects against not only a second prosecution for the same offense, but also "protects against multiple punishment for the same offense or violation." North Carolina v Pearce, 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1969).

Double jeopardy protects against multiple punishments for the same offenses or violations. The test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment where both arise out of the same transaction is whether each offense requires proof of an element which the other does not. Substantial overlap in the factual proofs establishing each offense is irrelevant under this test. Blockburger v United States, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

Constitutional protections do not bar convictions for multiple offenses arising out of a single transaction when supported by a statute which evidences clear legislative intent to authorize double convictions. Such intent can be shown when the Blockburger, supra, rule is satisfied. For example, the Michigan felony/firearms statute meets this test and convictions for both felony/firearm and its underlying felony is not violative of double jeopardy. Wayne County Prosecutor v Detroit Recorders Court Judge, 406 Mich 374; 280 NW 2d 793 (1979).

However, double jeopardy protections prevent convicting a person of a factually included lesser charge (cognate) and the principal charge. People v Jankowski, 408 Mich 79; 289 NW 2d 674 (1980).

The courts have held, however, that a person's conviction for felony murder and the underlying felony of armed robbery does violate the double jeopardy clauses. See People v Wilder, 411 Mich 328; 308 NW 2d 112 (1981).

In this case it is clear that the legislature did not intend to separate the various elements of section 16221(1)(a) for separate State action against license holders. If the legislature had intended to separate a violation of one's general duty based on negligence or failure to exercise due care from a person's ability to safely and skillfully practice a profession, the legislature would have done so.

A summary of case law surrounding this issue clearly establishes that Michigan and Federal Courts will not allow multiple convictions or violations based on separate and distinct statutes that punish the same behavior. In this case we have a more extreme factual situation, clearly the State wishes to punish this Respondent by taking the same identical subsection of the Code and "splitting it" into separate subsections to result in two violations under the same subsection of the Code. If that was the intent of the legislature, it would have taken the language of section 16221(1)(a) and divided that subsection of the Code into several subsections.

Clearly, then, the State cannot be allowed to prosecute this Respondent under section 16221(1)(a) of the Code under two separate counts based on the same factual allegations.

Therefore, it is appropriate to grant the Respondent's motion as to dismissal of one of these counts. Counts I and II are joined for purposes of this Opinion. In effect, then, Count II of the Complaint is joined with Count I, and there will be no Count II left standing in this matter. Therefore, the Motion to Dismiss Count I is denied. However, Count II is dismissed.

C. The Need for Expert Testimony

The Respondent reasons in his brief that the charges under Count I of the Complaint reference a professional standard of care or scope of authority and a corresponding breach of duty or deviation from scope of authority is required. See p 5 of the Respondent's brief.

The Respondent also argues that, although these charges reference a standard of care or scope of authority and a corresponding breach or deviation, the State presented no evidence, in the form of an expert opinion or otherwise, to establish the applicable standard of care or authority and the corresponding breach or deviation therefrom. See p 6 of the Respondent's brief.

Finally, the Respondent argues that there is insufficient proof of a violation consistent with the Respondent's due process rights due to the lack of expert testimony under Count I of the Complaint. See p 6 of the Respondent's brief.

The State argues that expert testimony is not necessary to establish, based on the evidence in this case, that the Respondent has failed to comply with the minimum standards of acceptable and prevailing practice by his conviction for the distribution of controlled substances for other than legitimate medical purposes. See p 5-6 of the State's brief.

While expert testimony is normally required to establish the applicable standards of practice, certain conduct is so obviously inappropriate and outrageous that no expert testimony is required. See Sillery v Board of Medicine, 145 Mich App 681; 378 NW 2d 570 (1985), lv den, 425 Mich 858 (1986).

In pertinent part, the Court of Appeals stated in Sillery, supra, that:

> "Where a professional's work product lacks such basic integrity as we believe that it is within the province of the layperson to determine that the conduct constitutes a failure to exercise due care. Accordingly, the absence of testimony on what constituted 'minimum standards of acceptable and prevailing practice' would not preclude a finding that plaintiff nevertheless failed to exercise due care." See Sillery, supra.

In this case, the State asserts that the Respondent's conviction establishes that he dispensed controlled substances for non-medical purposes in violation of his general duty under section 16221(1)(a) of the Code. Clearly, after taking this motion in the light most favorable to the State, the non-moving party, and accepting the allegations as true, it can be concluded that the alleged conduct, if true, would not require the testimony of an expert witness in this case.

Therefore, the Respondent's Motion to Dismiss and/or for Summary Decision, Summary Dismissal and/or Summary Judgment is denied.

Count II

As indicated in the discussion under Count I above, Count II of the Complaint is dismissed due to the fact that it is multiplicitous.

Count III

In the Complaint, the State alleges that the Respondent's conduct and conviction constitutes a departure from, or failure to

conform to, minimum standards of acceptable and prevailing practice for a health professional in violation of section 16221(1)(b)(i) of the Code.

A. Failure of Proof

The Respondent argues that Count III should be dismissed due to a lack of proof by the State. For the reasons stated above in the discussion under Count I, the Motion to Dismiss Count III for a lack of proof is denied.

B. The Need for Expert Testimony

In his brief, the Respondent also argues that Count III of the Complaint should be dismissed for a lack of expert testimony. Using the same arguments for Counts I, II and III, the Respondent asserts that the conduct alleged under Count III of the Complaint requires that the State submit expert testimony.

As indicated in the discussion under Count I above, the allegations by the State are those type which, if true, do not require under Sillery expert testimony. Taking the motion in the light most favorable to the non-moving party, i.e. the State, and for the reasons stated above, the Motion to Dismiss Count III for a lack of expert testimony is denied.

Count IV

While the Respondent argues about and references Count IV of the Complaint in his motion and brief, the Respondent does not specifically ask for dismissal of this count. Therefore, any discussion of Count IV of the Complaint will be addressed in the following sections of this Opinion.

Count V

The State in Count V of the Complaint alleges that the Respondent's conduct and conviction evidences lack of good moral character in violation of section 16221(1)(b)(vi) of the Code.

A. Failure of Proof

As indicated above, the Respondent argues that the sole proof offered by the State as to Count V is limited to three exhibits from Respondent's prior Federal Court proceedings. However, taking the motion in the light most favorable to the State, and after review of State Exhibits 1, 2 and 3, and for the reasons set forth in the discussion under Count I above, the Motion to Dismiss Count V for lack of evidence is denied.

B. Count V Lacks Any Support Other Than the Fact of Conviction.

The Respondent argues in his brief that Count V of the Complaint charges the Respondent with a lack of good moral character. However, the Respondent states that the evidence of record consists solely of the fact of Respondent's prior conviction in Federal Court. This is insufficient evidence to support the charge pursuant to the "Good Moral Character Act." See p 10-11 of the Respondent's brief.

The State counters that Count V does not allege that just because the Respondent has a felony conviction he automatically lacks good character, but rather it is the position of the State that in viewing the type of felony of which Respondent was convicted, it is clear that he cannot serve the public in a fair, honest and open manner. See p 7 of the State's brief.

Section 16221(1)(b)(vi) of the Code references "lack of good moral character." Section 16104(4) of the Code defines good moral character as, "good moral character means good moral character as defined and determined under Act No. 381 of the Public Acts of 1974, as amended, being sections 338.41 to 338.47 of the Michigan Compiled Laws."

This in effect, then, is the Licensing Former Offenders Act (Act). Section 1 of that Act states in pertinent part:

> "The phrase 'good moral character' . . .when used as a requirement for a . . .license . . . in the Michigan Compiled Laws or Administrative Rules promulgated under those laws shall be construed to mean the propensity on the part of the person to serve the public in the licensed area in a fair, honest and open manner."

Other sections of the Licensing Former Offenders Act address the following:

Section 2, the effect of prior judgments of guilt; Section 3, the use of criminal records; Section 4, the use of information as to an applicant's fitness; Section 5 addresses statements as a basis for denial of licensure; and Section 6 discusses judicial review. It is clear from a review of the Act that Sections 2, 3, 4, 5 and 6 specifically address individuals who have a criminal conviction. However, Section 1 of the Act does not address or set a mandate that a prerequisite for utilizing the Act must be the conviction of an individual.

While it is not necessary for an applicant or license holder to be judged on good moral character based on a conviction,

that is not the factual case at bar. In this case, clearly the Respondent does have a criminal felony conviction from the Federal Court.

The Respondent admits the felony conviction and then argues that the Attorney General offered absolutely no evidence other than the conviction to establish Respondent's violation of the Act under Count V of the Complaint. Further, the Respondent states that the legislature has made it clear to the Board of Medicine and other licensing boards that it cannot base a decision solely upon the fact of conviction. Since there is absolutely no other evidence in this record upon which a violation of section 16221(1)(b)(v) can be based, the Respondent requests Count V of the Complaint be dismissed. See p 11 of the Respondent's brief.

Clearly there can be no argument that the Licensing Former Offenders Act applies to this case and this Respondent. Having determined that the Act does apply to the Respondent in this matter, it must now be determined if the Department is in compliance with the Act.

Section 3(3) of the Act, being MCLA 338.43(3); MSA 18.1208(3)(3), requires the promulgation of rules in a reasonable period of time to administer the Act.

If this Respondent did not have a criminal conviction that the State was trying to use against him, then the only applicable part of the Act that it would be necessary to apply is Section 1, which defines good moral character. Clearly, the Code under section 16104(4) allows for the utilization of the definition

of good moral character under Section 1 of the Act. However, in this case, Sections 2, 3, 4, 5 and 6 of the Act must also be utilized.

The Honorable Michael G. Harrison, Ingham County Circuit Judge, in the matter of Ogonowski v Michigan Department of Licensing and Regulation, Circuit Court File #84-52786-AA (June 6, 1985), addressed the Licensing Former Offenders Act.

In Ogonowski, the Respondent had been convicted of a felony. Ogonowski was denied a real estate license. Judge Harrison, upon judicial review, however, overturned the action of the Department of Licensing and Regulation and required the granting of a license.

In Ogonowski, the Respondent/License Applicant argued that the Department of Licensing and Regulation failed to promulgate rules designating which convictions satisfy the Act. Mr. Ogonowski asserting this denied him due process of law. Further, Mr. Ogonowski claimed it was improper to place the burden on him of proving good moral character. See p 2 of the Ogonowski decision by Judge Harrison.

In his decision, Judge Harrison reasoned that Section 3(3) of the Act required the promulgation of rules in a reasonable period of time. See p 4 of the Ogonowski decision.

In pertinent part, Section 3(3) of the Act states:

> "The director or a person designated by the director of the principal department shall promulgate rules for each licensing board or agency under that department's jurisdiction which prescribe the offenses or categories

> of offenses which the department considers indicate a person is not likely to serve the public as a licensee in a fair, honest and open manner."

This Judge takes official notice of the fact that the Michigan Department of Licensing and Regulation has not promulgated rules as of this date under the Licensing Former Offenders Act.

Judge Harrison's conclusion that seven years (which it was in 1985) from the date the legislature amended the Act is not a reasonable period of time in which to promulgate rules is even more troublesome in this matter (in 1990, it is now 12 years). In light of the fact that 12 years have passed since the Act required the promulgation of rules, it is even more obtuse to fundamental concepts of due process that the Department has not promulgated rules for the administration of the Licensing Former Offenders Act.

Judge Harrison points out in his decision that the process of promulgating simple rules can be easily accomplished by a department. Judge Harrison concludes in pertinent part:

> "Perhaps the rule best answering the mandate is one enacted by the Board of Professional Community Planners, R 338.1323, regarding revocation of a certificate of registration which provides, in part:
>
> > 'Conviction in a court of confident jurisdiction of any crime involving moral turpitude shall be prima facie evidence of lack of good moral character.'
>
> The court takes notice that the statutory schemes of several other state boards and agencies address and elaborate the prior convictions issue, such as MCLA 339.708(d); MSA 18.425(708)(d), which regulates the licensing and registration of public accountants." (See p 4 of the Ogonowski decision).

Judge Harrison concluded in pertinent part:

> ". . .it was never contemplated that the Good Moral Character Act should stand alone for defining good moral character or that it should be continued as authority to consider all felony convictions as relevant on the question of character with respect to a particular occupation in turpituity." (See p 5 of the Ogonowski decision).

Clearly, the legislature in Section 3(3) of the Licensing Former Offenders Act has directed departments and licensing agencies to promulgate rules when evaluating the fitness of license holder or applicant or applicants who have been convicted of a serious crime.

Due to the fact that the Department has failed to properly promulgate rules in administering the Licensing Former Offenders Act, Count V of the Complaint should be dismissed. Therefore, the Respondent's Motion to Dismiss Count V of the Complaint is granted.

Count VI

The State in Count VI of its Complaint alleges that the Respondent's conduct and conviction constitute practice outside the scope of a license in violation of section 16221(1)(c)(iii) of the Code.

A. Failure of Proof

The Respondent argues that the Attorney General's office in this case has not presented sufficient proof to warrant a violation under Count VI of the Complaint. The Respondent contends that absent evidence other than the mere fact of corviction Count VI cannot be supported. See p 2-3 of the Respondent's brief.

For all of the reasons stated in the discussions above on this issue and taking this motion in the light most favorable to the State, the Respondent's Motion to Dismiss Count VI of the Complaint for lack of evidence is denied.

B. The Need for Expert Testimony

The Respondent argues that Count VI should be dismissed due to the fact that the State did not present expert testimony on the issues contained within Count VI of the Complaint.

This discussion incorporates by reference and makes a part and parcel of the ruling on this count of the Complaint all the principles of law discussed above.

Clearly, after taking this motion in the light most favorable to the State, the non-moving party, and accepting the allegations as true, it can be concluded that the conduct, if true, would not require the testimony of an expert witness. Clearly, under Sillery, a layperson could determine that the illegal distribution of controlled substances is not within the scope of this Respondent's license. Therefore, the Motion to Dismiss Count VI must be denied.

Count VII

The State's Complaint alleges that the Respondent's conduct and conviction constitute obtaining, possessing, or attempting to obtain or possess a controlled substance or a drug without lawful authority in violation of section 16221(1)(c)(iv) of the Code.

A. Failure of Proof

For all of the reasons stated above, it must be concluded on this record as a whole, taking the motion in the light most favorable to the State, that this record contains sufficient evidence to warrant the denial of the Motion to Dismiss Count VII based on lack of proof. Therefore, the Motion to Dismiss Count VII on lack of proof is denied.

B. Count VII and VIII are multiplicitous.

For the reasons stated in the discussions of Counts I and II above, the Motion to Dismiss Count VII or VIII must be granted. Therefore, Counts VII and VIII are joined for purposes of this Opinion and Count VIII is dismissed. However, the Motion to Dismiss Count VII based on multiplicity is denied.

C. The Need for Expert Testimony

For the reasons stated throughout this Opinion above, it must be concluded, taking the motion in the light most favorable to the State, that this is the type of allegation that does not require expert testimony. A layperson can easily determine that a doctor under certain circumstances should not be obtaining or possessing a controlled substance or drug without lawful authority. Clearly a doctor using or dispensing drugs illegally meets the Sillery standard. Therefore, the Motion to Dismiss Count VII on this ground is denied.

Count VIII

As indicated above, Count VIII is dismissed due to the fact that it is multiplicitous in nature. See the discussion under Counts I, II and VII above.

Summary

Based on all the above discussion, the Respondent's Motion to Dismiss, or for Summary Decision, Summary Disposition or Summary Judgement is granted as to Counts II, III, V, and VIII. Those counts having been dismissed, they will not be discussed below under findings of fact and conclusions of law.

The Motions to Dismiss, and/or grant Summary Decision, Summary Disposition, or Summary Judgment as to Counts I, VI, and VII are denied. These allegations will be discussed below in the findings of fact and conclusions of law. Further, there having been no motion made directly concerning Count IV of the Complaint, that allegation will also be discussed in the findings of fact and conclusions of law discussed below.

MISCELLANEOUS MATTERS:

Due to the individual circumstances surrounding this case, there are several miscellaneous matters that warrant being addressed before the discussions on findings of fact and conclusions of law in this Opinion.

Adjournments or Continuances

As indicated above, on May 2, 1989, the Department issued and entered a Notice of Hearing scheduling a contested case hearing to commence on July 10, 1989. On more than one occasion the Respondent requested and was granted an adjournment or continuation in this matter. Adjournments and/or continuations were granted to the Respondent on the following dates: (1) June 14, 1989; and (2) November 7, 1989. In addition, the parties jointly requested an

adjournment or continuance in order to execute a Stipulation for the Board. This adjournment or continuance was granted by the Judge on October 6, 1989. Finally, during the December 20, 1989 contested case hearing, the Respondent requested an adjournment or continuance until July 3, 1990. This request was denied. See transcript (TR) of the December 20, 1989 hearing at p 8-12.

Evidentiary Standard

1980 AACS R 338.973 states in pertinent part, "the complaining party (State) shall have the burden of proving, by a preponderance of the evidence, that grounds exist for the imposition of a sanction on a licensee. . ." (Emphasis Added).

Michigan courts have held that no greater preponderance of proof is required to authorize a verdict in one civil action that in another. Elliott v Van Buren, 33 Mich 49 (1875). "Preponderance of evidence" means simply evidence that outweighs that which is offered to oppose it. Strand v Chicago and W.M.R. Co., 67 Mich 328; 34 NW 712 (1887).

By a preponderance of evidence, it is that type of evidence which, when weighed with opposing evidence, has more convincing force, resulting in greater probability in favor of the party upon whom the burden rests. Klein v Studabaker Corporation, 189 Mich 514; 155 NW 519 (1915).

Convictions in criminal proceedings require proof beyond a reasonable doubt, a higher standard than a preponderance of evidence. In civil cases, only preponderance of evidence is necessary, which is simply that evidence which outweighs that which

is offered to oppose it, not beyond a reasonable doubt. Martucci v Detroit Commissioner of Police, 322 Mich 270; 33 NW 2d 789 (1948).

A Judge in a civil case is not required to make their findings beyond a reasonable doubt, but only to determine in whose favor the credible evidence preponderates. Krisher v Duff, 331 Mich 699; 50 NW 2d 332 (1951).

Preponderance of the evidence may not be determined solely by number of witnesses, but by greater weight of all the evidence, including opportunity for knowledge and information possessed. Gibson v Dexiel, 24 Mich App 428; 180 NW 2d 379 (1970).

Inferences

In a civil case involving an issue of criminal misconduct, a preponderance is enough, providing it overcomes the presumption of innocence. Monaghan v Agricultural Fire Insurance Company of Watertown, New York, 53 Mich App 238; 18 NW 797 (1884).

While in a civil case it is only necessary to establish the commission of a crime by a preponderance of evidence, there should, however, be evidence of sufficient weight and character to satisfy the Judge that a crime had been committed. Baird v Abbey, 73 Mich 347; 41 NW 272 (1889).

Judges are not warranted in finding a fact established by a greater probability unless the evidence satisfies the Judge that the fact exists, the conclusion that it exists may be drawn from a preponderance of probabilities in its favor, but the probabilities must be such that the conclusion may be and is drawn, or it is not proven. Dunbar v McGill, 64 Mich 676; 31 NW 578 (1887).

A Judge is permitted to draw legitimate inferences from established facts. Heppenstall Steel Company v Wabash R. Co., 242 Mich 464; 219 NW 717 (1928).

It is the province of the trial judge in a non-jury case to draw legitimate inferences from the established facts and to weigh the probabilities from such facts. Detroit Trust Company v Hartwick, 278 Mich 139; 270 NW 249 (1936).

Evidence is the means by which inferences may logically be drawn as to the existence of facts. Thornton v Luria-Dumes Co-Venture, 347 Mich 160; 79 NW 2d 457 (1956).

In absence of direct proofs, a Judge may draw reasonable inferences from established facts and circumstances. Wolverine Upholstery Company v Ammerman, 1 Mich App 235; 135 NW 2d 572 (1965).

The Value and Weight to be Given Evidence

The weight to be given evidence is discretionary within the fact finder. Kern v Pontiac Township, 93 Mich App 612; 287 NW 2d 603 (1979). Great deference is generally given to the findings of fact and weight given evidence by an Administrative Law Judge. Viculin v Department of Civil Service, 386 Mich 375; 192 NW 2d 499 (1971).

The Presiding Judge is the principal judge of the weight and credibility of evidence. Yellow Freight Systems v Public Service Commission, 73 Mich App 476; 252 NW 2d 595 (1977).

The weight and value to be given evidence is to be determined by the Presiding Judge in a non-jury trial. Consumer Power v Public Service Commission, 78 Mich App 581; 261 NW 2d 10 (1977).

Stipulations

Parties may stipulate to hear a given matter on it merits, or limit the scope of a hearing if they so choose. Kontal v Delhi Township, 91 Mich App 147; 283 NW 2d 677 (1979).

It is generally an abuse of discretion by a Judge to not recognize or admit stipulated facts or evidence. Ford v Monroe Steel Casting Company, 97 Mich App 482; 296 NW 2d 78 (1980).

Finally, parties may stipulate to findings of fact and conclusions of law in a final decision or order. St. Joseph Township v Municipal Finance Commission, 351 Mich 524; 88 NW 2d 543 (1958).

FINDINGS OF FACT:

During the months of August and September, 1989, Mr. Donnelly, on behalf of the State, Mr. Hoffman, on behalf of the Respondent, and the Respondent himself executed a Stipulation. The Stipulation acknowledged that Robert L. Alexander, M.D. possessed a current license to practice medicine in the State of Michigan at the time of the commencement of this contested case hearing process. Further, the Stipulation results in Dr. Alexander voluntarily surrendering his license to practice medicine in Michigan during the contested case hearing process.

On September 20, 1989, the Michigan Board of Medicine adopted the Stipulation surrendering Dr. Alexander's license to practice medicine in Michigan during the contested case hearing process.

On or about December 15, 1988, an Administrative Complaint was filed against the Respondent with the Board.

As indicated above the only evidentiary record in this matter is the three State Exhibits.

In May, 1986, the Federal Grand Jury in the United States District Court for the Eastern District of Michigan, Southern Division, indicted the Respondent on numerous charges under federal law. See State Exhibit 1.

On or about September 22, 1988, in the United States District Court for the Eastern District of Michigan, Southern Division, the Respondent was found guilty upon a jury verdict of violation of federal law through guilty verdicts on Counts VII through XVII of the above-referenced indictment. See State Exhibit 2.

The Respondent's conviction in Federal Court by a jury verdict resulted in the Respondent being found guilty of the offenses and allegations contained within Count VII through XVII of the indictment. The jury having found the allegations under Counts VII through XVII to be true beyond a reasonable doubt, the logical and legal inference may be drawn that the Respondent committed the acts and allegations contained in the indictment Counts VII through XVII by a preponderance of the evidence. Therefore, the facts below are inferred from State Exhibits 1 and 2.

On or about February 23, 1982, the Respondent knowingly, intentionally, and unlawfully distributed to Special Agent [redacted], by delivering a prescription for the following drugs which he knew was not issued in the usual course of medical practice for a legitimate medical purpose:

1. 30 dosage units of Preludin, a Schedule II non-narcotic drug controlled substance,
2. 60 dosage units of Valium, a Schedule IV non-narcotic drug controlled substance,
3. 30 dosage units of Desoxyn, a Schedule II non-narcotic drug controlled substance.

On or about March 29, 1982, the Respondent knowingly, intentionally, and unlawfully distributed the following drugs to Agent [redacted], by delivering a prescription for these drugs which he knew was not issued in the usual course of medical practice for a legitimate medical purpose:

1. 30 dosage units of Desoxyn, a Schedule II non-narcotic drug controlled substance,
2. 30 dosage units of Valium, a Schedule IV non-narcotic drug controlled substance.

On or about April 22, 1982, the Respondent and Mildred Perkins did knowingly, intentionally, and unlawfully distribute to Special Agent [redacted] the followings drugs by delivering six prescriptions for these drugs which they knew were not issued in the usual course of medical practice for a legitimate medical purpose:

1. 180 dosage units of Preludin, a Schedule II non-narcotic drug controlled substance,

2. 180 dosage units of Valium, a Schedule IV non-narcotic drug controlled substance.

On or about April 23, 1982, the Respondent did knowingly, intentionally, and unlawfully distribute to Police Officer, [redacted] the following drugs by delivering one prescription for these drugs which he knew was not issued in the usual course of medical practice for a legitimate medical purpose:

1. 30 dosage units of Desoxyn, a Schedule II non-narcotic drug controlled substance,

2. 30 dosage units of Valium, a Schedule IV non-narcotic drug controlled substance.

On or about April 23, 1982, the Respondent, Mildred Perkins, and Diane Norman did knowingly, intentionally, and unlawfully distribute the following drugs to Special Agent [redacted], by delivering six prescriptions for that drug which they knew were not issued in the usual course of medical practice for a legitimate medical purpose:

1. 240 dosage units of Percodan, a Schedule II narcotic drug controlled substance,

2. 180 dosage units of Valium, a Schedule IV non-narcotic drug controlled substance.

CONCLUSIONS OF LAW:

The principles that govern judicial proceedings also apply to administrative proceedings. 8 Callaghan's Michigan Pleading and Practice (2d Ed) §60.48, p. 176.

As indicated above, the burden of proof is upon the State to prove, by a preponderance of the evidence, that the Respondent violated the Code as alleged by the State in its Complaint.

Martucci v Detroit [illegible]r of Police, supra, American Way Service Corporation v [illegible]ioner of Insurance, 133 Mich App 243; 317 NW 2d 870 (1982), a 1980 AACS R 338.973.

In addition to the APA and the Code applying in this matter, the Administrative Rules of the Department of Licensing and Regulation of the 1979 Michigan Administrative Code, as amended, being 1980 AACS R 338.951 et seq, apply to this case. As indicated Rule 23 is applicable, being R 338.973 (burden of proof).

In reaching the findings of fact listed above and the conclusions of law listed below, legitimate and legal inferences have been drawn from the only evidence on this record as a whole, i.e. the State's three exhibits. Those exhibits establish, by a preponderance of the evidence, the above-listed findings of fact and result in the conclusions of law listed below.

Count I

Alleged Violation of Section 16221(1)(a)

By this charge, the State asserts that the Respondent is guilty of violating his general duty consisting of negligence or failure to exercise due care, whether or not injury results, in violation of section 16221(1)(a) of the Code.

Clearly, the record as a whole in this matter establishes, by a preponderance of the evidence, that the Respondent violated his general duty of care by distributing controlled substances by delivering prescriptions for drugs which were not issued in the usual course of medical practice for a legitimate medical purpose.

Accordingly, the State has proven that the Respondent violated section 16221(1)(a) of the Code as alleged in Count I of the Complaint. Therefore, a violation of that section is found.

Count IV

Alleged Violation of Section 16221(1)(b)(v) of the Code

The State in Count IV of its Complaint is alleging that the Respondent's conduct and conviction reasonably relate to and adversely effect the Respondent's ability to practice in a safe and competent manner in violation of section 16221(1)(b)(v) of the Code.

This record as a whole establishes, by a preponderance of the evidence, that the Respondent was found guilty of 11 counts of the indictment establishing 11 felony convictions under federal law.

Further, a preponderance of the evidence establishes that the distribution of controlled substances by the Respondent through prescriptions which were not issued in the usual course of medical practice for a legitimate medical purpose adversely effects his ability to practice in a safe and competent manner while treating patients.

The Respondent's conviction and other underlying conduct established that he knowingly, intentionally, and unlawfully participated in conduct, i.e. the unlawful distribution of controlled substances, for non-medical purposes. The evidence proves that the Respondent had no legitimate medical purpose for

his involvement with the distribution of controlled substances through the use of prescriptions that were not issued in the usual course of his medical practice.

This, then, is the type of conviction that the Code and legislature intended to prohibit under section 16221(1)(b)(v) of the Code. Danto v Michigan Board of Medicine, 168 Mich App 438; 425 NW 2d 171 (1988).

The Respondent's conduct demonstrates an inability to practice medicine in a safe and competent manner in violation of section 16221(1)(b)(v) of the Code. Thus, the State has established its allegations under Count IV of its Complaint and a violation of section 16221(1)(b)(v) is found on this record.

Count VI

Alleged Violation of Section 16221(1)(c)(iii) of the Code

In Count VI of the Complaint, the State asserts that the Respondent, by his conduct and conviction, has demonstrated and, in fact, constitutes the practice of medicine outside the scope of his license in violation of section 16221(1)(c)(iii) of the Code.

The practice of medicine does not consist solely of those practices enumerated in the Code as coming under the practice of medicine. It includes those enumerated practices and other practices not declared to be within the exclusive authority and jurisdiction of a defined healing art and specifically excludes practices which are totally prohibited by a doctor of medicine. Attorney General v Beno, 422 Mich 93; 373 NW 2d 544 (1985).

In this case, the Respondent's conduct was totally so inappropriate, by distributing controlled substances through the use of a prescription which he knew was not issued in the usual course of medical practice for a legitimate medical purpose, that it is so clearly outside the scope of the practice of medicine that a violation of section 16221(1)(c)(iii) of the Code as alleged by the State is clearly shown on this record.

Therefore, the State has proven, by a preponderance of the evidence, that the Respondent violated section 16221(1)(c)(iii) of the Code as alleged in Count VI of the Complaint.

Count VII

Alleged Violation of Section 16221(1)(c)(iv) of the Code

The State alleges in Count VII of its Complaint that the Respondent's conviction and underlying conduct involved in the intentional and unlawful distribution of controlled substances is in violation of section 16221(1)(c)(iv) of the Code.

The record as a whole on this matter establishes, by a preponderance of the evidence, that the Respondent knowingly, intentionally, and unlawfully distributed controlled substances in violation of section 16221(1)(c)(iv) of the Code.

The State has proven, by a preponderance of the evidence, that the Respondent, by his conduct, did violate section 16221(1)(c)(iv) of the Code as alleged in Count VII of the Complaint.

SUMMARY:

As indicated above, the following counts of the Administrative Complaint are dismissed: II, III, V, and VIII.

This record as a whole clearly establishes, by a preponderance of the evidence, the State's allegations as contained in Counts I, IV, VI and VII of its Complaint.

This record, then, shows that the Respondent has violated section 16221(1)(a), 16221(1)(b)(v), 16221(1)(c)(iii), and 16221(1)(c)(iv) of the Code.

Edward F. Rodgers
Administrative Law Judge

STATE OF MICHIGAN

DEPARTMENT OF LICENSING AND REGULATION

BOARD OF MEDICINE

In the Matter of

ROBERT L. ALEXANDER, M.D.
H.O. No. 89-416

STIPULATION AND ORDER

STIPULATION

NOW COME the respective parties, by counsel, and hereby stipulate and agree as follows:

1. The July 6, 1989 order for continuance issued and entered by Administrative Hearing Officer Edward F. Rodgers is attached hereto as Exhibit A and is incorporated herein by reference as if fully set forth.

2. Robert L. Alexander, M.D., hereafter Respondent, hereby voluntarily surrenders his right to practice medicine in the state of Michigan effective July 10, 1989. Respondent is voluntarily surrendering his license in consideration for an adjournment of the administrative hearing scheduled in the captioned matter for July 10, 1989.

3. The surrender of Respondent's license, and thereby his right to practice medicine, shall remain in effect

during the pendency of this proceeding before the Board of Medicine, hereafter Board.

4. The voluntary surrender of Respondent's license and right to practice medicine in the state of Michigan is irrevocable during the pendency of these proceedings before the Board.

5. In the event Respondent practices medicine while this matter is pending before the Board, the Board may take further action against Respondent pursuant to 1980 AACS, R 338.983, and section 16221(g) of the Public Health Code, 1978 PA 368, as amended; MCL 333.1101 et seq; MSA 14.15(1101) et seq.

6. The Board is not bound to credit the period of time during which Respondent's license was voluntarily surrendered to any period of suspension or revocation which the Board may ultimately impose as the appropriate disciplinary sanction in this matter.

APPROVED BY:

Mark E. Donnelly (P-39281)
Assistant Attorney General
Dated: Sept 18, 1989

Robert L. Alexander, M.D.
Respondent
Dated: 8/1/89

APPROVED BY:

Max R. Hoffman, Jr. (P-23199)
Attorney for Respondent
Dated: 9/13/89

ORDER

WHEREAS, an administrative complaint was filed on December 15, 1988 charging Respondent with having violated section 16221(a), (b)(i), (b)(v), (b)(vi), (c)(iii) and (c)(iv) of the Public Health Code, supra; and

WHEREAS, a hearing was scheduled before a duly authorized administrative hearing officer for July 10, 1989 on the aforesaid complaint in accordance with the Administrative Procedures Act of 1969, 1969 PA 306, as amended; MCL 24.201 et seq; MSA 3.560(101) et seq; and

WHEREAS, by stipulation submitted herewith, Respondent has agreed to voluntarily surrender his license and right to practice medicine pending the final disposition of the charges brought in the aforesaid administrative complaint;

NOW THEREFORE, in accordance with the July 6, 1989 order granting continuance issued by Administrative Hearing Officer Edward F. Rodgers;

IT IS HEREBY FOUND that Respondent hereby voluntarily surrenders his right to practice medicine in the state of Michigan effective July 10, 1989 and agrees that said surrender of his license and right to practice medicine shall remain in effect during the pendency of this proceeding before the Board.

IT IS FURTHER FOUND that Respondent agrees that said voluntary surrender of his license and right to practice medicine in the state of Michigan is irrevocable during the pendency of these proceedings before the Board.

IT IS FURTHER FOUND that Respondent agrees that if he practices medicine while this matter is pending before the Board the Board may take further action against Respondent pursuant to R 338.983, supra, and section 16221(g) of the Public Health Code, supra.

Accordingly,

IT IS HEREBY ORDERED that Respondent voluntarily surrender his license to practice medicine in the State of Michigan pending the final disposition of this matter by the Board.

IT IS FURTHER ORDERED that should Respondent violate any term or condition set forth herein, or fail to comply with any of the provisions contained in the stipulation submitted herewith, the Board may determine that Respondent has violated an order of the Board and proceed pursuant to R 338.983, supra, and section 16221(g) of the Public Health Code, supra.

IT IS FURTHER ORDERED that this order shall take immediate effect on the date signed as set forth below.

Signed this 20 day of Sept, 1989.

MICHIGAN BOARD OF MEDICINE

By _____
Chairperson

Approved as to form and substance:

_____
Max R. Hoffman, Jr. (P-23199)
Attorney for Respondent

This is the last and final page of a Stipulation and Order in the matter of Robert L. Alexander, M.D. pending before the Michigan Board of Medicine and consisting of five (5) pages, this page included.

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mlp/46/20-21

STATE OF MICHIGAN

DEPARTMENT OF LICENSING AND REGULATION

ADMINISTRATIVE LAW SERVICES OFFICE

In the matter of:

ROBERT L. ALEXANDER, M.D. Docket No. 89-416

_____/

Issued and entered
this 6th day of July, 1989
by Edward F. Rodgers
Administrative Law Judge

ORDER FOR CONTINUANCE

This matter originated with the filing of a formal Administrative Complaint by the Attorney General's Office on behalf of the State of Michigan (State) on December 15, 1988.

On or about February 14, 1989, a copy of the formal Administrative Complaint and a Notice of Administrative Proceedings were forward to the Respondent at his last known address.

On or about April 17, 1989, Mr. Mark E. Donnelly, Esq., Assistant Attorney General, filed a "Demand for Hearing" on behalf of the State. Mr. Donnelly's Demand for Hearing was filed with the Bureau of Health Services, Department of Licensing and Regulation (Department).

On April 25, 1989, Mr. Max R. Hoffman, Jr., Esq., filed an appearance on behalf of the Respondent with the State of Michigan, Department of Licensing and Regulation, Board of Medicine (Board).

The Department, on May 2, 1989, forwarded to the Respondent at his last known address, a "Notice of Hearing." The Notice of Hearing indicated that a contested case hearing pursuant to the Administrative Procedures Act of 1969, as amended (APA), being MCLA 24.201 et seq.; MSA 3.560(101) et seq. was scheduled for July 10, 1989. Furthermore, the Notice of Hearing indicated that the contested case hearing was scheduled before a duly authorized Administrative Law Judge pursuant to the Public Health Code of 1978, as amended, (Code), being MCLA 333.1101 et seq.; MSA 14.15(1101) et seq.. The Notice also indicated that the APA and any rules promulgated under the Code were applicable.

Mr. Hoffman, on behalf of the Respondent, on or about June 1, 1989, filed with the Presiding Administrative Law Judge (Judge) a "Motion to Adjourn Hearing." Further, on or about June 13, 1989, Mr. Donnelly filed a "Response in Opposition to Motion to Adjourn Hearing."

The Presiding Judge, on June 14, 1989, issued and entered an Order scheduling oral argument on the Motion to Adjourn due to the fact that the Attorney General's Office had objected to this Request for First Adjournment in this matter.

On June 19, 1989, oral argument on the Motion to Adjourn was held before the Presiding Judge. Mr. Donnelly appeared on behalf of the State, and Mr. Hoffman on behalf of the Respondent.

At the conclusion of the oral argument on the Motion to Adjourn, the Presiding Judge determined that it was appropriate to continue this matter for at lease 90 days to allow the Respondent to

be released from the United States Federal Corrections System to personally appear at his hearing and offer a proper defense. Mr. Donnelly, on behalf of the State, objected to the Continuance on the main grounds that the Respondent could continue to practice medicine if he were granted a long Continuance in this matter.

Based on the record as a whole in this matter, as established by a preponderance of the evidence during the June 19, 1989 oral argument hearing and based on the previous pleadings of the parties, it is determined by the Presiding Judge that justice, due process and fair play allow the Respondent an opportunity to continue this matter in order to secure his appearance at the contested case hearing. However, mindful of the State's objections to the Respondent continuing to hold an "active" license, it was determined during the June 19 hearing by the Presiding Judge, that a lengthy Continuance could only be granted if the public health, safety and welfare were protected by the Respondent putting his medical license in some type of "escrow" during the pendency of this matter.

The Presiding Judge determined that the July 10, 1989 contested case hearing should be adjourned until September or October to allow the Respondent's release from the Federal Corrections System so that he may properly defend the charges against him. However, the Judge indicated that the Continuance was contingent upon the Respondent voluntarily surrendering his license during the pendency of this contested case hearing.

On Wednesday, July 5, 1989, a telephone conference call was held between Mr. Donnelly, Mr. Hoffman and the Presiding Judge. During the telephone conference call, it was understood by all of the parties that the July 10, 1989 contested case hearing would be adjourned and that the Board would be presented with a Stipulation and Consent Order in which the Respondent would voluntarily surrender his license pending the final disposition of this matter by the Board after the contested case hearing process was completed.

THEREFORE IT IS ORDERED that:

1) The contested case hearing scheduled for July 10, 1989 is ADJOURNED.

2) The contested case hearing in this matter shall commence at 9:30 a.m. on Tuesday, September 19, 1989 in the hearing rooms of the Administrative Law Services Office, Second Floor, North Ottawa Towers State Office Building, 611 W. Ottawa Street, Lansing, Michigan.

3) The parties shall submit their Stipulation and Consent Order to the Board indicating that the Respondent voluntarily surrenders his license during the pendency of this contested case and until final disposition by the Board in this matter, pursuant to the ruling of the Presiding Administrative Law Judge.

4) The Stipulation and Consent Order shall be presented to the Board within a reasonable period of time.

Jurisdiction of the matters contained herein is specifically retained together with the authority to issue such further order or orders as may be deemed just, necessary, and appropriate.

Edward F. Rodgers
Edward F. Rodgers
Administrative Law Judge