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THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK

Office of Professional Discipline, 475 Park Avenue South, 2nd Floor, New York, NY 10016-8901
Tel. (212) 951-6400
Fax (212) 951-6420
E-mail: OP4INFO@MAIL.NYSED.GOV

Public

April 13, 2006

Marshall J. Hubsher, Physician
7 Forest Drive
Sands Point, New York 11050

Re: Application for Restoration

Dear Dr. Hubsher:

Enclosed please find the Commissioner's Order regarding Case No. CP-06-03 which is in reference to Calendar No. 21720. This order and any decision contained therein goes into effect five (5) days after the date of this letter.

Very truly yours,

Daniel J. Kelleher
Director of Investigations

By: *William D. Klaus*
William D. Klaus
Supervisor

DJK/WDK/bt

cc: Nathan L. Dembin, Esq.
Nathan L. Dembin & Associates, P.C.
225 Broadway – Suite 1400
New York, New York 10007

The
University of the
Education  State of New York
Department

IN THE MATTER

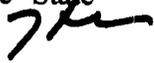
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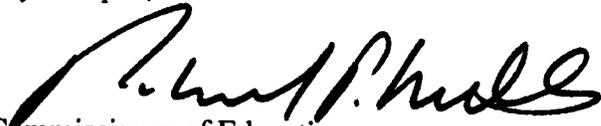
Application of MARSHALL J.
HUBSHER for restoration of his
license to practice as a physician in
the State of New York.

Case No. CP-06-03

It appearing that the license of MARSHALL J. HUBSHER, 7 Forest Drive, Sands Point, New York 11050, to practice as a physician in the State of New York, was revoked pursuant to Order of the Administrative Review Board for Professional Medical Conduct, effective May 16, 1995, and he having petitioned the Board of Regents for restoration of said license, and the Regents having given consideration to said petition and having agreed with and accepted the recommendations of the Peer Committee and the Committee on the Professions, now, pursuant to action taken by the Board of Regents on March 21, 2006, it is hereby

ORDERED that the petition for restoration of License No. 129123, authorizing MARSHALL J. HUBSHER to practice as a physician in the State of New York, is granted.

IN WITNESS WHEREOF, I, Richard P. Mills,
Commissioner of Education of the State of New York for
and on behalf of the State Education Department, do
hereunto set my hand and affix the seal of the State
Education Department, at the City of Albany, this 
day of April, 2006.


Commissioner of Education

Case No. CP-06-03

It appearing that the license of MARSHALL J. HUBSHER, 7 Forest Drive, Sands Point, New York 11050, authorizing him to practice as a physician, was revoked pursuant to Order of the Administrative Review Board for Professional Medical Conduct, effective May 16, 1995, and he having petitioned the Board of Regents for restoration of said license, and the Regents having given consideration to said petition and having agreed with and accepted the recommendations of the Peer Committee and the Committee on the Professions, now, pursuant to action taken by the Board of Regents on March 21, 2006, it was

VOTED that the petition for restoration of License No. 129123, authorizing MARSHALL J. HUBSHER to practice as a physician in the State of New York, is granted.

Case Number
CP-06-03
February 24, 2006

THE UNIVERSITY OF THE STATE OF NEW YORK
The State Education Department

Report of the Committee on the Professions
Application for Restoration of Physician License

Re: **Marshall J. Hubsher**

Attorney: Nathan Dembin

Marshall J. Hubsher, 7 Forest Drive, Sands Point, New York 11050, petitioned for restoration of his physician license. The chronology of events is as follows:

- 10/22/76 Issued license number 129123 to practice as a physician in New York State.
- 06/18/82 Charged with violating Article 33 of the Public Health Law by the Commissioner of Health. (See "Disciplinary History.")
- 10/29/82 Sentenced in United States District Court, Eastern District of New York after having pled guilty to knowingly and intentionally possessing a controlled substance in violation of Title 21 U.S.C. section 844.
- 03/08/83 Disciplined by the Commissioner of Health based upon a stipulation concerning the above referenced charges.
- 04/24/87 Sentenced in County Court, Nassau County after having pled guilty to Grand Larceny in the Second Degree and Tampering with Public Records in the First Degree, both class D felonies.
- 05/06/87 Charged with professional misconduct by the Office of Professional Medical Conduct of the Department of Health. (See "Disciplinary History.")
- 03/25/88 Board of Regents voted to approve 18 months actual suspension, 42 months stayed suspension, and 42 months probation.
- 04/27/88 Commissioner's Order effective.
- 04/15/94 Charged with professional misconduct by Department of Health. (See "Disciplinary History.")

- 01/20/95 Hearing Committee of the State Board for Professional Medical Conduct voted revocation.
- 05/09/95 Administrative Review Board for Professional Medical Conduct sustained revocation.
- 05/16/95 Effective date of revocation.
- 05/17/96 First application for restoration of physician license.
- 02/05/99
- 03/01/99
- 03/05/99 First Peer Committee restoration review
- 11/28/99 First Report and Recommendation of Peer Committee.
- 01/05/00 First Report and Recommendation of the Committee on the Professions.
- 03/07/00 Board of Regents voted denial of first restoration application.
- 04/07/00 Commissioner's order denying restoration served.
- 04/11/03 Second application for restoration submitted.
- 10/06/04 Second Peer Committee restoration review.
- 07/07/05 Second Report and Recommendation of Peer Committee. (See "Recommendation of the Peer Committee.")
- 02/24/06 Second Report and Recommendation of Committee on the Professions.

Disciplinary History. On May 6, 1987, the Department of Health charged Dr. Hubsher with three specifications of professional misconduct. The first specification was based upon his conviction of committing an act constituting a crime under New York State Law. On or about January 14, 1987, Dr. Hubsher pled guilty to submitting false claims to the Medicaid program for three and one-half years for approximately \$4,125 and making a false entry on and falsely altering a New York State Medical Assistance Program Prior Approval Request. On April 24, 1987, he was sentenced to 4 months in jail and 5 years' probation, and he was ordered to make restitution in the amount of \$25,569.55 and to return \$6,550 to two patients. The second specification of professional misconduct charged him with being convicted of committing an act constituting a crime under Federal Law. On or about October 29, 1982, Dr. Hubsher pled guilty to knowingly and intentionally possessing approximately 2,000 Methaqualone tablets. He was fined \$5,000. Lastly, Dr. Hubsher was charged with being in violation of Article 33 of the Public Health Law. On or about March 8, 1983, the Commissioner of Health found that Dr. Hubsher issued a prescription for a controlled substance with a

false date. His right to issue triplicate prescriptions was revoked for 24 months, and he was assessed a civil penalty of \$1,200. On February 25, 1988, a Regents Review Committee found him guilty of the three specifications of professional misconduct. The Committee recommended that his license be suspended for five years, that the last 42 months of the suspension be stayed, and that he be placed on probation for 42 months under specified terms and conditions. On March 25, 1988, the Board of Regents accepted the Committee's findings of fact, determination as to guilt, and recommendation as to penalty, and the Commissioner's Order was effective April 27, 1988.

On April 15, 1994, the Department of Health charged Dr. Hubsher with 13 specifications of professional misconduct, specifically, practicing the profession while his license was suspended, failing to maintain records, and practicing the profession fraudulently. A Hearing Committee of the State Board for Professional Medical Conduct concluded that Dr. Hubsher did provide treatment, issue prescriptions, formulate diagnoses, modify dosages and alter medications for many of his patients, including Patients A, B, C, D and AH, during the period of his suspension. The Committee also determined that Dr. Hubsher failed to keep any records reflecting the evaluation and treatment of his patients while he treated them. Lastly, the Committee found that Dr. Hubsher did not inform Patients A and AH that his license was suspended and that he intentionally and knowingly concealed that fact in order to mislead them to falsely believe he was licensed to practice psychiatry and could prescribe medications for their disorders. The Committee stated, "He manipulated circumstances to intentionally conceal he was practicing medicine during the suspension of his license. He purposely dissembled by signing bills as 'M. Hubsher, Certified Psychiatrist' or 'M. Hubsher, M.D.' and calling in prescriptions using the name 'M. Hubsher, M.D.', 'Hubsher, M.D.', or 'Merritt Hubsher, M.D.' for the purpose of making patients, insurance carriers, and pharmacies falsely believe that treatment and prescriptions were rendered by a licensed physician." The Committee also felt that Dr. Hubsher perjured himself by falsely testifying that he gave his brother, Merritt Hubsher, M.D., a check for \$30,000 for being available to prescribe medications to his patients during his suspension but noted that he never claimed a business tax deduction nor issued an IRS Form 1099 to his brother for income paid. The Hearing Committee voted to revoke his license.

Dr. Hubsher appealed the Committee's determination to an Administrative Review Board for Professional Medical Conduct. On May 9, 1995, the Review Board sustained the Hearing Committee's determination that Dr. Hubsher had practiced medicine while suspended, had failed to maintain adequate records, and had practiced medicine fraudulently and sustained the Committee's determination revoking his license. The revocation was effective May 16, 1995.

On May 17, 1996, Dr. Hubsher submitted his first application for restoration of his physician license. In a report dated November 28, 1999, a Peer Committee recommended unanimously that the application be denied. In a report dated January 5, 2000, the Committee on the Professions (COP) voted unanimously to concur with the recommendation of the Peer Committee that Dr. Hubsher's application for restoration of his license to practice as a physician in the State of New York be denied at that time. The COP concluded that Dr. Hubsher failed to adequately address (1) the underlying problems that led him to the revocation of his license and (2) what they found to be a

lack of professional judgment. The COP further found that he failed to acknowledge at that time the serious consequences his actions could have had on his patients. On March 7, 2000, the Board of Regents voted to deny Dr. Hubsher's petition for restoration of his physician license, and the Commissioner's order implementing that vote was served on April 7, 2000.

Recommendation of Peer Committee. (See attached Report of the Peer Committee.) The Peer Committee (Kavaler, Vorhaus, Norris) convened on October 6, 2004 to consider Dr. Hubsher's second application for restoration of his physician license. In its report dated July 7, 2005, the Committee voted unanimously to recommend that Dr. Hubsher's application for restoration be granted.

Recommendation of the Committee on the Professions. On September 29, 2005, the Committee on the Professions (Templeman, Frey, Hansen) met with Dr. Hubsher to consider his application for restoration. Nathan Dembin, his attorney, accompanied him.

The Committee asked Dr. Hubsher to explain the events that brought him to his present situation of having to seek restoration of his license. He explained that his difficulties started in 1980 when he first started living and working on his own. He reported that he rented a suite of offices and sublet part of the space to two other psychiatrists who illegally ordered large quantities of quaaludes which were delivered to the suite. As the individual responsible for the lease, Dr. Hubsher stated that he was held responsible for the illegal activities taking place on the premises. He reported that he didn't know about the illegal orders but stated that he should have known.

Dr. Hubsher reported that, also in 1980, he was treating two Medicaid patients who had agoraphobia, as a result of which they were unable to leave their homes. He agreed to see them at their homes, and each paid him cash for his expenses in traveling to see them in addition to the money he received from Medicaid for their sessions. As a result of these activities, he pled guilty to Grand Larceny in the Second Degree and Tampering with Public Records in the First Degree, both class D felonies, and he was sentenced to four months in jail. Dr. Hubsher asserted that he was unaware that his actions were illegal, as evidenced by the fact that he was reporting the private payments as income, but that he now realizes that he should have known that he shouldn't have been taking the additional payments for his traveling expenses.

Dr. Hubsher described the third incident included in the charges that led to the suspension as having begun with a request by one of his patients for a post-dated prescription for use during the patient's upcoming vacation. Dr. Hubsher wrote the prescription, and when the patient tried to fill the prescription prior to the date indicated on the prescription, the pharmacist called the Drug Enforcement Administration, as a result of which Dr. Hubsher was fined \$1,200 and lost his right to use Official New York State Prescription Forms for two years.

These three incidents led to the suspension of Dr. Hubsher's license in 1988. Dr. Hubsher indicated that, during that suspension, he arranged for his brother, who was also a psychiatrist, to see his patients for medical concerns while he continued to provide them with psychotherapy. Prior to his suspension, Dr. Hubsher wrote

prescriptions for some patients which included refills that would be good for a year, a practice he acknowledged was improper. Soon after entering the start of his arrangement with his brother, Dr. Hubsher said that his brother moved out of the area. Dr. Hubsher acknowledged that at that point he should have referred his patients to other psychiatrists. Instead of doing so, however, he engaged in activities which constituted the practice of medicine, including diagnosing and advising patients how to use and alter the use of medications. Dr. Hubsher reported that in 1989 one of his patients suffered a reaction to a medication prescribed by his brother. When an investigation revealed that his brother had no records of the patient or of the prescription, the brother told the investigator that Dr. Hubsher was treating the patient. Dr. Hubsher maintained that during his suspension he told all of his patients except one that his license was suspended and that he did not take on any new patients.

The COP asked the applicant what had changed since his prior application for restoration of his license was denied in 2000. Dr. Hubsher indicated that he was traumatized by the loss of his license and the accompanying loss of career and income, and that he applied for restoration as soon as he could. He expressed that this first application for restoration came too soon, before he had the opportunity to work his way through what he described as the five stages of reaction: denial, anger, bargaining, depression, and acceptance. He indicated that he has now had sufficient time to go through the process and to gain the necessary insight and that both a psychiatrist and a psychoanalyst, who provided services to Dr. Hubsher for approximately 14 years and eight years respectively, have reported that he has developed the insight into his past actions which is necessary for him to return to practice. He further reported that both the psychiatrist and the psychoanalyst indicated that there was little chance that Dr. Hubsher would repeat the activities that formed the basis of the disciplinary charges against him.

Dr. Hubsher told the COP that he has provided extensive volunteer services to the Red Cross and to his synagogue, providing free counseling to many individuals, many of whom were reacting to the trauma of the destruction of the World Trade Center. The applicant reported that this volunteer service had helped to make him more compassionate and caring. In order to address the ethical issues involved in his misconduct, he reported that he has taken courses in ethics. He considers himself to be a different person than he was 10 years ago. At that time, he was single and had no family; now he is married and has two children for whom he wants to be a good role model. To that end, he reported that he wants them to learn the importance of being honest and ethical, and that he has started school-based bullying and drug abuse counseling programs. He also reported that he supports the participation of his children on sports teams and helps them with their homework.

The COP asked Dr. Hubsher to discuss the causes of the incidents that led to the disciplinary proceedings brought against him. He replied that growing up he had always felt himself to be a favored child and that he had been first in his class in college and in medical school. His problems began when he left school and was on his own for the first time. He felt that he was "above everyone else" and "above the rules and regulations" of society. He went on to report that the suspension of his license in 1988 had been traumatic and that the death of his father and his impending marriage added

to his stress. Those stresses, combined with his immaturity, led him to make bad decisions.

When questioned about his plans for the future, Dr. Hubsher discussed his expertise in psychopharmacology and indicated that he would start up a private practice in psychiatry. He indicated that he had practiced legally from 1989 to 1995 without any malpractice or other patient complaints and that he would let doctors in his area know that he is able to practice again. He further indicated that he would continue to work with schools and with the Red Cross.

The overarching concern in all restoration cases is the protection of the public. Education Law §6511 gives the Board of Regents discretionary authority to make the final decision regarding applications for the restoration of a professional license. Section 24.7 of the Rules of the Board of Regents charges the COP with submitting a recommendation to the Board of Regents on restoration applications. Although not mandated by law or regulation, the Board of Regents has instituted a process whereby a Peer Committee first meets with an applicant for restoration and provides a recommendation to the COP. A former licensee petitioning for restoration has the significant burden of satisfying the Board of Regents that there is a compelling reason that licensure should be granted in the face of misconduct that resulted in the loss of licensure. There must be clear and convincing evidence that the petitioner is fit to practice safely, that the misconduct will not recur, and that the root causes of the misconduct have been addressed and satisfactorily dealt with by the petitioner. It is not the role of the COP to merely accept, without question, the arguments presented by the petitioner but to weigh and evaluate all of the evidence submitted and to render a determination based upon the entire record.

The COP agrees with the findings and recommendations of the Peer Committee. Dr. Hubsher has presented a compelling case that he understands the nature, causes, and effects of his misconduct. Given his current level of maturity and the insight he has developed from the psychoanalysis he has undergone and from his life experiences, it is highly unlikely that he will again engage in activities similar to those which led to the loss of his medical license.

In recommending the denial of his first application for restoration of his license, the Peer Committee reviewing that application questioned Dr. Hubsher's commitment to his expressed wish to help people as it saw no evidence that he was volunteering his time to provide counseling to people in his community. That Peer Committee also expressed its concern that it was not provided with sufficient evidence from a professional addressing the underlying problems that led the disciplinary actions against Dr. Hubsher. Finally, the Peer Committee indicated that it believed that Dr. Hubsher saw himself as the victim of actions taken by the Department of Health rather than expressing true remorse for the effect of his misconduct on his patients.

Similarly, the COP considering Dr. Hubsher's first application for restoration was concerned about his lack of appreciation of the seriousness of the offenses for which he was disciplined; his lack of judgment in failing to appreciate that the suspension of his license revealed a need to re-examine the way in which he conducted his practice; and his failure to appreciate the danger to his patients resulting from the inadequate

arrangements he made with his brother for their medical care while his license was suspended.

It appears from the record of the instant restoration proceeding that Dr. Hubsher has satisfactorily addressed the concerns expressed by the Peer Committee and the COP in his first restoration proceeding. He has provided volunteer counseling services through both his religious community and the Red Cross and has worked to establish bullying and drug abuse counseling programs in local schools. Additionally, he has submitted reports from a psychiatrist who has monitored his progress periodically over a fourteen-year period. Those reports indicate that Dr. Hubsher has meaningfully addressed the underlying causes of the misconduct in which he engaged, that he expressed sincere remorse and apologized to his patients for his mistakes in judgment, and that he has matured significantly, now exhibiting "a caring, honest, ethical and responsible attitude." Dr. Hubsher has also submitted affidavits from several of his patients indicating that he had apologized to those he treated while his license was suspended and that he had provided volunteer services to those he served more recently. At his appearance before this COP, he acknowledged the seriousness of his misconduct and its effect on his patients, and he appears to have recognized the necessity of conducting his practice in accordance with requirements designed to protect the public from harm.

We note that there has never been any question raised with respect to the quality of the services actually provided by Dr. Hubsher, and there are no allegations of the abuse of any patient. We further note that Dr. Hubsher has completed extensive continuing education programs and has continued to provide permissible psychotherapy services, thus maintaining and developing his skills at working with patients. The record clearly supports the conclusion of the Peer Committee that "[t]he applicant would unquestionably be an asset to the community, and to deprive it of his services further would be an injustice."

Based on all of the foregoing, a complete review of the record, and its meeting with him, the Committee on the Professions voted unanimously to concur with the recommendation of the Peer Committee that the application herein be granted and that Dr. Hubsher's license to practice as a physician in New York State be restored.

Leslie Templeman, Chair

Joseph Frey

Stanley Hansen



The University of the State of New York

NEW YORK STATE EDUCATION DEPARTMENT
OFFICE OF PROFESSIONAL RESPONSIBILITY
STATE BOARD FOR MEDICINE

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In the Matter of the Application of

MARSHALL J. HUBSHER

REPORT OF
THE PEER
COMMITTEE
CAL. NO. 21720

for the restoration of his license to
practice as a physician in the State of
New York.

-----X

MARSHALL J. HUBSHER, hereinafter known as the applicant, was previously licensed to practice as a physician on or about October 22, 1976 in the State of New York by the New York State Education Department. Said license was revoked, effective May 16, 1995, by the Office of Professional Medical Conduct (OPMC), New York State Department of Health (DOH), as the result of a professional misconduct proceeding.

A prior application for restoration was denied in 2000.

The applicant has now applied again for restoration of his license.

MARSHALL J. HUBSHER (21720)

PRIOR DISCIPLINARY HISTORY

On May 6, 1987, the Department of Health charged the applicant with three specifications of professional misconduct. The first specification was based upon his conviction of committing an act constituting a crime under New York State law. On or about April 24, 1987, the applicant pled guilty to submitting false claims to the Medicaid program for three and one-half years for approximately \$4,125 and making a false entry on and falsely altering a New York State Medical Assistance Program Prior Approval Request. He was sentenced to 4 months in jail and 5 years' probation and ordered to make restitution for \$25,569.55 and to return \$6,550 to two patients. The second specification of professional misconduct charged him with being convicted of committing an act constituting a crime under federal law. On or about December 23, 1982, the applicant pled guilty to knowingly and intentionally possessing approximately 2,000 Methaqualone tablets. He was fined \$5,000. Lastly, the applicant was charged with being in violation of Article 33 of the Public Health Law in that on or about March 8, 1983, the Commissioner of Health found that the applicant issued a prescription for a controlled substance with a false date. His right to issue triplicate prescriptions was revoked for 24 months and he was assessed a civil penalty of \$1,200.

On February 25, 1988, a Regents Review Committee found him

MARSHALL J. HUBSHER (21720)

guilty of the three specifications of professional misconduct and recommended that his license be suspended for five years and that the last 42 months be stayed, at which time he be placed on probation for 42 months under specified terms and conditions. On March 25, 1988, the Board of Regents accepted the Committee's findings of fact, determination as to guilt, and recommendation as to penalty, and the Commissioner's Order was effective April 27, 1988.

On April 15, 1994, the Department of Health charged the applicant with 13 specifications of professional misconduct, specifically practicing the profession while his license was suspended, failing to maintain records, and practicing the profession fraudulently. A Hearing Committee of the State Board for Professional Medical Conduct concluded that the applicant did provide treatment, issue prescriptions, formulate diagnoses, modify dosages and alter medications for many of his patients, including Patients A, B, C, D and AH, during the period of his suspension. The Committee also determined that the applicant failed to keep any records reflecting the evaluation and treatment of his patients while he treated them. Lastly, the Committee found that the applicant did not inform Patients A and AH that his license was suspended and that he intentionally and knowingly concealed that fact in order to mislead them to falsely believe he was licensed to practice psychiatry and could prescribe medications for their disorders. The Committee stated,

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He manipulated circumstances of his license. He purposely dissembled by signing bills as 'M. Hubsher, Certified Psychiatrist' or 'M. Hubsher, M.D.' and calling in prescriptions using the name 'M. Hubsher, M.D.,' 'Hubsher, M.D.,' or 'Merritt Hubsher, M.D.' for the purpose of making patients, insurance carriers, and pharmacies falsely believe that treatment and prescriptions were rendered by a licensed physician." The Committee also felt that the applicant perjured himself by falsely testifying that he gave his brother, Merritt Hubsher, M.D., a check for \$30,000 for being available to prescribe medications to his patients during his suspension but noted that he never claimed a business tax deduction nor issued an IRS Form 099 to his brother for income paid. The Hearing Committee voted to revoke his license.

The applicant appealed the Committee's determination to an Administrative Review Board for Professional Medical Conduct. On May 9, 1995, the Review Board sustained the Hearing Committee's determination that the applicant had practiced medicine while suspended, had failed to maintain adequate records, and had practiced medicine fraudulently and sustained the Committee's determination revoking his license. The revocation was effective May 16, 1995.

BACKGROUND INFORMATION

The written application, supporting papers provided by the applicant and papers resulting from the investigation conducted

MARSHALL J. HUBSHER (21720)

by the Office of Professional Discipline (OPD) were compiled by the prosecutor from OPD into a packet that was distributed to this Peer Committee in advance of its meeting and also provided to the applicant.

APPLICATION FOR RESTORATION

The applicant executed the State Education Department's (SED) standard form for applying for restoration of licensure. The application contained information and attachments as referred to, below:

Entries in the basic application form:

Continuing Medical Education (CME): The applicant listed a number of courses in different areas of psychology, some correspondence and some class-attended. He also wrote that he has continued to thoroughly read monthly journals in psychiatry and attend grand rounds at Long Island Jewish Hospital for the latest information on new medications and new treatments. He noted that although he has never had a malpractice case or patient complaint made against him, the many hours of CME he has taken has given him the additional confidence and knowledge to be the "best caring, honest, moral, ethical psychiatrist I can be".

Community Service: With respect to this aspect of his restoration application, the applicant listed the following activities:

- 1) crisis counseling for the Red Cross;
- 2) psychotherapy to people in need at his synagogue;
- 3) assistance to the Port Washington School Board;

MARSHALL J. HUBSHER (21720)

- 4) coached Little League Baseball; and
- 5) volunteered at various synagogue-related activities.

Professional Rehabilitation Activities: The applicant cited his therapy with Dr. Richard Grossman of the Impaired Physicians Program of the New York State Medical Society, which he voluntarily entered into to understand the reasons for his mistakes and to prevent future ones, and his later treatment with Dr. Peter Stein, a psychiatrist, who he saw from April 1988 to April 1993, and who monitored his psychiatric practice for the Office of Professional Medical Conduct.

Submissions of Affidavits: The applicant listed thirteen (13) individuals who submitted affidavits. These included a number of former and current patients, a classmate of the applicant's from medical school, and his rabbi, among others.

Additional attachments to the application: The applicant submitted a written statement as part of his petition in which he elaborated on his personal history and the reasons for his misconduct.

Additional letters and affidavits in support of the applicant as well as further evidence of CME was submitted at the hearing and marked into the record as Applicant's Exhibit "A".

INVESTIGATIVE INFORMATION

The packet provided by OPD contains the following additional information from the investigation that resulted from the filing

MARSHALL J. HUBSHER (21720)

of the application for restoration:

- March 23, 2004 report of the OPD investigator for this proceeding, which includes a summary of an interview of the applicant by the investigator in which the applicant described his current activities, including his CME and his volunteer work with the Red Cross, Chabad (a Jewish organization) and his children's sports teams. The investigator maintained in his report that the applicant changed his story regarding his monitoring while suspended in that the applicant stated that he had met personally with a particular investigator once or twice during the monitoring period and otherwise checked in by phone with her, while the investigator states that no record in OPD files exists of such contacts. The report also states that the file contains no record of the investigator's having accepted the applicant's license during the period of suspension, as the applicant maintains.
- October 27, 2003 letter from Dennis J. Graziano, Director, OPMC, stating his office's position on the current application as follows: OPMC opposed the applicant's petition for restoration, saying that it saw no reason to "change our previously stated position opposing restoration of (the applicant's) revoked license to practice as a physician in the State of New York."

MARSHALL J. HUBSHER (21720)

Reciting the applicant's list of misconduct, it continued to state that "(t)he privilege to practice medicine should not be restored to a physician with such a history of fraud and deceit."

PEER COMMITTEE MEETING

On October 6, 2004 this Peer Committee met to consider this matter. The applicant appeared before us personally and was represented by an attorney, Nathan L. Dembin, Esq. Also present was Wayne L. Keyes, an attorney from the Division of Prosecutions, OPD.

Upon motion by the applicant's counsel, pp.68-74 of the restoration packet, which constitute a presentence report prepared for the applicant's criminal case, was redacted from the packet and stricken from the record. The panel was instructed to disregard the information contained in those pages.

The applicant presented a number of witnesses on his behalf, beginning with his wife, Randye L. Hubsher. She testified that he is remorseful now, realizing that he has let down his community, his family and his children. He used to feel that he was above authority but knows now that he is not.

She went on to say that he has developed a spiritual perspective in that he is very active with his synagogue and performs community service with Chabad, a Jewish organization, by seeing patients referred by it to him.

MARSHALL J. HUBSHER (21720)

Mrs. Hubsher knows that he is sincerely remorseful because she has heard him on the phone with a patient, crying and apologizing to the patient for his actions.

She lauded him for his involvement as a parent with his children and his desire to instill the correct moral and ethical values in them and believes that he would never do anything to violate any regulations or laws in the future.

On cross-examination the applicant's wife was asked about the family's finances. She said that she is a student who is seeking her master's in business administration and takes care of their children and that they live off savings, although she did say that the applicant buys and sells stocks which she believes he does on a part-time basis. She also testified that he sees patients for pay, which she assumes he derives some income from, as well as for free. He goes to his office five days a week, seven to eight hours a day, and occasionally on the weekends. His office is located in Roslyn and the applicant and his family live in Port Washington, which is about ten minutes away.

The next witness to testify on behalf of the applicant was Rabbi Shalom M. Palteil. The rabbi has known the applicant for 13 years and considers him a friend as well as being his spiritual adviser. He also said that the applicant's children have attended religious school at his congregation.

The rabbi testified that he has noticed growth in the applicant over the past four or five years and that he has become

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a more observant person, more outwardly interested in helping the community. He said that the applicant volunteers time, raises money for a humanitarian organization that helps children and pitched in to help the congregation purchase an ambulance. He is not a member of the synagogue in name only but a hands-on participant along with his children in its activities. He now places an emphasis on his marriage and family which wasn't always the case.

The applicant also volunteers his time as a therapist to congregants who need psychological help and has been successful in cases where the rabbi wasn't able to help.

Rabbi Paltiel believes the applicant to be repentant and having internalized a strong ethical sense of values.

The next witness to appear was Kenneth Lester, an attorney and former patient of the applicant's. He felt that the applicant was an excellent therapist who was compassionate and ethical; he said that the applicant apologized to him as a patient because he had to seek other medical care and that he had let other patients down as well as friends and family, and demeaned the standards of his profession.

The applicant then testified before the committee. His appearance began with a description of his professional history and then went on to discuss the circumstances which led to his loss of licensure. His first brush with professional misconduct occurred in 1982 when Quaaludes which were being illegally

MARSHALL J. HUBSHER (21720)

dispensed by two physicians renting office space from him resulted in his being arrested and later disciplined. Although the pills were not physically found in the applicant's own office, it was in his suite of offices and the lease was in his name. In December of 1982 he pleaded guilty and paid a fine.

The applicant testified that he accepted responsibility for this and that he should have known what was going on in his offices.

The applicant also testified that he cooperated with law enforcement in the case involving Quaaludes as well as one involving a former patient who was selling heroin.

During the period of probation and suspension and following that time the applicant sought help from a psychologist to see why he was repeatedly getting into trouble and to prevent it from happening again. He remained free of trouble until 1995, when the DOH brought charges against him for violating his suspension in 1988 by practicing while suspended and failing to keep proper medical records. The applicant acknowledged his wrongdoing and accepted responsibility for his misconduct. These violations of his suspension resulted in his license being revoked. The nature of the applicant's misconduct was his writing of prescriptions whose effective date extended into the period of suspension; the applicant testified that he did this to ensure that his patients would continue to receive their medications but he acknowledges that this was wrong and that he had failed to properly cover their

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continuing treatment in any event. He said that he also failed to tell at least one patient that his license was suspended.

The applicant stated that he feels remorse every day over these acts and has asked forgiveness from his patients, colleagues, rabbi and from the Lord for them.

The applicant has sought help through the Committee on Physician's Health (CPH) from a psychoanalyst in order to gain insight into his behavior. A side benefit of his receiving therapy has been the ability to better understand his patients.

The applicant testified that in addition to receiving psychological help he sought to develop his spiritual side. This led to his greater involvement in his synagogue and the volunteering of his time to congregants and charitable activities.

The applicant viewed his "flaunting" (sic) of the rules when writing those postdated prescriptions as a delayed acting out of adolescent rebellion.

He currently sees about 10 patients a week, five for a low fee and five for no fee, rendering psychotherapy services to them. He said he derives about \$15,000 a year from this and an additional \$30-35,000 from his investment activity. With some dividend checks that he receives his total annual income is about \$65,000 a year.

If his license is restored, his plans are to restart his psychiatry practice, with the ability to prescribe medication again, as his expertise is in psychopharmacology. He said that he

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would be able to help so many more people as a complete psychiatrist, "not just half of a psychotherapist."

Although the OPD representative did not make a recommendation on the applicant's petition for restoration, he stated that it seemed that the applicant had fallen well short of submitting a compelling case for the restoration of his license.

The applicant's attorney argued for the restoration of the applicant's license, citing his substantial efforts at rehabilitation, including his volunteer and community work, his CME, and the insight he has achieved through therapy, all of which were not present to the same degree before the prior peer committee.

He also noted that no patient complaint or malpractice suit has ever been brought against the applicant and that enough time has passed without incident to be assured that the applicant will not engage in any misconduct again.

RECOMMENDATION

We have reviewed the entire record in this matter, including the written materials received before and during our meeting. In arriving at our recommendation, we note that, in a licensure restoration proceeding, the burden is on the applicant to demonstrate that which would compel the return of the license. Greenberg v. Board of Regents of University of New York, 176 A.D. 2d, 1168, 575 N.Y.S. 2d 608, 609. In reaching our recommendation, we consider whether the applicant demonstrates sufficient remorse,

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rehabilitation and re-education. However, we are not necessarily limited to such formulaic criteria and may consider other factors, particularly the seriousness of the original offense and, ultimately, our judgment as to whether the health and safety of the public would be in jeopardy should the application be granted. Given these considerations, it is the unanimous recommendation of this Peer Committee that the application before us be granted. It is evident to us that the applicant meets the various established criteria in order to be relicensed.

Given the testimony we heard, there is almost no chance that the applicant will ever again commit misconduct of the sort which led to his loss of licensure. In the area of rehabilitation, the applicant has undergone enough therapy through the Committee on Physician's Health and other sources to achieve the insight into his behavior that was needed; no question of mental illness or a character defect was raised by anyone who worked with him in that regard.

Further, the applicant has undergone a spiritual awakening, as attested to by Rabbi Paltiel and the applicant's wife, who appeared before us, as well as others. This awakening has extended to his community work, where he has rendered therapy services to synagogue members, victims of 9/11 and to the Red Cross. His charitable work has been described as exemplary.

Although no question of the applicant's competence has ever been raised, the applicant has maintained and furthered his skills

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through a combination of his ongoing therapy practice and the extensive CME he has taken, which satisfies the re-education component of the restoration process.

The applicant appeared to us to be sincerely remorseful, which was buttressed by the testimony of his witnesses. Moreover, we see a different person than the one who appeared before the Peer Committee five years ago. The applicant of today has had the benefit of additional years of psychological treatment and time to reflect upon his behavior.

Enough time has passed since his last act of misconduct that to punish him further would be unfair, fruitless and serve no further purpose. The applicant would unquestionably be an asset to the community, and to deprive it of his services further would be an injustice.

For all the aforementioned reasons, we unanimously recommend to the Board of Regents that the applicant's license to practice medicine in the State of New be restored.

Respectfully submitted

Florence Kavalier, M.D., Chairperson

Louis Vorhaus, M.D.

James E.C. Norris, M.D.

Florence Kavalier m 7/7/05

Chairperson

Dated