STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

Antonia C. Novello, M.D., M.P.H. , Dr.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

September 27, 2001

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Dianne Abeloff, Esq.
NYS Department of Health
5 Penn Plaza – Sixth Floor
New York, New York 10001

Abraham Solomon, M.D.

Abraham Solomon, M.D.
29-27 41st Street
Suite 509
Long Island City, New York 11103

RE: In the Matter of Abraham Solomon, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 01-140) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt **or** seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified mail or in person** to:

Office of Professional Medical Conduct
New York State Department of Health
Hedley Park Place
433 River Street-Fourth Floor
Troy, New York 12180

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm
Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH
ADMINISTRATIVE REVIEW BOARD FOR PROFESSIONAL MEDICAL CONDUCT

COPY

In the Matter of

Abraham Solomon, M.D. (Respondent)

A proceeding to review a Determination by a Committee (Committee) from the Board for Professional Medical Conduct (BPMC)

Administrative Review Board (ARB)

Determination and Order No. 01-140

Before ARB Members Grossman, Lynch, Pellman, Price and Briber
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): **Dianne Abeloff, Esq.**
For the Respondent: **Pro Se**

After a hearing below, a BPMC Committee determined that the Respondent committed professional misconduct in providing treatment to ten patients and in applying for privileges at three hospitals. The Committee voted to revoke the Respondent's License to practice medicine in New York State (License). In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 2000), the Respondent contends that no basis existed in the record for the Committee's findings concerning either patient treatment or the applications and the Respondent alleges that inappropriate conduct occurred at the hearing. After considering the hearing record and the parties' review submissions, the ARB affirms the Committee's Determination that the Respondent provided substandard patient care and that the Respondent submitted knowingly false applications. We modify the Determination to delete or amend certain Findings of Fact (FF) and, on our own motion, we sustain additional misconduct specifications. We find no evidence in the record to show inappropriate conduct at the hearing and we affirm the Committee's Determination revoking the Respondent's License.

Committee Determination on the Charges

The Petitioner commenced the proceeding by filing charges with BPMC alleging that the Respondent violated N. Y. Educ. Law §§ 6530(2-6) & 6530(14)(McKinney 2001) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- practicing medicine with negligence on more than one occasion,
- practicing medicine with gross negligence,
- practicing medicine with incompetence on more than one occasion,
- practicing medicine with gross incompetence, and,
- violating provisions in Pub. Health Law § 2805-k concerning applications for credentials or privileges at hospitals.

The charges involved the emergency room care that the Respondent provided to ten persons, Patients A-J, and to applications that the Respondent submitted for privileges or employment at three hospitals. The record refers to the Patients by initials to protect privacy. The Respondent denied the charges and a hearing ensued before the Committee who rendered the Determination now on review.

On the charges involving the care that the Respondent provided to Patients A-J, the Committee found that the Respondent:

- failed to perform adequate physical examinations for Patients A, B, D, E, F, H and I;
- failed to obtain adequate histories for Patients A, B, C, D, E, F, G, H and I;
- failed to address complaints of abdominal pain by Patients A, B and I;
- failed to perform rectal examinations to check for the cause of the abdominal pain for Patients A and B;
- failed to assess the cause for Patient A's hypotension;
- failed to obtain an immediate surgical consult for Patient B, to recognize free air in the Patient's abdomen and to monitor the Patient for a rapid heartbeat;
- ordered contraindicated treatment for Patient D and failed to treat the Patient with appropriate medication;

- failed to address whether any change occurred in the dementia or thinking level for Patient E;
- failed to order an indicated urinalysis for Patient F,
- failed to address right shoulder pain or consider cardiac history for Patient G;
- prescribed medication inappropriately for Patient H and failed to exclude a diagnosis of bowel obstruction;
- treated Patient I inappropriately with magnesium citrate, with possible or suspected bowel obstruction present; and,
- failed to diagnose ischemia in Patient J, failed to admit and treat the Patient appropriately and failed to consult nurses notes and ambulance reports in determining the cause for the Patient's chest pain.

The Committee sustained charges that the Respondent practiced with gross negligence in treating Patients A, B, G and J and practiced with negligence on more than one occasion in treating Patients A-J. The Committee dismissed charges that the Respondent practiced with incompetence on more than one occasion or gross incompetence in treating the Patients A-J.

In the Committee's Determination at FF 67-72, the Committee made their findings on the factual allegations relating to the fraud and false applications. The Committee found that the Respondent:

- lost employment at Nathan Littauer Hospital in October 1997 through termination [FF 67],
- never received credit for time he spent in an emergency medicine residency at Beth Israel Hospital [FF 68],
- failed to accurately answer a 1998 Southside Hospital Application concerning non-renewal or voluntary relinquishment of staff membership, privileges, affiliation or status [FF 69],
- failed to disclose knowingly and with intent to deceive the Littauer and Beth Israel terminations on his 1998 appointment application to University Hospital of Brooklyn [FF 70],

- failed to disclose knowingly and with intent to deceive the Littauer termination on his 1999 application to Maimonides Medical Center [FF 71], and,
- failed to list the Littauer employment on the same 1999 Maimonides application [FF 72].

With FF 67-72 as their basis, the Committee sustained the charges that the Respondent practiced fraudulently and violated the provision on credential or privilege applications that appears at Pub. Health Law § 2805-k.

In making their findings, the Committee found testimony by the Respondent evasive and non-responsive and the Committee found the Respondent lacked credibility. The Committee also found three witnesses (Drs. Valladares, Brown and Gouge) defensive in their answers and intent on avoiding the weaknesses in the treatment the Respondent provided to the Patients. The Committee found three other witnesses fully credible (Drs. Brogan, Molina and Murphy).

The Committee concluded that the Respondent was a competent physician, but also a physician who treated patients superficially as to signs and symptoms, without analysis or thoughts as to the cause for the complaints. The Committee concluded that such superficial treatment resulted in incorrect diagnoses and improper treatments. The Committee voted to revoke the Respondent's License.

Review History and Issues

The Committee rendered their Determination on June 7, 2001. This proceeding commenced on July 2, 2001, when the ARB received the Respondent's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and the Petitioner's response brief. The record closed when the ARB received the response brief on August 27, 2001.

The Respondent challenges the Committee's Determination on both the patient care and the fraud findings. As to the patient care findings, the Respondent refers to expert testimony as "speculation" and notes that emergency medicine is far from an exact science. The Respondent alleges that the Committee erred by crediting testimony by the Petitioner's experts and rejecting conflicting testimony by the Respondent's experts. The Respondent argues that the ARB should pay no deference to the Committee's conclusions on credibility. Further, the Respondent alleges that Dr. Shamir, a medical coordinator for the Office for Professional Medical Conduct (OPMC), assisted the Committee inappropriately during the Committee's deliberations. The Respondent also argued that no basis existed in fact for the Committee's conclusions that the Respondent submitted false applications intentionally.

In reply, the Petitioner contends that the Respondent's arguments on the patient care findings constitute the same arguments that the Respondent made at hearing and that the Committee rejected. The Petitioner also contends that Dr. Shamir never spoke to the Committee and that Dr. Shamir attended hearing sessions only, to provide assistance to the Petitioner's counsel.

Determination

The ARB has considered the record and the parties' briefs. In reviewing a Committee's Determination, the ARB determines: whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law; and, whether the Penalty is appropriate and within the scope of penalties which N.Y. Pub. Health Law §230-a permits [N.Y. Pub. Health Law §230(10)(i), §230-c(1) and §230-c(4)(b)]. That authority allows the ARB to substitute our judgement for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med.

Conduct Bd. 195 A.D.2d 86, 606 N.Y.S.2d 381 (3rd Dept. 1993); and in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 NYS 2d 759 (3rd Dept. 1994). The ARB may choose to substitute our judgement on our own motion, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996).

The ARB exercises our authority to substitute our judgement in this case. We affirm the Committee's Determination that the Respondent practiced with negligence on more than one occasion in treating Patients A-J. We also affirm the Committee's Determination that the Respondent's care to Patients A, B and J constituted practice with gross negligence. We overturn the Committee and dismiss the charge that the Respondent practiced with gross negligence in treating Patient G. We also overturn the Committee and sustain charges that the Respondent practiced with gross incompetence in treating Patients A and B, and with incompetence on more than one occasion in treating Patients A, B and J. The ARB affirms the Committee's Determination that the Respondent practiced fraudulently and violated provisions on applications for privileges or staff membership that appear at Pub. Health Law § 2805-k, but we overturn certain FF and conclusions concerning the fraud and applications charges. We find no evidence in the record to support the Respondent's allegation that the OPMC medical Coordinator, Dr. Shamir, engaged in a conflict of interest or improper conduct. We affirm the Committee's Determination revoking the Respondent's License.

Conflict of Interest: The Respondent alleged that Dr. Shamir engaged in a conflict of interest and that Dr. Shamir assisted the Committee during deliberations. Any contact concerning fatual or legal issues in a case, between one party (such as an OPMC Medical Coordinator) and the Committee, would constitute an impermissible ex parte communication under N.Y.A.P.A § 307(2)(McKinney Supp. 2001). The Respondent has failed to offer any conclusive evidence,

however, that such contact occurred. The Respondent's brief at pages 6-7 stated that the Committee's Determination contained FF with no reference to the record [see FF 7, 27]. The Respondent's brief stated "I believe Dr. Shamir helped the Committee formulate these statements". The brief states no basis for the Respondent's belief. The Respondent's belief alone fails to support the claim alleging an ex parte communication, Demilio-Frytos v. McCall, 274 A.D.2d 653, 710 N.Y.S.2d 458 (3rd Dept. 2000), Gould v. Board of Regents, 103 A.d.2d 897, 478 N.Y.S.2d 129 (3rd Dept 1984). The Respondent also failed to establish that Dr. Shamir's presence at the hearing, as an advisor to the Petitioner's counsel, caused any prejudicial effect at the hearing, Matter of Moore v. State Bd. for Prof. Med. Cond., 258 A.D.2d 837, 686 N.Y.S.2d 129 (3rd Dept. 1999).

Patient Care Findings: In his challenge to the Committee's patient care findings and conclusions, the Respondent challenged the Committee's reliance on expert testimony by the Petitioner's expert, Dr. Grogan, the standards for judging expert testimony and any appellate body's deference to a fact-finder's judgement on witness credibility. We find no validity in those arguments. In a BPMC proceeding, expert testimony that a physician failed to exercise requisite care provides sufficient evidence to sustain findings of negligence and incompetence, notwithstanding contradictory evidence in the record, Matter of Schoenbach v. DeBuono, 262 A.D.2d 820, 692 N.Y.S.2d 208 (3rd Dept 1999). Also, expert testimony and patient medical records provide evidence sufficient to prove negligence, if the expert testifies that a respondent failed to provide appropriate care to the patients at issue in the case, Matter of Moore v. State Bd. for Prof. Med. Cond., 258 A.D.2d 837, 686 N.Y.S.2d2d 129.

In the hearing below, the testimony from the Petitioner's experts established that the Respondent failed to provide appropriate care and/or display appropriate skill or knowledge in

treating the Patients at issue. The Respondent presented contradictory testimony, but the Committee explained in detail their reasons for rejecting testimony by the Respondent and his experts. The ARB owes the Committee as fact-finder deference in their judgements on credibility, despite the Respondent's criticism about such deference. Most ARB members served on hearing Committees before our appointments to the ARB and we know that reading a hearing transcript, as we do on these reviews, provides a poor substitute for observing live testimony during a hearing, as the Committee does. We see no error by the Committee in their judgement on credibility.

The evidence that the Committee found credible provided preponderant evidence to support the Committee's FF 1-6, 8-26 and 28-66. As we noted above, FF 7 and 27 contained no citations to any evidence from the record on which the Committee based FF 7 or 27. Those FF concerned the point at which another physician at Maimonides examined Patient A [FF 7] and the point at which a cardiologist evaluated Patient C and after which the Respondent administered medication to Patient C [FF 27]. For those two FF, the Committee failed to identify what if any evidence the Committee relied upon in making the FF. We amend the Committee's Determination and delete FF 7 and 27.

Committee FF 1-6, 8-26 and 28-66 establish the Respondent failed to practice according to acceptable medical standards in treating Patients A-J. As the Committee concluded, the Respondent responded superficially and without analysis to the Patients' signs and symptoms, which resulted in incorrect diagnoses and improper treatments. These failures constituted practicing with negligence on more than one occasion. The ARB agrees with the Committee that the Respondent's sub-standard care to Patients A, B and J rose to egregious levels and we affirm the Committee's Determination that the Respondent practiced with gross negligence in treating

these Patients. In those cases, the Respondent missed the immediate diagnostic and treatment needs for each Patient and failed to take necessary action. The ARB overturns the Committee's Determination that the care to Patient G constituted practicing with gross negligence. We hold that the failure to consider all the possibilities for Patient G's shoulder pain amounted to simple negligence.

We overturn the Committee, and on our own motion, we sustain the charge that the Respondent practiced with incompetence on more than one occasion in treating Patients A, B and J. Incompetence in practice means that a physician lacks the necessary skill or knowledge to practice medicine safely and effectively, Matter of Dhabuwala v. State Board for Prof. Med. Cond. 225 AD2d 209, 651 NYS 2d 249 (Third Dept. 1996). We conclude that the missed diagnoses and improper treatment for Patients A, B and J showed that the Respondent lacked the skill or knowledge to make the correct judgements in those cases. We hold that the Committee made a determination inconsistent with their findings when the Committee referred to the Respondent as a competent physician. We hold further that the incompetent care to Patients A and B rose to an egregious level. We sustain the charge that the Respondent practiced with gross incompetence in treating Patients A and B.

The Fraud and Application Charges: The Committee based their determination to sustain the fraud and application charges on the Committee's FF 67-72. The Respondent challenged the factual basis for all the charges.

We agree with the Respondent that no basis existed for the Committee finding that Nathan Littauer hospital terminated the Respondent's employment or privileges at that hospital [FF 67]. As a basis for FF 67, the Committee cited the Petitioner's Hearing Exhibit 17, which comprised documents from Littauer concerning the Respondent's application to and employment

at Littauer. Exhibit 17 contained no letters or memoranda that indicated that Littauer in any way terminated the Respondent's association with that facility. The Exhibit did include a print out of a page from the National Practitioner Data Bank that indicated that a search in the Data Bank revealed no information about the Respondent. The page also contained handwriting that stated "-gone-terminated from serving at NLH thru [sic] Saratoga ER service +- 10/97". Nothing on the page or in the record indicated who wrote that statement. We find that statement insufficient evidence to prove that Littauer terminated the Respondent. We amend the Committee's Determination and delete FF 67.

At FF 68, the Committee found that the Respondent never received credit for a residency at Beth Israel Hospital and that the Respondent admitted he never received credit for the residency. The Respondent argued that no basis existed for that statement. The record indicates that such basis does exist. The Petitioner's Exhibit 2, the State Education Department Licensing file for the Respondent, contains a complaint and an affidavit from a lawsuit by the Respondent against Beth Israel. In paragraph 8 in the Respondent's affidavit [Exhibit 2, page 16], the Respondent stated that Beth Israel terminated his clinical responsibilities, effective immediately, on April 20, 1994. That affidavit by the Respondent constituted his admission that Beth Israel terminated him. The record, therefore, provided the basis for Committee FF 68.

In their FF 69, the Committee found that the Respondent failed to answer accurately a question on a 1998 Southside application that asked whether the Respondent's affiliation, status or membership on any hospital medical staff was ever denied, revoked, limited, placed on probation, not renewed or voluntarily relinquished. The Respondent challenged FF 69, in part, by attempting to limit the question to privileges and arguing that his residency at Beth Israel differed from staff privileges. The application question, however, applied to more than staff

membership and the Respondent failed to reveal his termination without credit from the Beth Israel residency. We affirm FF 69 as to the Beth Israel residency.

At FF 70, the Committee found that the Respondent knowingly and with intent to deceive failed to disclose his termination at Littauer and Beth Israel on a 1998 application to University Hospital of Brooklyn. For the reasons we noted in discussing FF 67, we amend FF 70 and delete the portions that relate to Littauer. We affirm the provisions that relate to Beth Israel. In challenging FF 70, the Respondent once again argued that the question on the Brooklyn application related to privileges. The question, however, actually asked about termination or non-renewal of privileges, or whether disciplinary or corrective action was ever instituted. The residency termination at Beth Israel clearly constituted disciplinary or corrective action, as it related to the Beth Israel termination.

At FF 71, the Committee found that the Respondent answered a question on a 1999 Maimonides Medical Center application untruthfully concerning the termination at Littauer. For the reasons we deleted FF 67, we delete FF 71. The record failed to prove that the Respondent left Littauer through termination.

At FF 72, the Committee found that the Respondent failed to list his former employment at Littauer on the 1999 Maimonides application. The Respondent's brief described FF 72 as factually correct, but indicated that he explained in his testimony his failure to list the Littauer employment. We find that the record supports FF 72.

The Committee's FF 68-70 & 72 support the Committee's Determination that the Respondent violated the provisions in Pub. Health Law § 2805-k concerning applications for staff privileges or employment at hospitals. The FF 68-70 & 72 also support the Committee's Determination that the Respondent practiced fraudulently. Practicing medicine fraudulently means that (1) a physician made a false representation, whether by words, conduct or by

concealing that which the physician should have disclosed, (2) the physician knew the representation was false, and (3) the physician intended to mislead through the false representation, Sherman v. Board of Regents, 24 A.D.2d 315, 266 N.Y.S.2d 39 (3rd Dept. 1966), aff'd, 19 N.Y.2d 679, 278 N.Y.S.2d 870 (1967). A committee may reject a physician's explanation for his conduct and draw the inference that the physician intended or was aware of the misrepresentation, with other evidence as the basis, Matter of Brestin v. Comm. of Educ., 116 A.D.2d 357, 501 N.Y.S.2d 923 (3rd Dept. 1986).

The record in this case demonstrated that the Respondent withheld information on applications to Southside, Brooklyn and Maimonides. The Committee acted within their authority in rejecting the Respondent's explanation for the misrepresentations. We agree with the Committee that the Respondent testified evasively at the hearing. The Respondent's denials about the Beth Israel termination also contradicted his earlier sworn statement in the affidavit that appears at Petitioner's Hearing Exhibit 2. We infer that the applications demonstrated a pattern of deliberate and knowing misrepresentations that reveal an intent to deceive the hospitals. Such conduct constituted fraud in practice.

Penalty: The sub-standard care that the Respondent provided to Patients A-J resulted in incorrect diagnoses and inappropriate and/or contraindicated treatment. The delay in providing appropriate care, treatment and consultations placed the Patients at risk. The Respondent demonstrated no recognition that he provided sub-standard care and no willingness to change his practice. The Respondent also betrayed the trust that society places in the medical profession and demonstrated that he lacks the integrity necessary to practice medicine, by providing deliberately false answers concerning his past medical practice on applications to three hospitals. Society must trust physicians to provide truthful answers on such applications so hospitals can assure that their affiliated physicians will provide quality care to patients. The Respondent's refusal to admit his deficiencies demonstrated his unfitness for retraining. Further, no retraining course can provide the Respondent with integrity.

We conclude that if we allowed the Respondent to remain in practice, he would continue to place his patients at risk. The ARB agrees with the Committee that the fraudulent conduct and the egregiously sub-standard patient care warrant revoking the Respondent's License.

ORDER

NOW, with this Determination as our basis, the ARB renders the following **ORDER:**

1. The ARB amends the Committee's Determination by deleting FF 7, 27, 67 & 71 and by deleting a portion of FF 70.
2. The ARB affirms the Committee's Determination that the Respondent violated Pub. Health Law § 2805-k, practiced medicine fraudulently, practiced medicine with negligence on more than one occasion in treating Patients A-J and practiced medicine with gross negligence in treating Patients A, B and J.
3. The ARB overturns the Committee and dismisses the charge that the Respondent practiced with gross negligence in treating Patient G.
4. The ARB overturns the Committee and sustains the charges that the Respondent practiced medicine with incompetence on more than one occasion in treating Patients A, B and J and with gross incompetence in treating Patients A and J.
5. The ARB affirms the Committee's Determination to revoke the Respondent's License.

Robert M. Briber
Thea Graves Pellman
Winston S. Price, M.D.
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.

In the Matter of Abraham Solomon, M.D.

Robert M. Briber, an ARB Member concurs in the Determination and Order in the Matter of Dr. Solomon.

Dated: Sept 24, 2001

Robert M. Briber

In the Matter of Abraham Solomon, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the Matter of Dr. Solomon.

Dated: 9-26, 2001

Thea Graves Pellman

In the Matter of Abraham Solomon, M.D.

Winston S. Price, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Solomon.

Dated: 7/24, **2001**

Winston S. Price, M.D.

In the Matter of Abraham Solomon, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the Matter of Dr. Solomon.

Dated: September 24 **2001**

Stanley L Grossman, M.D.

In the Matter of Abraham Solomon, M.D.

Therese G. Lynch, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Solomon.

Dated: Sept 25, 2001

Therese G. Lynch, M.D.