

**BEFORE THE BOARD OF MEDICAL EXAMINERS  
STATE OF MONTANA**

_____	)	<b>Docket No. CC-02-0166-MED</b>
<b>IN THE MATTER OF THE DISCIPLINARY</b>	)	<b>Hearings Bureau Case No. 1999-2002</b>
<b>TREATMENT OF THE LICENSE OF</b>	)	
<b>KEVIN R. HAM, M.D.,</b>	)	<b>RECOMMENDED ORDER</b>
<b>License No. 8142.</b>	)	<b>ON SANCTIONS</b>
_____	)	

**I. INTRODUCTION**

By order dated November 6, 2002, Hearing Examiner Gregory L. Hanchett granted the Department of Labor and Industry's motion for summary judgment on the issue of liability for sanctions based upon unprofessional conduct. The hearings examiner concluded that the licensee had committed acts of unprofessional conduct.

In lieu of contested case proceedings, the parties agreed to submit briefs with respect to the issue of the appropriate sanction to be recommended to the regulatory board. Each side timely filed briefs setting out its position on the imposition of sanctions.

**II. FINDINGS OF FACT**

1. At all times relevant to this matter, the licensee has been licensed to practice medicine in this state by the Montana Board of Medical Examiners.
  
2. On June 18, 1999, the licensee pleaded guilty in Missouri to one count of statutory sodomy, a class C felony. The crime occurred over a period of nine months, between August 1997 and May 1998. The victim of the crime was the licensee's male step child, who was under the age of seventeen at the time the crime was perpetrated. The crime constitutes a crime of moral turpitude.
  
3. On September 7, 1999, the trial court presiding over the charge sentenced the licensee to five years in the Missouri Department of Corrections. At the present time, the licensee is still serving his prison sentence.

4. On October 27, 1999, the licensee permanently surrendered his license to practice medicine in Ohio to the Ohio medical board.

5. On December 6, 1999, the Ohio Medical board permanently revoked the licensee's Ohio medical license.

6. On February 3, 2000, the Missouri State Board of Registration for the Healing Arts revoked the licensee's license to practice medicine in Missouri. The Missouri board further prohibited the licensee from reapplying for admission to practice medicine for a period of seven years, until sometime during the year 2007.

7. The disciplinary action taken by the boards in Ohio and Missouri was a direct consequence of the licensee's conviction for sodomy. Under Missouri law, the licensee's conviction of a felony offense involving moral turpitude required automatic revocation of the licensee's Missouri license.<sup>(1)</sup>

8. The licensee has been very candid with the Montana Board of Medical Examiners regarding his Missouri conviction and the status of his medical licenses in Missouri and Ohio.

9. The licensee has been undergoing sex offender treatment while he has been incarcerated. He has not yet completed his sex offender treatment. In addition, his incarceration is not yet completed.

10. The nature of the licensee's crime, sodomy committed upon a minor, is of grave concern and weighs heavily in considering the appropriate sanction in this case. By the very nature of the practice of medicine, a physician comes into close, personal contact with young patients in private settings.

### **III. CONCLUSIONS OF LAW**

1. A regulatory board may impose any sanction provided for by Mont. Code Ann. Title 37, Chapter 1, upon a finding of unprofessional conduct. Mont. Code Ann. § 37-1-307(f). Among other things, Mont. Code Ann. § 37-1-312 provides that a regulatory board may revoke a license or suspend the license for an indefinite term.

2. To determine which sanctions are appropriate, the regulatory board must first consider the sanctions that are necessary to protect the public. Only after this determination has been made can the board then consider and include in the order requirements that are designed to

rehabilitate the licensee. Mont. Code Ann. § 37-1-312(2).

3. The licensee contends that the provisions of Mont. Code Ann. § 37-1-203 and the holding of *Ulrich v. State ex rel. Board of Funeral Examiners*, 1998 MT 196, 289 Mont. 407, 961 P.2d 126, require a showing that the licensee has not been rehabilitated before imposing sanctions. Neither the statute nor the case supports the licensee's proposition. In *Ulrich*, the Montana Supreme Court held that the fact of conviction of a felony involving moral turpitude (theft) was not sufficient in and of itself to find that unprofessional conduct had been committed nor was it sufficient to require revocation. In doing so, the court specifically held:

Thus, unlike the revocation statute in *Erickson* [NOTE: full cite in the next paragraph], the revocation statute and the Board's own administrative rule do cross-reference § 37-1-203, MCA. Regardless of the fact that § 37-1-203, MCA, does not on its own terms apply to revocation proceedings, *Ulrich* is entitled to be considered under the provisions of that statute by virtue of § 37-19-311, MCA (1993), and Rule 8.30.701(1)(y), ARM.

1998 MT ¶ 24.

Unlike the statute and regulation applicable to *Ulrich*, the statute applicable to revocation or suspension of a physician's license, Mont. Code Ann. § 37-3-323, and the applicable administrative regulation, Admin. R. Mont. 24.156.625, do not refer to Mont. Code Ann. § 37-1-203. The language of Mont. Code Ann. § 37-1-203 applies only to persons "who have lost their license or are seeking a license for the first time." *Erickson v. Board of Medical Examiners* (1997), 282 Mont. 367, 373-74, 938 P.2d 625, 629. Here, the question is one of the appropriate sanctions to be imposed against an existing license. Thus, unlike *Ulrich*, there is no requirement that the Board consider the factors enumerated in Mont. Code Ann. § 37-1-203 prior to imposing a sanction in the present administrative proceeding. *Erickson, supra*.

4. In *Gilpin v. Board of Nursing* (1998), 254 Mont. 308, 837 P.2d 1342 (overruled on other grounds in *Erickson, supra*), the Montana Supreme Court upheld the hearing examiner's determination that revocation was an appropriate sanction. In that case, the licensee, a registered professional nurse, had been convicted of sexually assaulting two minor females. Despite the fact that the assaults had not been committed in the course of the licensee's practice, the court upheld the imposition of revocation, noting that the practice of nursing, by its very nature, "involves the care of patients, including possible contact with intimate body areas of patients who are young, old, male, and female." Furthermore, the court noted that there was nothing in the record that showed that the licensee had been rehabilitated and further noted that the licensee had not yet completed his sentence of imprisonment.

5. Like the licensee in *Gilpin*, the licensee in this case has not yet completed his sentence and he continues to be incarcerated within the Missouri Department of Corrections. After his incarceration, he will continue to remain on probation for some time. While it appears that the licensee has made progress toward his rehabilitation, his rehabilitation is not complete. He continues to be incarcerated and he continues to receive sex offender treatment.

6. Taking account of the primary duty of the board to protect the public, and considering both the nature of the crime committed by the licensee as well as the duties carried out by physicians, the licensee cannot be allowed to practice medicine in this state as he has failed to show that he has been rehabilitated. Unquestionably, someone who has been convicted of sodomy upon a minor is unfit to practice medicine in the absence of substantial proof that he has been rehabilitated and poses no threat to patients.

7. The reasoning of *Gilpin* applies to the instant matter and compels the hearing examiner to conclude that revocation of the license is appropriate. When the licensee can demonstrate that he has completed his rehabilitation, he can then apply to the Board of Medical Examiners for a new license to practice medicine. At that time, the Board can determine whether the licensee has been rehabilitated and is fit to practice medicine.

#### **IV. RECOMMENDED ORDER**

Based on the foregoing, the hearing examiner recommends to the Board of Medical Examiners that License No. 8142 be revoked.

DATED this 30th day of January, 2003.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT

GREGORY L. HANCHETT  
Hearing Examiner

**NOTICE**

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.

1. § 334.103 RSMo 1994 provides:

The license of a physician shall be automatically revoked at such time as the final trial proceedings are concluded whereby a physician has been adjudicated and found guilty, or has entered a plea of guilty or nolo contendere, in a felony criminal prosecution under the laws of the state of Missouri, the laws of any other state, or the laws of the United States of America for any offense reasonably related to the qualifications, functions or duties of a physician, or for any felony offense, an essential element of which is fraud, dishonesty or an act of violence, or for any felony offense involving moral turpitude, whether or not sentence is imposed, or, upon the final and unconditional revocation of the license of a physician to practice the healing arts in another state or territory upon grounds for which revocation is authorized in this state following a review of the record of the proceedings and upon a formal motion of the state board of registration for the healing arts.