



STATE OF NEW YORK
DEPARTMENT OF HEALTH

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

Public

Dennis P. Whalen
Executive Deputy Commissioner

August 14, 2006

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Hank Ross, M.D.

REDACTED

Hank Ross, M.D.

161 Willis Avenue
Mineola, New York 11501

Howard Fensterman, Esq.

Abrams, Fensterman, Fensterman, et al
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NYS Department of Health
Office of Professional Medical Conduct
90 Church Street – 4th Floor
New York, New York 10007-2919

RE: In the Matter of Hank Ross, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 06-86) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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,

REDACTED

Sean D. O'Brien, Director
Bureau of Adjudication

SDO:nm

Enclosure

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

COPY

In the Matter of

Hank Ross, M.D. (Respondent)

Administrative Review Board (ARB)

Determination and Order No. 06-86

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

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

**For the Department of Health (Petitioner):
For the Respondent:**

**Christine M. Radman, Esq.
Howard Fensterman, Esq.**

After a hearing below, a BPMC Committee found that the Respondent engaged in deliberate, fraudulent conduct by submitting false applications to medical facilities, the government and a private insurer. The Committee voted to suspend the Respondent's License to practice medicine in New York State (License), to place the Respondent on probation for two years following the suspension and to require that the Respondent complete continuing medical education courses (CME). In this proceeding pursuant to N.Y. Public Health Law (PHL) § 230-c(4)(a)(McKinney 2006), both parties seek review and ask the ARB to modify that Determination. After considering the record and the review submissions from the parties, the ARB sustains the additional charge that the Respondent engaged in conduct that evidenced moral unfitness in practicing medicine. We affirm the Committee's other conclusions on the charges, but we overturn the Committee's conclusion on penalty. The ARB votes unanimously to revoke the Respondent's License.

Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent violated N. Y. Educ. Law (EL) §§ 6530(2), 6530(14) & 6530(20-21) (McKinney Supp. 2006) by committing professional misconduct under the following categories:

- practicing medicine fraudulently,
- violating PHL § 2805-k,
- engaging in conduct that evidences moral unfitness, and,
- willfully making or filing a false report.

The charges related to applications that the Respondent submitted to the New York State Education Department, Blue Cross/Blue Shield and four hospitals over a period from 1989 until 2004. The Respondent admitted that the applications contained inaccuracies, but blamed the problem on his office staff and denied any fraudulent or willful conduct. The case proceeded to hearing before the Committee that rendered the Determination now on review.

The Committee determined that the Respondent practiced fraudulently by making false representations on:

- the 2005-2007 biennial registration to the New York State Education Department (SED),
- a 2003 application to Blue Cross/Blue Shield (Blue Cross),
- both 1997 and 2003 applications to North Shore University Hospital (North Shore),
- a 1991 application to Booth Memorial Hospital (Booth),
- a 2001 application to Mercy Medical Center (Mercy),
- and 1996, 1998, 2002 and 2004 applications to Winthrop University Hospital (Winthrop).

The Committee found that the applications contained false and misleading information about:

- a disciplinary action and an investigation against the Respondent by the Office for Professional Medical Conduct (OPMC),
- a practice suspension by the Hospital for Joint Diseases (Joint Diseases),
- focused review at Winthrop Hospital in 1999,

- privilege delineations at Winthrop Hospital in 2004,
- the Respondent's attendance at Boston University, and,
- the expiration of the Respondent's license to practice medicine in Arkansas.

The Committee found that the Respondent knew that he made false representations on the applications and that the Respondent intended to mislead recipients of the applications by making the false representations.

The Committee also sustained charges that the Respondent willfully filed false reports by submitting the same SED, Blue Cross, North Shore, Mercy, Booth and Winthrop Applications at issue under the fraud charges. The Committee found that the Respondent submitted applications containing untruths or inaccuracies and found nothing accidental about those untruths and inaccuracies.

The Committee sustained charges that the Respondent violated PHL § 2805-k[1][g] by failing to verify information that the Respondent submitted in staff privilege applications to:

- North Shore in 1997 and 2003,
- Booth in 1989,
- Joint Diseases in 1989,
- Mercy in 1989 and 2001, and,
- Winthrop in 1989, 1996, 1998, 2002 and 2004.

The Committee found further 2805-k violations in the Respondent's failure to report the Joint Diseases suspension on all those applications (except the 1989 Joint Diseases application) and in the Respondent's failure to report pending professional medical proceedings on the 1989 Booth, Joint Diseases, Mercy and Winthrop applications. The Committee dismissed allegations that the Respondent failed to report pending professional medical proceedings on applications subsequent to 1989 because the Committee found that there were no longer any pending proceedings at the time the Respondent submitted the subsequent applications.

The Committee dismissed charges that the Respondent's submission of false applications amounted to engaging in conduct that evidenced moral unfitness. The Committee stated that they

found insufficient evidence that the Respondent violated the public trust or the moral standards of the medical profession.

In reaching their conclusions, the Committee rejected the Respondent's explanations that the submission of the false applications resulted from errors in his office rather than from intentional and deliberate misconduct. The Committee found that the Respondent received letters in 1989 and 1990 that faulted the Respondent for failing to provide full disclosure, present information or properly represent himself on applications to two facilities. The Committee concluded that these letters put the Respondent on notice about the problems with the applications the Respondent was submitting and made the Respondent aware of the need to correct those applications and assure no such problems recurred in the future. The Committee indicated that they could have accepted explanations that the false applications resulted from errors up until the time of the 1989-1990 letters. The Committee concluded that the pattern of false applications subsequent to 1990 demonstrated that the Respondent knew that subsequent applications contained false information and that the Respondent intended to mislead others through the false information.

The Committee voted to suspend the Respondent's License for one year and to place the Respondent on probation for two additional years, under the probation terms that appear as Appendix 2 to the Committee's Determination. In addition, the Committee ordered that the Respondent must complete successfully ten hours of continuing medical education in office management/practice management and ten hours in medical ethics/medical professionalism. The Committee also required the Respondent, during the suspension and probation periods, to submit copies of all applications to the Director of OPMC.

Review History and Issues

The Committee rendered their Determination on April 26, 2006. This proceeding commenced on May 8, 2006, when the ARB received the Petitioner's Notice requesting a

Review. The Petitioner also requested review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and reply brief and the Respondent's brief and reply brief. The record closed when the ARB received the Petitioner's June 26, 2006 response brief. The Respondent submitted letters subsequent to that date complaining about the timing and content of the Petitioner's reply. The Committee's Administrative Officer had already forwarded the reply brief to the ARB at that point.

The Petitioner alleges error by the Committee as to both the Determination on the charges and on penalty. The Petitioner contends that the record and the Committee's own findings support a Determination that the Respondent engaged in conduct that evidenced moral unfitness. The Petitioner alleges further error in the Committee's Determination to dismiss the 2805-k charges that relate to the applications subsequent to 1989. The Petitioner also contends that the Committee imposed an inappropriate penalty. The Petitioner asks that the ARB revoke the Respondent's License.

The Respondent also alleges error by the Committee in their conclusions on the charges and on the penalty, but for different reasons. The Respondent contends that no evidence in the record established knowing and intentional misconduct and that the only evidence in the record concerning the Respondent's mental state came from the Respondent and his office employee, Wendy Noto. The Respondent argues that the Committee erred in rejecting the Respondent's explanations concerning the false applications, because the Respondent presented a reasonable and honest explanation for the misrepresentations. The Respondent also contends that the Committee erred in partially sustaining the 2805-k charges, because the Notice of Hearing allegations on those charges were so vague as to prejudice the Respondent's ability to present a defense. The Respondent asks that the ARB overturn the Committee and dismiss all charges.

ARB Authority

Under PHL §§ 230(10)(i), 230-c(1) and 230-c(4)(b), the ARB may review Determinations by Hearing Committees to determine 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 PHL §230-a permits. The ARB may substitute our judgment 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); 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); and in determining credibility, Matter of Minielly v. Comm. of Health, 222 A.D.2d 750, 634 N.Y.S.2d 856 (3rd Dept. 1995). The ARB may choose to substitute our judgment and impose a more severe sanction than the Committee on our own motion, even without one party requesting the sanction that the ARB finds appropriate, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). In determining the appropriate penalty in a case, the ARB may consider both aggravating and mitigating circumstances, as well as considering the protection of society, rehabilitation and deterrence, Matter of Brigham v. DeBuono, 228 A.D.2d 870, 644 N.Y.S.2d 413 (1996).

The statute provides no rules as to the form for briefs, but the statute limits the review to only the record below and the briefs [PHL § 230-c(4)(a)], so the ARB will consider no evidence from outside the hearing record, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3rd Dept. 1997).

A party aggrieved by an administrative decision holds no inherent right to an administrative appeal from that decision, and that party may seek administrative review only pursuant to statute or agency rules, Rooney v. New York State Department of Civil Service, 124 Misc. 2d 866, 477 N.Y.S.2d 939 (Westchester Co. Sup. Ct. 1984). The provisions in PHL §230-c provide the only rules on ARB reviews.

Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination that the Respondent practiced fraudulently and willfully filed false reports. We also affirm the Committee's Determination to sustain in part and dismiss in part the charges relating to 2805-k violations. We overturn the Committee and sustain the charges that the Respondent engaged in conduct that evidenced moral unfitness. We also overturn the Committee's Determination to suspend the Respondent's License, place the Respondent on probation and require the Respondent to complete CME courses. The ARB votes to revoke the Respondent's License.

Fraud and Willfully Filing a False Report: In order to sustain a charge that a licensee practiced medicine fraudulently, a hearing committee must find that (1) a licensee made a false representation, whether by words, conduct or by concealing that which the licensee should have disclosed, (2) the licensee knew the representation was false, and (3) the licensee intended to mislead through the false representation, Sherman v. Board of Regents, 24 A.D.2d 315, 266 N.Y.S.2d 39 (Third Dept. 1966), aff'd, 19 N.Y.2d 679, 278 N.Y.S.2d 870 (1967). A committee may infer the licensee's knowledge and intent properly from facts that such committee finds, but the committee must state specifically the inferences it draws regarding knowledge and intent,

Choudhry v. Sobol, 170 A.D.2d 893, 566 N.Y.S.2d 723 (Third Dept. 1991). To prove willfully filing a false report, a committee must establish that a licensee made or filed a false statement willfully, which requires a knowing or deliberate act, Matter of Brestin v. Comm. of Educ., 116 A.D.2d 357, 501 N.Y.S.2d 923 (Third Dept. 1986). Merely making or filing a false report, without intent or knowledge about the falsity fails to constitute professional misconduct, Matter of Brestin v. Comm. of Educ., (supra). A committee may reject a licensee's explanation for erroneous reports (such as resulting from inadvertence or carelessness) and draw the inference that the licensee intended or was aware of the misrepresentation, with other evidence as the basis, Matter of Brestin v. Comm. of Educ., (supra).

The evidence in this case demonstrates that the Respondent made false representations on a number of applications over a long period of time, even though he received notice early in that time period that he had submitted false applications. That pattern and the notice provided the Committee the basis for rejecting the Respondent's explanations for the false applications and the basis for inferring that the Respondent intended the misrepresentations knowingly and with intent to deceive. The Committee also rejected the Respondent's claim that he corrected the false information. The Committee found that the Respondent told Booth in 1990 that he failed to mention the 1989 OPMC disciplinary penalty, because he had received a stay on the penalty [Committee Finding of Fact (FF) 11]. The Committee found that statement false because the Respondent actually received the stay six weeks after he made out the Booth application [FF 12]. The Committee also noted that the current Chair in Orthopedics at Winthrop, Dr. DiMaio, testified at the hearing that he was unaware of the 1989 OPMC disciplinary action.

The Committee, as finder of fact, may reject the Respondent's explanations and rely on other information in the record and may draw inferences from that other information. The

Committee acted within their authority and consistent with the record in sustaining the fraud and willfully filing false report charges.

Violations Under PHL § 2805-k: We affirm the Committee's Determination that the Respondent violated § 2805-k[1][g] by failing to verify the applications at issue in this proceeding. The Respondent's own testimony established his failure to verify [Hearing Transcript pages 266-267]. We also affirm the Committee's conclusion that the Respondent violated § 2805-k[1][c] & [d] by failing to report pending proceedings on a number of 1989 applications. In addition, we affirm the Committee's Determination finding no 2805-k[1][c]&[d] violations concerning applications subsequent to 1989. We agree with the Committee that there were no pending proceedings to report on the subsequent applications and that the statutory provision at issue requires reporting only as to cases pending when the licensee files the application.

The Respondent challenged all the sustained 2805-k charges on grounds that the Respondent failed to receive sufficient notice because the charges were vague. We find that the Respondent raises a technical legal point on that issue that the Respondent should raise with the courts. We realize that the Respondent needs to raise such issues at this level in order to preserve the issue for later appeal.

Moral Unfitness: We overturn the Committee's Determination on moral unfitness, because we find the Committee's conclusion inconsistent with the evidence and with the Committee's findings.

We agree with the Committee that the standard for moral unfitness requires a finding that either a licensee violated the public trust that the public bestows on the medical profession by virtue of the license, or that the licensee violated the moral standards of the medical profession.

We also agree with the Committee that this case involves the question whether the Respondent violated the moral standards of the medical profession. We disagree with the Committee that the record contained insufficient evidence to conclude that the Respondent violated the medical profession's moral standards.

The Respondent made repeated, deliberate false representations to the government, to medical facilities and to an insurer. The Committee found that integrity is essential to the practice of medicine and that it is imperative that physicians deal truthfully with regulators, facilities and insurers. The Committee also found the Respondent's conduct unprofessional, irresponsible, intentional and deliberate and found that the Respondent lacked the ethical understanding of his responsibility as a physician to the honor of the profession. In addition, the Committee found that the Respondent lacked respect for the ethical rules of the medical profession and that the Respondent dismissed the importance of those ethical rules.

The ARB holds that the Respondent's conduct and the Committee's findings demonstrate that the Respondent has violated the moral standards of the medical profession. The ARB sustains the charge that the Respondent's conduct evidenced moral unfitness in the practice of medicine.

Penalty: We overturn the penalty the Committee imposed because we find the penalty inappropriate to address the Respondent's misconduct. The Respondent lacks the integrity necessary to practice medicine and the ARB holds that ten hours continuing education in ethics or professionalism will do nothing to provide the Respondent such integrity. The Committee rejected the Respondent's explanation that the false applications resulted from mistakes by his staff, so the ARB finds no value in requiring the Respondent to complete continuing education courses on office or practice management. The Respondent refused even at the hearing to

acknowledge that he did anything wrong. The Respondent's refusal to accept responsibility for his misconduct and his lack of insight into the need to correct his conduct demonstrates the likelihood that the Respondent will continue to engage in such conduct if he retains his license, even if he must serve a suspension and then practice under probation.

The Respondent engaged in repeated and serious misconduct and has demonstrated his unfitness to continue to practice medicine in New York State. The ARB votes unanimously to revoke the Respondent's License. Making fraudulent applications to medical facilities, SED and Blue Cross, standing alone, provides sufficient reason to revoke the Respondent's License.

ORDER

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

1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB overturns the Committee's Determination to dismiss the charge that the Respondent engaged in conduct that evidenced moral unfitness in the practice of medicine and the ARB sustains that charge.
3. The ARB overturns the Committee's Determination and we vote unanimously to revoke the Respondent's License.

Robert M. Briber
Thea Graves Pellman
Datta G. Wagle, M.D.
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.

In the Matter of Hank Ross, M.D.

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

Dated: August 8, 2006

REDACTED

~~Robert M. Briber~~

In the Matter of Hank Ross, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Ross.

Dated: July 11, 2006

REDACTED

Thea Graves Pellman

In the Matter of Hank Ross, M.D.

Datta G. Wagle, M.D., an ARB Member concurs in the Determination and Order in the

Matter of Dr. Ross,

Dated: 8/9, 2006

REDACTED

~~Handwritten signature~~
Datta G. Wagle, M.D.

In the Matter of Hank Ross, M.D.

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

Dated: August 8, 2006

REDACTED

Stanley L Grossman, M.D.

In the Matter of Hank Ross, M.D.

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

Dated: August 8, 2006

REDACTED

Therese G. Lynch, M.D.