

Public



STATE OF NEW YORK  
DEPARTMENT OF HEALTH

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

Richard F. Daines, M.D.  
Commissioner

James W. Clyne, Jr.  
Executive Deputy Commissioner

November 2, 2010

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Jude B. Mulvey, Esq.  
NYS Department of Health  
ESP-Corning Tower-Room 2512  
Albany, New York 12237

Charles A. Mitgang, M.D.

REDACTED

Alexander G. Bateman, Jr., Esq.  
Ruskin, Moscou, Faltischek, P.C.  
East Tower - 15<sup>th</sup> Floor  
1425 RXR Plaza  
Uniondale, New York 11556-1425

**RE: In the Matter of Charles A. Mitgang, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 10-218) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the 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.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), (McKinney Supp. 2007) and §230-c subdivisions 1 through 5, (McKinney Supp. 2007), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the Respondent or the Department may seek a review of a committee determination.

All notices of review must be served, by certified mail, upon the Administrative Review Board and the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge  
New York State Department of Health  
Bureau of Adjudication  
Hedley Park Place  
433 River Street, Fifth Floor  
Troy, New York 12180

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,

REDACTED

James F. Horan, Acting Director  
Bureau of Adjudication

JFH:cah

Enclosure

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

-----X  
IN THE MATTER :  
OF :  
CHARLES A. MITGANG, M.D. :  
CO-09-04-2004-A :  
-----X

DETERMINATION  
AND  
ORDER

BPMC #10-218

**COPY**

A Commissioner's Order and Notice of Referral Proceeding and a Statement of Charges, both dated February 3, 2010, were served upon the Respondent, Charles A. Mitgang, M.D. C. DEBORAH CROSS, M.D. (Chair), THERESE G. LYNCH, M.D., and PAUL J. LAMBIASE, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. LARRY G. STORCH, ESQ., ADMINISTRATIVE LAW JUDGE, served as the Administrative Officer. The Department of Health appeared by Robert Bogan, Esq., Associate Counsel. The Respondent appeared by Ruskin, Moscou, Faltischek, P.C., Alexander G. Bateman, Jr., Esq., of Counsel. A hearing was held on September 22, 2010. Evidence was received and witnesses sworn and heard and transcripts of these proceedings were made.

After consideration of the entire record, the Hearing Committee issues this Determination and Order.

STATEMENT OF CASE

This case was brought pursuant to Public Health Law Section 230(10)(p). The statute provides for an expedited hearing where a licensee is charged solely with a violation of Education Law §6530(9). In such cases, a licensee is charged with misconduct based upon a prior criminal conviction in New York or another jurisdiction, or upon a prior administrative adjudication regarding conduct which would amount to professional misconduct, if committed in New York. The scope of an expedited hearing is limited to a determination of the nature and severity of the penalty to be imposed upon the licensee.

In the instant case, Respondent is charged with professional misconduct pursuant to Education Law §6530(9)(c), in that he is accused of having been found guilty in an adjudicatory proceeding of violating a state or federal statute or regulation, pursuant to a final decision or determination, when the violation would constitute professional misconduct under New York Education Law §6530. A copy of the Statement of Charges is attached to this Determination and Order in Appendix I.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers in parentheses refer to transcript page numbers or exhibits. These citations represent evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence.

1. Charles A. Mitgang, M.D. (hereinafter, "Respondent"), was authorized to practice medicine in New York State on July 1, 1976 by the issuance of license number 127551 by the New York State Education Department. (Ex. #3).

2. On or about January 6, 2008, a Stipulation was entered into between the Nassau County Department of Health (County) and Charles A. Mitgang, M.D., P.C., a professional corporation. As part of the Stipulation, the professional corporation admitted to 51 violations of provisions of the New York State Sanitary Code pertaining to the operation of x-ray equipment. (Exhibit #5).

3. On or about March 17, 2009, Nassau County Board of Health accepted the Stipulation, and fined Charles A. Mitgang, M.D., P.C. \$26,000.00 in satisfaction of the violations. (Exhibit #4).

CONCLUSIONS OF LAW

The following conclusions were made pursuant to the Findings of Fact listed above. All conclusions resulted from a unanimous vote of the Hearing Committee unless noted otherwise.

The Department's case against Respondent is fatally flawed. The sole specification charges Respondent with professional misconduct in violation of New York Education Law §6530(9)(c). It is based upon Respondent's allegedly having been found guilty in the County Board's adjudicatory proceeding.

In order to sustain a charge under this statute, a licensee must have been found guilty in an adjudicatory proceeding of violating a state or federal statute or regulation, when the violation would constitute professional misconduct pursuant to this section.

However, the documents placed into evidence by the Department clearly show that the County proceeding was against a professional corporation (P.C.), which was the registered operator of the x-ray equipment, and not against the Respondent individually. (See, Exhibits #4 and #5). Contrary to the Department's assertion (T., p. 32), an individual and a professional corporation are not one and the same. Thus, it is clear that the specification of misconduct must be dismissed.

If the Department wishes to proceed against Respondent in

his individual capacity, it must do so through the normal hearing process. We dismiss this case without prejudice to the Department's ability to proceed against Respondent in his individual capacity for the actions undertaken during the course of his medical practice. However, we do suggest that this case might be amenable to treatment under the expedited procedures provisions of Public Health Law §230(10)(m).

DETERMINATION AS TO PENALTY

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, unanimously determined that the Specification of professional misconduct brought against the Respondent should be dismissed. Accordingly, no penalty shall be imposed upon Respondent.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED THAT:

1. The Specification of professional misconduct, as set forth in the Statement of Charges (Exhibit # 1) is DISMISSED;

2. This Determination and Order shall be effective upon service. Service shall be either by certified mail upon Respondent at Respondent's last known address and such service shall be effective upon receipt or seven days after mailing by certified mail, whichever is earlier, or by personal service and such service shall be effective upon receipt.

DATED: Elmsford, New York

*October 28*, 2010

REDACTED

C. DEBORAH CROSS, M.D. (CHAIR) *DC*

THERESE G. LYNCH, M.D.  
PAUL J. LAMBIASE



TO: Jude B. Mulvey, Esq.  
Associate Counsel  
New York State Department of Health  
Corning Tower, Room 2512  
Albany, New York 12237

Charles A. Mitgang, M.D.

REDACTED

Alexander G. Batemen, Jr., Esq.  
Ruskin, Moscou, Faltischek, P.C.  
East Tower, 15<sup>th</sup> Floor  
1425 RXR Plaza  
Uniondale, New York 11556-1425

## APPENDIX I

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

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IN THE MATTER  
OF  
CHARLES A. MITGANG, M.D.  
CO-09-04-2004-A

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STATEMENT  
OF  
CHARGES

CHARLES A. MITGANG, M.D., Respondent, was authorized to practice medicine in New York state on July 1, 1976, by the issuance of license number 127551 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. On or about March 17, 2009, the Board of Health, County of Nassau, State of New York, (hereinafter "Nassau County Board"), by an Order of the Board of Health (hereinafter "New York Order"), inter alia, fined Respondent \$26,000.00, based on fifty-one (51) violations of the Sanitary Code of the State of New York.
- B. The conduct resulting in the Nassau County Board disciplinary action against Respondent would constitute misconduct under the laws of New York state, pursuant to the following sections of New York state law:
1. New York Education Law §6530(3) (negligence on more than one occasion);
  2. New York Education Law §6530(11) (permitting, aiding or abetting an unlicensed person to perform activities requiring a license);
  3. New York Education Law §6530(16) (a willful or grossly negligent failure to comply with substantial provisions of federal, state, or local laws, rules, or regulations governing the practice of medicine) and/or
  4. New York Education Law §6530(25) (delegating professional responsibilities to a person when the licensee delegating such responsibilities knows or has reason to know that such person is not qualified, by training, by experience, or by licensure, to perform them).

SPECIFICATION

Respondent violated New York Education Law §6530(c) by having been found guilty in an adjudicatory proceeding of violating a state or federal statute or regulation, pursuant to a final decision or determination, and when no appeal is pending, or after resolution of the proceeding by stipulation or agreement, and when the violation would constitute professional misconduct under New York Education Law §6530, in that Petitioner charges:

1. The facts in Paragraph A and/or B.

DATED: *February 3*, 2010  
Albany, New York

REDACTED

PETER D. VAN BUREN  
Deputy Counsel  
Bureau of Professional Medical Conduct