



STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303

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

Dennis P. Whalen
Executive Deputy Commissioner

January 28, 2002

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Robert Bogan, Esq.
& Robert Maher, Esq.
NYS Department of Health
Hedley Park Place – 4th Floor
Troy, New York 12180

Hermes Fernandez, Esq.
111 Washington Avenue
Albany, New York 12210

Carlos F. Delos Reyes, M.D.

Carlos F. Delos Reyes, M.D.
Elmira Psychiatric Center
100 Washington Street
Elmira, New York 14901

REDACTED

RE: In the Matter of Carlos F. Delos Reyes, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 01-229) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:cah
Enclosure

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

COPY

In the Matter of

Carlos F. Delos Reyes, M.D. (Respondent)

Administrative Review Board (ARB)

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

Determination and Order No. 01-229

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

For the Department of Health (Petitioner):

Paul Robert Maher, Esq.

For the Respondent:

Hermes Fernandez, Esq.

In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 2000), the Petitioner asks the ARB to modify a BPMC Committee Determination that found the Respondent liable for disciplinary action against his New York Medical License (License) due to professional misconduct in another state. After considering the hearing record and review submissions by each party, we modify the Committee's Determination and hold that the Respondent committed misconduct in a sister state that would amount to engaging in conduct that evidenced moral unfitness and failing to maintain accurate records under New York Law. We overturn the Committee's Determination to censure and reprimand the Respondent and we vote 5-0 to suspend his License for six months and to stay the suspension in full.

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(9)(b) & (9)(d) (McKinney Supp. 2001) by committing professional misconduct because:

- the duly authorized professional disciplinary agency from another state (Nebraska) found the Respondent guilty for professional misconduct [§6530(9)(b)] and/or took disciplinary action against the Respondent's medical license in that state [§6530(9)(d)], for,
- conduct that would constitute professional misconduct, if the Respondent had committed such conduct in New York.

The Petitioner's Statement of Charges [Petitioner Exhibit 1] alleged that the Respondent's misconduct in Nebraska would constitute misconduct if committed in New York, under the following categories:

- practicing medicine beyond its authorized scope, a violation under N. Y. Educ. Law §§ 6530(2)&(24) (McKinney 2001),
- practicing medicine with gross negligence, a violation under N. Y. Educ. Law §6530(4) (McKinney 2001)
- willful or grossly negligent failure to comply with federal, state or local laws, rules or regulations governing medical practice, a violation under N. Y. Educ. Law § 6530(16) (McKinney 2001),
- engaging in conduct that evidences moral unfitness, a violation under N. Y. Educ. Law § 6530(20) (McKinney 2001),
- willfully making or filing a false report, a violation under N. Y. Educ. Law § 6530(21) (McKinney 2001), and,
- failing to maintain accurate records, a violation under N. Y. Educ. Law § 6530(32) (McKinney 2001).

An expedited hearing (Direct Referral Proceeding) ensued pursuant to N.Y. Pub. Health Law §230(10)(p)(McKinney Supp. 2001), before a BPMC Committee, which rendered the Determination now on review. In the Direct Referral Proceeding, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, see In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The Committee found that the Nebraska Department of Health and Human Services, Regulation and License (Nebraska Board) revoked the Respondent's Nebraska License in 2000 for prescribing medication inappropriately and for lying to authorities during an investigation. The Nebraska Board found that the Respondent, a psychiatrist, wrote a prescription for a colleague for 120 bottles of Stadol, an analgesic, which the colleague's own physician had prescribed to treat Multiple Sclerosis. The Nebraska Board also found that the Respondent guilty for misleading investigators during inquiries into the Stadol prescription. The Committee found that the Nebraska action constituted both a disciplinary action and guilty findings by another state's disciplinary agency.

The Committee concluded that the Respondent's conduct would have amounted to professional misconduct if committed in New York as failing to maintain an accurate patient record. The Committee then held that the Respondent's conduct made him liable for disciplinary action under Educ. Law §§ 6530(9)(b) & (9)(d). The Committee voted to censure and reprimand the Respondent. The Committee determined that the Respondent's conduct resulted from an ill-advised but well-intentioned attempt to help a colleague. The Committee held that the Respondent received a harsh punishment from the Nebraska Board and that the Nebraska misconduct provided the only blot on an otherwise unblemished record.

Review History and Issues

The Committee rendered their Determination on October 5, 2001. This proceeding commenced on October 9, 2001, when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and the Respondent's response brief. The record closed when the ARB received the response brief on November 14, 2001.

The Petitioner asks the ARB to overturn the Committee and find that the Respondent's Nebraska conduct, if committed in New York, would amount to practicing beyond authorized

scope, engaging in conduct that evidenced moral unfitness and practicing with gross negligence. The Petitioner argues that the Committee Determination contained mischaracterization and misinterpretation of the Nebraska Board's findings. The Petitioner also argues that the Committee imposed an insufficient penalty for the Respondent's untruthful statements and disregard for patient safety. In response, the Respondent argues that the Petitioner requested the modifications in the Determination without supporting authority or references to the record.

Determination

The ARB has considered the record and the parties' briefs. Under our review authority from Pub. Health Law § 230-c(1), 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 Pub. Health Law §230-a permits. That statutory standard means that the ARB may 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); 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). We elect to exercise that authority in this case.

We affirm the Committee's Determination that the Respondent's Nebraska conduct constituted failure to maintain accurate records. We amend the Determination on that charge to correct an error. We reject the Petitioner's request that we hold that the Nebraska conduct would amount to gross negligence and practice beyond the authorized scope. We overturn the Committee and sustain the charge that the Respondent's Nebraska conduct would constitute

engaging in conduct that evidences moral unfitness. We also overturn the Committee's Determination on penalty.

First, we amend the Committee's Determination to correct an error. The Committee held that the Respondent's Nebraska conduct would constitute failure to maintain an accurate patient record under New York Law. Failure to maintain an accurate record constitutes professional misconduct under Educ. Law § 6530(32). Neither party challenged the Committee's holding on record keeping, but the Petitioner pointed out that the Committee's Determination at page 4 referred to the sustained charge as § 6530(7). That section pertains to practice while impaired. We infer that the reference constituted a drafting error, because nothing in the charges or in the evidence related to impairment in practice. We amend the statutory reference at page 4 in the Committee's Determination to read § 6530(32) rather than § 6530(7).

The Petitioner's brief argued that the Respondent wrote a prescription for another physician's patient, without examining the patient, while knowing that the Respondent was moving from Nebraska and would be unable to care for the patient. The Petitioner argued that such conduct exceeded all reasoned and reasonable limitations as far as what "scope of practice" encompassed, although the Petitioner's brief claimed that no case law defined the term "authorized scope". In reply, the Respondent argued that several cases concerning non-physician professionals defined "scope of practice" to mean practicing beyond a profession's statutory definition, Warmbrand v. Regents, 277 App. Div. 926, 98 N.Y.S.2d 517 (3rd Dept. 1950), Klein v. Sobol, 167 A.D.2d 625, 562 N.Y.S.2d 856 (3rd Dept 1990). The definition for the practice of medicine under Educ. Law §.6521 includes prescribing for any human disease, pain, deformity or physical condition. The Respondent notes that the only reported case on the issue dealing with a physician involved a finding that the physician practiced beyond the authorized scope by

continuing to practice with a suspended license, Hubsher v. DeBuono, 232 A.D.2d 764, 648 N.Y.S.2d 735 (3rd Dept 1996).

The ARB agrees with the Respondent that the facts in this case fail to prove practice beyond the authorized scope. Under Educ. Law § 6521, a psychiatrist can prescribe medications.

The Petitioner also argued that the Respondent's Nebraska conduct constituted practicing with gross negligence, by disregarding patient safety and well being in prescribing the Stadol for the Nebraska colleague. Gross negligence means an egregious or conspicuously bad deviation from acceptable medical practice, Spero v. Board of Regents, 158 A.D.2d 763, 551 N.Y.S.2d 352 (3rd Dept 1990). We hold that the Nebraska conduct failed to constitute gross negligence. The Nebraska colleague already received Stadol through her regular physician as a treatment for Multiple Sclerosis. The Respondent failed to consult with that physician before writing the Stadol prescription and prescribed the medication without an adequate medical assessment [Nebraska Board Order, Hearing Exhibit 5: page 3, Finding of Fact 9; page 5, paragraph 22]. The Nebraska Board's Order made no finding that the Respondent disregarded patient safety or well being. We hold that writing the prescription without the consultation or assessment constituted a failure to practice according to acceptable standards, but fell short from egregious or conspicuously bad conduct. We affirm the Committee's Determination to dismiss the gross negligence charge.

The Petitioner also argued that providing misleading information to the Nebraska investigators would constitute misconduct under Educ. Law § 6530(20). To prove misconduct under that section, the Petitioner must prove that the Respondent engaged in an act or acts that evidenced moral unfitness, rather than proving the Respondent himself morally unfit. The

Nebraska Board found that the Respondent lied to disciplinary investigators and to the Nebraska State Patrol concerning the Stadol prescription [Exhibit 5, pages 5-6, paragraph 23]. Those factual findings bind the Committee and the ARB, Ikramuddin v. DeBuono, 256 A.D.2d 1039, 683 N.Y.S.2d 319 (3rd Dept. 1998). The Committee found the misleading information to the investigators morally deficient, but the Committee also held that the conduct occurred outside medical practice and the Committee dismissed the moral unfitness charge. We disagree that the conduct occurred outside medical practice. The Respondent provided the misleading information concerning a prescription he wrote within the scope of his practice. We hold that providing misleading information about the prescription constitutes a matter in medical practice and we sustain the charge that providing the misleading information constituted engaging in conduct that evidences moral unfitness in practice.

The Committee voted to censure and reprimand the Respondent for conduct that would amount to failure to maintain accurate records in New York Law. We have concluded that the Respondent's conduct also involved moral unfitness. We vote to suspend the Respondent's License for six months and to stay the suspension in full. In staying the suspension, we considered that Nebraska imposed a harsh penalty by revoking the Respondent's License and we considered that the prescription and the misleading information constituted the only blot on the Respondent's record. From this record, we see no risk that the Respondent will repeat his aberrant behavior.

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 by engaging in conduct in another state that would constitute failure to maintain accurate records under New York Law.
2. The ARB overturns the Committee and we hold that the Respondent's conduct would also have amounted to engaging in conduct that evidenced moral unfitness.
3. The ARB overturns the Committee's Determination to censure and reprimand the Respondent.
4. The ARB suspends the Respondent's License for six months and stays the suspension in full.

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 Carlos F. Delos Reyes, M.D.

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

Dated: December 10, 2001

REDACTED

~~Robert M. Briber~~

FROM :

In the Matter of Carlos F. Delos Reyes, M.D.

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

Dated: 1/7, 2001 ✓

REDACTED

Thea Graves Pellman

In the Matter of Carlos F. Delos Reyes, M.D.

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

Dated: 1/25, 2001

REDACTED

Winston S. Price, M.D.

In the Matter of Carlos F. Delos Reyes, M.D.

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

Dated: December 10, 2001

REDACTED

Stanley L Grossman, M.D.

In the Matter of Carlos F. Delos Reyes, M.D.

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

Dated: Dec. 10, 2001

REDACTED

Therese G. Lynch, M.D.