

IN THE MATTER OF	*	BEFORE THE
CIMENGA TSHIBAKA, M.D.	*	MARYLAND STATE BOARD
Applicant for Reinstatement After Revocation of License	*	OF PHYSICIANS
	*	Board Case Number 8817-0003A
* * * * *		* * * * *

DECISION AND ORDER ON APPLICATION FOR REINSTATEMENT

On July 23, 2015, Disciplinary Panel A (the “Panel” or “Panel A”) of the Maryland State Board of Physicians (the “Board”) revoked the medical license of Cimenga Tshibaka, M.D. At issue now is Dr. Tshibaka’s application for the reinstatement of his license after revocation.

Background

Dr. Tshibaka was initially licensed to practice medicine in Maryland in 2005, and continuously renewed his license. He began practicing medicine in Maryland in 2006. In 2013, Dr. Tshibaka worked at a hospital in Maryland.

On June 24, 2013, at the hospital, during a hug with a female employee, Dr. Tshibaka grabbed the employee’s buttocks and told her that she had “a nice ass.” Approximately 90 minutes later, Dr. Tshibaka approached the same employee from behind and grabbed her breasts for a few seconds. Dr. Tshibaka’s conduct was unwanted by the employee, and the employee felt “very violated.”

Based upon the conduct described above, Dr. Tshibaka was charged under the Maryland Medical Practice Act with immoral and unprofessional conduct in the practice of medicine. *See* Md. Code Ann., Health Occ. § 14-404(a)(3)(i) and (ii). An evidentiary hearing was held at the Office of Administrative Hearings. The Administrative Law Judge issued a proposed decision recommending that the Panel revoke Dr. Tshibaka’s medical license. On July 23, 2015, after an

exceptions hearing, Panel A issued a Final Decision and Order, concluding that Dr. Tshibaka was guilty of immoral and unprofessional conduct in the practice of medicine and revoked his license to practice medicine in Maryland. Under the Final Decision and Order, Dr. Tshibaka was not allowed to apply for reinstatement for one year.

Dr. Tshibaka petitioned for judicial review with the Circuit Court for Baltimore City. On February 2, 2016, the Honorable Philip S. Jackson affirmed the Panel's Final Decision and Order. Dr. Tshibaka did not appeal Judge Jackson's decision.

On July 31, 2016, Dr. Tshibaka took a two hour online course on Workplace Sexual Harassment Awareness.

On August 11, 2016, the Board received Dr. Tshibaka's application for the reinstatement of his medical license. On September 26, 2016, pursuant to COMAR 10.32.02.06B, the Board sent Dr. Tshibaka the following six questions and two requests for information:

- 1) What is your understanding of the nature and circumstances of your conduct, which resulted in the revocation of your Maryland license?
- 2) What is your understanding of the Board's concerns with respect to your conduct?
- 3) Have you accepted responsibility for the action(s) resulting in the revocation of your license?
- 4) What steps have you taken to lessen the likelihood of recurrence?
- 5) What are your plans for returning to the practice of medicine as a physician in the State of Maryland and what is your proposed practice setting?
- 6) What efforts have you made to maintain your competency to practice medicine in your area of specialty (i.e. continuing education credits)?

* * *

- 1) Provide details of any courses or tutorials you may have taken related to ethics and/or professional boundary (the event that occurred) beyond

the two hour on-line *Workplace Sexual Harassment Awareness* training in July 2016; and

2) Outline any counseling and/or therapy you have undertaken other than the evaluation and subsequent 6 months of counseling sessions which ended in March 2011.

On September 29, 2016, Dr. Tshibaka's attorney responded to the questions. The portion of the letter responding to the substance of the questions states:

. . . the information attached should answer the questions contained in your letter and, as mentioned, has been supplied to the Licensure Unit. In addition, Dr. Tshibaka plans to resume his clinical and office based practice when he obtains his license. As indicated in the attached documents, he has maintained competency by reading medical books, journals, and has taken online seminars. In fact he has taken more CME training over the last 2 years than required. Although not required, he has taken an ethics course in sexual harassment and is well aware by virtue of this course and his evaluation and counselling in 2011 of the significance of treating all fellow employees with dignity and respect. He is aware of the conduct which constitutes sexual harassment and is aware of how to avoid an appearance of impropriety.

The letter attached the Panel's Final Decision and Order, the circuit court's Memorandum and Order, certificates of continuing medical education, documentation of Dr. Tshibaka's two hour online course on Workplace Sexual Harassment Awareness, and a list of his Applications for Employment.

Pursuant to COMAR 10.32.02.06B(6), the administrative prosecutor from the Maryland Office of the Attorney General's Health Occupations and Prosecution and Litigation Division responded, recommending that the Panel deny the application. On February 8, 2017, Panel A met with Dr. Tshibaka, his counsel, and the administrative prosecutor to discuss Dr. Tshibaka's reinstatement application.

Dr. Tshibaka's Double Jeopardy Argument

Dr. Tshibaka argues that the Panel's decision on his application for reinstatement may violate the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. It is not clear whether Dr. Tshibaka is arguing that double jeopardy precludes the Panel from imposing conditions on his license upon reinstatement or precludes the Panel from denying his reinstatement application or both. In any case, the issue of whether imposing conditions on his license upon reinstatement would violate the Double Jeopardy Clause is moot because the Panel has decided to deny his reinstatement application. If Dr. Tshibaka is arguing that denying his application for reinstatement would constitute double jeopardy, he is incorrect.

The Double Jeopardy Clause does not apply to a denial of reinstatement after revocation. One cannot be punished (placed in "jeopardy") without being entitled to constitutional due process protection. Dr. Tshibaka is not entitled to constitutional due process protection on his reinstatement application following revocation because one has no property interest in a license once it has been revoked. *See Oltman v. Maryland State Board of Physicians*, 182 Md. App. 65, 77-78 (2008).

None of the cases cited by Dr. Tshibaka concerns the reinstatement of a license after revocation. The main legal authority Dr. Tshibaka relies upon is *U.S. v. Halper*, 490 U.S. 435 (1989). Citing *Halper*, Dr. Tshibaka states that sanctions imposed by administrative agencies "may run afoul of double jeopardy protections." (Letter, January 27, 2017, from Dr. Tshibaka's counsel.) *Halper*, however, was abrogated by *Hudson v. U.S.*, 522 U.S. 93 (1997). The U.S. Supreme Court in *Hudson* determined that *Halper* "deviated from our traditional double jeopardy doctrine" by "bypass[ing] the threshold question: whether the successive punishment at issue is a 'criminal' punishment." *Hudson*, 522 U.S. at 101. According to *Hudson*, this "deviation from

longstanding double jeopardy principles was ill considered” and “has proved unworkable.” *Id.* at 101-02.

Moreover, as explained by the Court of Appeals, “penalties imposed on licensed individuals for violating provisions attendant to that license are outside of the reach of the Double Jeopardy Clause because those penalties are directed toward protecting the public, and are therefore remedial, rather than punitive.” *Garrity v. Maryland State Board of Plumbing*, 447 Md. 359, 387 (2016). The Panel finds no merit in Dr. Tshibaka’s double jeopardy argument.

Decision on Application

Dr. Tshibaka does not acknowledge the conduct that resulted in the revocation of his license: his unwanted sexual touching of a female employee’s breasts and buttocks. His attorney states that a two hour online course on sexual harassment and counseling he received in 2011 have made Dr. Tshibaka well aware of the conduct which constitutes sexual harassment, the significance of treating all fellow employees with dignity and respect, and how to avoid an appearance of impropriety. The Panel certainly encourages counseling, but the 2011 counseling, which stemmed from a hospital investigation regarding previous allegations of Dr. Tshibaka’s sexual misconduct, appears to have been insufficient, considering that the 2013 incidents that resulted in the revocation of his license occurred after the counseling was completed. The Panel also supports any courses aimed at preventing unwanted sexual activity, but one two hour online course taken immediately prior to filing an application for reinstatement does not denote the level of commitment likely needed to rectify the type of behavior at issue in this case.

Dr. Tshibaka’s conduct that resulted in the revocation of his license raises an extremely serious concern: unwanted sexual touching in a medical facility. Dr. Tshibaka has not made a significant effort to alleviate this concern. The Panel has no real basis to be assured that Dr.

Tshibaka will not engage in the same type of conduct at issue in this case if he returns to practicing medicine in Maryland at this time. The Panel finds, in its discretion, that it is not in the interest of the health and welfare of the general public nor consistent with the best interest of the profession to reinstate Dr. Tshibaka's license.

ORDER

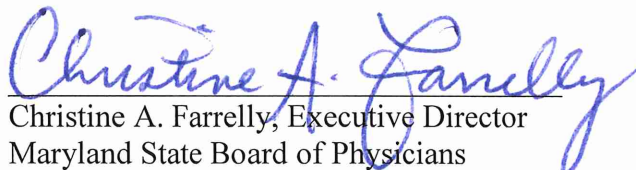
It is thus, by Board Disciplinary Panel A, hereby

ORDERED that Cimenga Tshibaka, M.D.'s Application for the Reinstatement of Medical Licensure, filed with the Board on August 11, 2016, is **DENIED**; and it is further

ORDERED that Dr. Tshibaka may not reapply for the reinstatement of his medical license until after **SIX MONTHS** from the issuance of this decision and order; and it is further

ORDERED that this is a public document pursuant to § 14-411.1(f) of the Health Occupations Article and § 4-333 of the General Provisions Article.

03/31/2017
Date


Christine A. Farrelly, Executive Director
Maryland State Board of Physicians