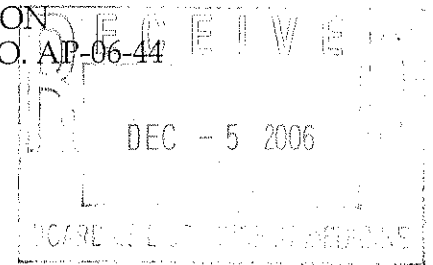


STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-06-44



ANDREW S. NICHOLSON, M.D.,

Petitioner

v.

DECISION AND ORDER

STATE OF MAINE
BOARD OF LICENSURE IN MEDICINE,

Respondent

This matter came before the court on Respondent State of Maine Board of Licensure in Medicine's motion to dismiss. For the following reasons, the court GRANTS the motion.

Andrew S. Nicholson, M.D. ("Nicholson") petitioned this court to review the State of Maine Board of Licensure of Medicine's ("Board") decision not to lift restrictions contained in a Consent Agreement entered into by the two parties in January 2003.

The Board first licensed Nicholson as a medical doctor in December 2000. He specialized in family practice and was certified by the American Board of Family Medicine in "Family Practice." On July 16, 2002, Nicholson reported to the Board that he had been arrested by federal authorities for ordering child pornography from a sting website operated by the United States Postal Service. On August 1, 2002, the Board received information from Penobscot Bay Medical Center that indicated that Nicholson had voluntarily surrendered his medical privileges at that facility and taken a leave from his family medical practice. In October 2002, the Board issued a complaint against Nicholson's medical license, alleging incompetence based upon "conduct that evidences

a lack of ability or fitness to discharge the duty owed by the licensee to a client or patient or the general public." 32 M.R.S.A. § 3282-A 2(E)(1).

On January 29, 2003, Nicholson voluntarily entered into a Consent Agreement with the Board, pursuant to 10 M.R.S.A. § 8003(5)(B) and 32 M.R.S.A. § 3282-A, in lieu of proceeding to an adjudicatory hearing regarding the complaint. Pursuant to the Consent Agreement, Nicholson agreed to be on probation, to restrict his practice of medicine to adults over 18 years of age, and to undergo a yearly psychological evaluation. On July 13, 2004, the Board reviewed Nicholson's psychological evaluations, along with other information, and voted to continue under the current consent agreement with another evaluation in one year. On May 10, 2005, the Board reviewed Nicholson's psychological evaluation, along with other information, and again voted to continue with the terms of the consent agreement.

On March 31, 2006, the Board received a written request from Nicholson for reinstatement of a full and unrestricted medical license. On June 13, 2006, the Board voted and denied Nicholson's request to lift the restrictions imposed upon his license pursuant to the Consent Agreement. On July 13, 2006, Nicholson filed this petition for review of agency action pursuant to M.R.C.P. 80(C). Nicholson asks this court to either rescind the Consent Agreement for violating 32 M.R.S.A. § 3282-A 1(A), direct the Board to lift the restrictions contained in the Consent Agreement, or direct the Board to provide a full adjudicatory hearing on his request.

Nicholson asserts that the Consent Agreement that he entered into is defective because it fails to fix the period of his probation as statutorily required by 32 M.R.S.A.

§ 3282-A 1(A).¹ Nicholson argues that because the Consent Agreement has failed to fix the period of probation, the Board has, in effect, placed him on indefinite probation and permanently restricted his medical license. Nicholson asserts that this was not the intent of the parties, rather, the Consent Agreement was intended to give the Board sufficient time to evaluate his treatment progress and that upon evidence of rehabilitation, the restrictions on his medical license would be lifted. Nicholson believes that his psychological evaluations have, from the beginning, shown that he is not a danger to children. Therefore, according to Nicholson, the Board, in continually voting down his request to lift the restrictions on his license, is acting contrary to the intent of the Consent Agreement and depriving him of the opportunity to be re-certified in his medical specialty (Family Practice).

The Board's motion to dismiss is based on its belief that the Consent Agreement, according to 10 M.R.S.A. § 8003(5)(B), "is not subject to review or appeal." In addition, the Board asserts, the express language of the Consent Agreement did not give Nicholson the right to a hearing on whether or not the terms of the agreement should be modified and left the decision to modify to the "sole discretion" of the Board. Therefore, according to the Board, Nicholson, by agreeing to forego an adjudicatory hearing in lieu of agreeing to be bound by the terms of the Consent Agreement, has waived his right to appeal its terms and conditions.

The express language of 32 M.R.S.A. § 3282-A 1(A) clearly states that "the board may enter into a consent agreement that *fixes the period* and terms of probation." The Board asks the court to focus on the language "the board *may* enter into a consent agreement," and declare that this language has *two* distinct interpretations: (1) that the

¹ "With the consent of the licensee, the board may enter into a consent agreement that fixes the period and terms of probation best adapted to protect the public health and safety and rehabilitate or educate the licensee."

Board, in its discretion, can enter into consent agreements that fix the period and terms of probation, and (2) that the Board can also, by negative implication, enter into consent agreements that *do not* fix the period or terms of probation. The court cannot accept the Board's second interpretation. The clear intent of this statutory language is that *if* the Board chooses to order probation in a consent agreement, then by doing so, it *must* fix the period and terms of probation. Accordingly, because the Consent Agreement entered into by the Board and Nicholson fixes a one-year of probation, the court finds that Nicholson's term of probation is completed.²

Nevertheless, Nicholson's primary motivation in filing this appeal is to have the Board lift the restriction upon his license that limits his practice of medicine to adults over 18 years of age. Nicholson argues that this restriction is contained in the Consent Agreement as a condition of probation, the completion of which entitles him to the lifting of the restriction. However, the Board argues that this restriction is separate and distinct from probation and that it has authority to impose such restrictions without a time limit.

The Board cites to 32 M.R.S.A. § 3282-A (2) ("The following are grounds for an action [by the Board of Licensure in Medicine] to . . . modify, restrict, suspend, revoke . . . the license of an individual licensed under this chapter") and 10 M.R.S.A. § 8003(5)(B) ("Any remedy, penalty or fine that is otherwise available by law . . . may be achieved by consent agreement, including long-term suspension and permanent revocation of a professional or occupational license") as authority for its right to restrict

² In order for the Consent Agreement to comply with the statute, the court reads the language stating "Licensee will be on probation and the Board will order a reevaluation of the Licensee after one year from the effective date of this Agreement," to mean that Nicholson's period of probation was for a term of one year.

Nicholson's license without a time limit and without the restriction being a condition of probation.³

Nicholson wishes to have the court parse the language of the Consent Agreement and declare that the restriction on his medical license is incorporated into the terms of probation and not a separate negotiated restriction that allowed him to keep his license with the understanding that he limit his practice to adults. As noted above, the Board clearly has authority under the aforementioned statutes to both restrict licenses and put licensees on probation. Therefore, the court reads the disciplinary measures under the heading "AGREEMENT" in the Consent Agreement as separate and distinct. The court notes that the *restriction* in the Consent Agreement is listed first and separately from any other disciplinary measures in the agreement and as such should be upheld on its own.

One of the functions of a Board is to provide oversight of terms of probation contained in Consent Agreements in order to monitor and evaluate the rehabilitative effects of the denominated terms and conditions on the licensee and how these efforts protect the health and safety of the public. The character of a restriction on a license differs markedly from a term or condition of probation in that the Board has nothing to monitor under a restriction. Therefore, the court reads subpart two under "AGREEMENT" as containing the terms and conditions of *probation* (participate in ongoing therapy with reports provided to the Board) because it envisions an oversight role by the Board. It is these terms and conditions of probation that the Board wished to monitor in order to assure itself that Nicholson was fit to continue practicing medicine.


³ In addition, the court notes that 5 M.R.S.A. § 5302 grants licensing agencies the authority to "suspend, revoke or take other disciplinary action against any occupational license . . . on the basis of the criminal history record" relating to convictions in § 5301(2)(C) ("Convictions for which no incarceration can be imposed and which directly relate to the trade or occupation for which the license or permit is sought"). Nicholson apparently made a plea arrangement regarding his arrest for ordering child pornography whereby he pled guilty to Possession of Sexually-Explicit Materials, a Class D Misdemeanor.

Finally, there is evidence in the record that Nicholson did not anticipate that the restriction on his license would cause him to lose his specialty certification in Family Medicine. Nicholson Aff. ¶ 15 (“Unfortunately, when I entered into the Consent Agreement, I did not anticipate that the age restriction would cause the American Board of Family Medicine to rescind my diplomate status.”). A fair reading of the evidence supports the conclusion that Nicholson was facing the possibility of losing his license due to his possession of child pornography and, faced with this prospect, he offered to restrict his practice to adults in order to reassure the Board that he could still be an effective medical practitioner to that population of patients.⁴ The evidence does not support the conclusion that either the Board or Nicholson believed that this restriction was in any way temporary or linked to the terms of his probation until after Nicholson learned he was losing his specialty status. The fact that Nicholson was unaware of all of the consequences of his entering into the Consent Agreement does not make the restriction conditional on this knowledge. As per the terms of the Consent Agreement, the Board has the sole discretion to modify, continue, or terminate the restriction and the court declines to disturb this authority.

The entry will be:

It is hereby ORDERED that the State of Maine Board of Licensure in Medicine’s Motion to Dismiss is GRANTED, according to the terms of this Order.

DATED: November 30, 2006



Donald H. Marden
Justice, Superior Court

⁴ Significantly, Nicholson’s November 13, 2002 letter to the Board (*prior* to entering into the Consent Agreement) states on pages 2-3 “He further realizes that any practice of medicine cannot involve children or even a family practice.” Resp. M. to Dismiss, Ex. B. In addition, Nicholson notes he is seeking employment at a VA Hospital, and if that employment falls through “it is respectfully submitted that Dr. Nicholson should be allowed to seek a similar type of employment—*i.e.*, treating an adult-only population, with no contact with children.” *Id.*

STATE OF MAINE
BOARD OF LICENSURE IN MEDICINE

In re:) CONSENT
Andrew S. Nicholson, M.D.) AGREEMENT

This document is a Consent Agreement, effective when signed by all parties, regarding a license to practice medicine in the State of Maine held by Andrew S. Nicholson, M.D. This Consent Agreement is issued pursuant to 10 M.R.S.A.

§ 8003(5)(B) and 32 M.R.S.A. § 3282-A. The parties to this Consent Agreement are:

Andrew S. Nicholson, M.D. ("the Licensee"), the State of Maine Board of Licensure in Medicine ("the Board") and the State of Maine Department of the Attorney General.

STATEMENT OF FACTS

1. The Licensee was first licensed to practice medicine in the State of Maine in December, 2000.

2. In May, 2002, the Licensee ordered videotapes of child pornography from an internet site. This site was actually an undercover operation conducted by the postal inspectors. After the videotapes were delivered to the Licensee, he was approached by the postal inspectors and agreed to allow them to take possession of his home computer. The Licensee admitted that what he had done was wrong and cooperated completely with the federal authorities.

3. The federal authorities subsequently deferred prosecution to the State authorities where, by agreement, the Licensee will enter a plea of guilty to a misdemeanor charge of "Possession of Sexually Explicit Materials".

4. The Licensee voluntarily disclosed this information to the Board which issued a complaint alleging unprofessional conduct and incompetence.

AGREEMENT

In lieu of proceeding to an adjudicatory hearing and in order to resolve the outstanding complaint, the Licensee and the Board agree to the following discipline:

1. The Licensee will restrict his practice of medicine to adults over 18 years of age.

2. The Licensee will participate in ongoing treatment with a therapist, approved by the Board, with experience in the treatment of sexual offenses. The therapist will provide the Board with quarterly reports that indicate whether the Licensee is attending his therapeutic sessions. If for any reason, the therapist and the Licensee are unable to form a mutually satisfactory therapeutic relationship, the Licensee may petition the Board to continue therapy with another therapist who must be approved by the Board.

3. The Licensee will be on probation and the Board will order a reevaluation of the Licensee after one year from the effective date of this Agreement. Following the one year reevaluation, the restrictions and conditions set forth in this Agreement may be modified, continued or terminated in the sole discretion of the Board. If there is a

repeat offense, the Board shall revoke the Licensee's license.

4. The Licensee has been represented by Bruce M. Merrill, Esq., who has advised him and participated in the negotiation of this Consent Agreement.

5. The Licensee waives any further hearings or appeals regarding the matter which is the subject of this Consent Agreement. He agrees that this Consent Agreement is a final order resolving all matters pending before the Board.

I, ANDREW S. NICHOLSON, M.D., HAVE READ AND UNDERSTAND THE FOREGOING CONSENT AGREEMENT. I UNDERSTAND THAT BY SIGNING IT, I WAIVE CERTAIN RIGHTS. I SIGN THIS CONSENT AGREEMENT VOLUNTARILY, WITHOUT ANY THREAT OR PROMISE. I UNDERSTAND THAT THIS CONSENT AGREEMENT CONTAINS THE ENTIRE AGREEMENT AND THERE IS NO OTHER AGREEMENT OF ANY KIND, VERBAL, WRITTEN OR OTHERWISE.

DATED: 1/29/03 Andrew S. Nicholson
ANDREW S. NICHOLSON, M.D.

STATE OF ME
John X [REDACTED], S.S.

Personally appeared before me the above-named Andrew S. Nicholson, M.D., and swore to the truth of the foregoing based upon his own personal knowledge, or upon information and belief, and so far as upon information and belief, he believes it to be true

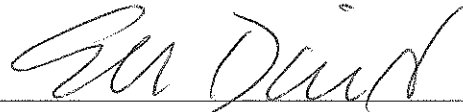
DATED: 1-29-03 Jo Ann Call
NOTARY PUBLIC

My Commission Expires:
JO ANN CALL
Notary Public, Maine
My Commission Expires April 12, 2009

STATE OF MAINE
BOARD OF LICENSURE IN MEDICINE

DATED:

2/11/03

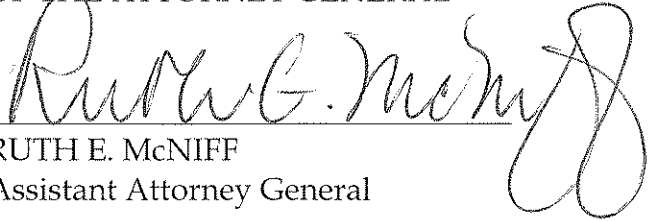


EDWARD DAVID, M.D., Chairman

STATE OF MAINE DEPARTMENT
OF THE ATTORNEY GENERAL

DATED:

2/11/03



RUTH E. McNIFF
Assistant Attorney General

APPROVED
EFFECTIVE:

2/11/03