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NEW YORK
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HEALTH

Nirav R. Shah, M.D., M.P.H
Commissioner

Sue Kelly
Executive Deputy Commissioner

August 12, 2013

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Cynthia M. Fascia, Esq.
NYS Department of Health
ESP-Corning Tower-Room 2505
Albany, New York 12237

Mushtaq Khan, M.D.
REDACTED

Frank Howard, Esq.
1441 East Avenue – Suite 109
Rochester, New York 14610

RE: In the Matter of Mushtaq Khan, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 13-239) 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.

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 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
Office of Professional Medical Conduct
Riverview Center
150 Broadway - Suite 355
Albany, New York 12204

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.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), (McKinney Supp. 2013) and §230-c subdivisions 1 through 5, (McKinney Supp. 2013), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

Request for review of the Committee's determination by the Administrative Review Board stays penalties other than suspension or revocation until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

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., Chief Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Riverview Center
150 Broadway – Suite 510
Albany, New York 12204

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
Chief Administrative Law Judge
Bureau of Adjudication

JFH:cah

Enclosure

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

In the matter of

Mushtaq Khan, M.D.
NYS permit # P78485

regarding charges of violations of NYS Ed.L 6530

Determination and Order

BPMC #13-239

Before a committee on professional conduct:

Charles J. Vacanti, M.D., Chair
Therese G. Lynch, M.D.
William W. Walence, Ph.D.

John Harris Terepka, Administrative Law Judge

Held at: New York State Department of Health
335 East Main Street
Rochester, New York
March 13, 2013
259 Monroe Avenue
Rochester, New York
April 24, 25, May 16, 17, 2013
Briefs: June 17, 2013
Deliberations: July 16, 2013

Parties: New York State Department of Health
Bureau of Professional Medical Conduct
Corning Tower, Room 2505
Empire State Plaza
Albany, New York 12237
By: Cynthia M. Fascia, Esq.

Mushtaq Khan, M.D.

REDACTED

By: Frank Howard, Esq.
1441 East Avenue, Suite 109
Rochester, New York 14610

JURISDICTION

As is set forth in Public Health Law 230(1)&(7) and Education Law 6530, the legislature created the State Board for Professional Medical Conduct (the Petitioner) in the Department of Health, and authorized it to conduct disciplinary proceedings in matters of professional medical conduct.

A notice of hearing and statement of charges, both dated February 6, 2013, were served on Mushtaq Khan, M.D. (The Respondent). The statement of charges alleged professional misconduct in violation of Ed.L 6530. (Exhibit 1.) A hearing before a committee on professional conduct (the Hearing Committee) was scheduled pursuant to PHL 230(10) and hearing procedures set forth in Department of Health regulations at 10 NYCRR Part 51. The burden of proof is on the Petitioner. 10 NYCRR 51.11(d)(6).

SUMMARY

The charges arise from the Respondent's actions in connection with two patients he treated at Unity Hospital in Rochester, New York in the spring of 2011. The Petitioner alleged seven specifications in support of three charges of misconduct. The three charges are 1) harassing abusing or intimidating a patient (two specifications), 2) moral unfitness (three specifications), and 3) fraudulent practice (two specifications).

In this decision, the Hearing Committee sustains both specifications of harassing, abusing or intimidating a patient, two specifications of moral unfitness, and one specification of fraudulent practice. The Respondent was practicing medicine under a limited permit issued in connection with his employment at Unity Hospital. The Hearing Committee determined that the Respondent should be denied the registration or issuance of any further license to practice medicine.

EVIDENCE

A prehearing order issued by William J. Lynch, ALJ, was marked as ALJ Exhibit 1. A pre-hearing conference pursuant to 10 NYCRR 51.9(c)(9) was held on March 1, 2013.

Witnesses for the Petitioner:	Mary Catherine Keeley Linda Jantzen Laura Elizabeth Osborne Patient A Kathleen O'Leary Cynthia Bileschi Patient B Lewis C. Zulick, M.D.
Petitioner exhibits:	Exhibits 1-15
Witnesses for the Respondent:	Mushtaq Khan, M.D. Brad H. Landsman, Ph.D.
Respondent exhibits:	Exhibits A-D

A transcript of the proceedings was made. (Prehearing conference transcript, pages 1-39; Hearing transcript, pages 1-671.)

FINDINGS OF FACT

All findings of fact were made upon unanimous vote of the Hearing Committee.

1. Respondent Mushtaq Khan, M.D., was issued a limited permit to practice medicine in New York State on November 24, 2010 under permit number P78485. He received his medical training and was licensed as a physician in Pakistan. (Transcript, pages 423-24; Exhibit B.)

2. The Respondent's limited permit was issued pursuant to Ed.L 6525 in connection with his employment as a physician and surgical house officer at Unity Hospital, Rochester, New York in November 2010. (Transcript, page 424.) His employment responsibilities included conducting pre- and post-surgical physical examinations and interviews and patient care. (Transcript, pages 424-25; Exhibit 14.)

3. The Respondent was terminated by Unity Hospital on July 27, 2011. He was terminated because of his conduct with Patient A and because he lied about it. (Transcript, pages 119-20, 424; Exhibit 5.)

Patient A

4. Patient A arrived at the Unity Hospital emergency department on July 13, 2011 and was subsequently admitted for surgical care. A laparoscopic appendectomy was performed on July 14. (Transcript, pages 173-75, 178; Exhibit 4.)

5. The Respondent provided preoperative and postoperative medical care to Patient A at Unity Hospital on July 14, 15 and 16, 2011.

6. During his initial preoperative evaluation of Patient A, the Respondent engaged her in discussion of personal matters that were not pertinent to her medical care. He also asked for and exchanged cell phone numbers with her. (Transcript, pages 175-76, 445-47.)

7. Between 11 and 12 pm on the evening of July 14, after her appendectomy, the Respondent visited Patient A in an extended stay recovery area. He made inappropriate personal and sexual advances to her and touched her breast, buttocks and vaginal area with no legitimate medical purpose. (Transcript, pages 41, 154-55, 182-84, 188.)

8. At 11:39 pm, at the end of his encounter with her in the extended stay recovery area, the Respondent initiated a text message exchange with Patient A. (Transcript, page 189.)

9. The text message exchange initiated by the Respondent continued from July 14 through July 16 as follows: (Exhibit 6; Transcript, page 501.)

July 14, 11:39pm.	Respondent:	Have good night. With lot of love
July 15, 6:14am.	Patient A:	Had a good night. Thanks xoxox
9:24am.	Respondent:	Dear [Patient A]; get well soon. Let me know when discharge from Hospital. Love u
9:27am.	Patient A:	Will do. Xoxo

9:25am.	Respondent:	Thanks
12:17pm.	Respondent:	How are you doing now. Are you tolerating regular diet: I m praying for you.
12:25pm.	Patient A:	Still clear liquids. : (
3:03pm.	Respondent:	Should I call you [Patient A] now
3:06pm.	Patient A:	No. I have a friend here w me
3:04pm.	Respondent:	Ok thanks
8:19pm.	Respondent:	How are you now sweety. Can I call you after 9. 00 pm
8:23pm.	Patient A:	I'm not home yet. Battery about to die. Gotta turn off Phone. Talk to u tomorrow tho.
8:22pm.	Respondent:	Ok tomorrow I am on day duty
July 16, 3:47am.	Patient A:	I misunderstood ur intention at first but now I understand and I am not comfortable with you. Do not contact me again please.
6:19am.	Respondent:	I apologise if anything hurt you. I am so upset. I will still love you even you trash me. I feel very empty. Thanks for breaking my heart.
8:14am.	Respondent:	I am again very sorry but good news is that white count is trending down to 12000 near normal

10. The Respondent brought flowers and a box of chocolates to Patient A on July 16, 2011. (Transcript, pages 203-204, 448; Exhibit 7.)

11. On the afternoon of July 16, after Patient A had explicitly advised him "do not contact me again please" (Exhibit 6), the Respondent visited her again and persisted in pursuing a personal relationship even after she expressed discomfort with his attentions. (Transcript, pages 205-207.)

12. After disclosing the Respondent's conduct to a friend and being encouraged by her to report it, Patient A complained to Unity Hospital. (Transcript, pages 38-39, 152, 209-211.)

13. The Respondent was formally questioned by Unity Hospital personnel at a meeting on July 22. (Transcript, page 98.) At the meeting, the Respondent denied he had exchanged telephone numbers with Patient A. (Transcript, pages 101, 510.) He also denied he had sent text messages to Patient A. (Transcript, pages 111, 502, 510.) He tried to explain the

existence of the messages by fabricating a story that Patient A had borrowed his telephone. (Transcript, pages 112, 198, 549.) The Respondent lied because he was afraid of being disciplined or terminated if he told the truth. (Transcript, pages 511, 547, 549.)

Patient B

14. Patient B was hospitalized at Unity Hospital at various times from late March through May 2011 for a hip replacement and subsequent complications. (Transcript, page 328; Exhibit 8.) She was discharged on June 1. (Transcript, pages 333, 337; Exhibit 8, page 557.)

15. The Respondent provided medical care to Patient B at Unity Hospital at various times during her hospitalization. (Transcript, pages 330-31, 512.)

16. In June 2011, after Patient B had been discharged, the Respondent made an uninvited visit to her residence when she was not there and left flowers and a card for her. (Transcript, pages 339-40, 516, 529-30; Exhibit 9.) He telephoned her while he was at her door with the flowers and left a voice mail message. (Transcript, pages 342-43, 529-30; Exhibit 14.) He left a second voice mail message later that day. (Transcript, pages 345-46, 529-30.)

17. The Respondent obtained Patient B's telephone number and address by accessing Unity Hospital records on May 29, 2011. (Transcript, pages 307-308, 512, 529-30.) The Respondent had no legitimate medical reason to access and obtain this information about her, and used it to make unwanted personal advances toward her.

Deposition testimony

18. In a deposition on April 4, 2012 the Respondent stated under oath that he had never sent a text message to a patient other than Patient A. Respondent had sent a text message to Patient B in June 2011, after Patient B was discharged from Unity Hospital. (Transcript, pages 526-32, 550-51.)

19. In a deposition on April 4, 2012 the Respondent stated under oath that Patient A was the first patient he had ever telephoned when not on duty. Respondent had telephoned Patient B in June 2011, after she was discharged from Unity Hospital. (Transcript, page 531.)

DISCUSSION OF FACTUAL ALLEGATIONS

The Respondent disputed some of the details and denied the allegations that anything he did was inappropriate, but he otherwise admitted most of the factual allegations set forth in the statement of charges. He admitted that he telephoned, sent text messages, and brought flowers, cards and candy to these patients. (Allegations A1a&b, A3, A4, A5, A6, A7, B1, B2.) He admitted he lied to Unity Hospital investigators about sending text messages to Patient A. (Allegation A8.) He admitted he accessed Unity Hospital records to obtain Patient B's personal demographic information in order to telephone and visit her at home. (Allegation B3.) He admitted that in a deposition in April 2012 he denied telephoning or texting any patients other than Patient A. (Allegations C1, C2) The Hearing Committee sustained these factual allegations.

The Respondent denied only the allegations (allegations A2a-g) that he inappropriately touched and made sexual advances toward Patient A in the extended stay recovery area on July 14. The Hearing Committee did not credit his denials and sustained these factual allegations as well.

The Respondent claimed he had no inappropriate intentions towards the patients and was just being friendly and supportive. His excuses and explanations for the behavior he admitted to are inadequate, and his denial that he physically molested Patient A is not credited. The Hearing Committee did, however, accept his explanation for his deposition

testimony, which was that his denials he telephoned or texted any patient other than Patient A were not willfully false statements because Patient B, having been discharged, was no longer a patient when he contacted her by telephone. (Transcript, page 457.)

The Respondent repeatedly argued that his Pakistani background and training somehow explains the behavior to which he admitted, suggesting that consideration should be given to the cultural context in which he was raised and trained as a physician. (Transcript, pages 455, 562, 564-66; Respondent brief, pages 2, 12.) He claimed some kind of "cultural misunderstanding," the nature of which he did not explain, with Patient A. (Transcript, pages 535-36.) The Hearing Committee rejected these excuses. The Respondent's conduct was not excusable in any way on these grounds. The Committee agreed with Dr. Zulick that it is the physician's responsibility to understand the cultural norms and the setting in which he is practicing. It is not the patient's responsibility to understand or excuse the physician's behavior. (Transcript, pages 379-80.)

To the extent that any "cultural misunderstanding" was a factor in the Respondent's behavior, it does not help to explain that behavior. The Respondent's own witness, Dr. Landsman, agreed that such crude and direct approaches toward women as the Respondent admittedly engaged in, and the language that he used, are hardly the norm in Pakistan. (Transcript, page 630.) The idea that such behavior might be acceptable there was, Dr. Landsman said, "contrary to my experience." (Transcript, page 632.) Dr. Landsman also testified that the Respondent described his role as a physician in Pakistan as an even more powerful position of authority with patients than it is in the United States. (Transcript, page 608.) If this evidence presented by the Respondent about his cultural background is credited, his abuse of his authority in this case is all the more egregious. The Respondent's repeated

invocation of a flimsy "cultural" explanation for his behavior was viewed by the Committee as demonstrative of his poor credibility in general.

PATIENT A

Patient A's testimony describing the manner in which the Respondent physically molested, groped and exposed himself to her on July 14, 2011 was credited by the Hearing Committee. (Transcript, pages 182-88.) Her testimony was corroborated by Ms. Keeley and Ms. Osborne, who both credibly testified that Patient A complained about and described her experience to them on July 16. (Transcript, pages 41, 154-55.) The Committee did not credit the Respondent's denial of the encounter. His attempts to show inconsistencies or improbabilities in the evidence about it were unpersuasive and misrepresented the record. (Respondent brief, pages 5-6.)

The Respondent's claims (Transcript, pages 657-58; Respondent brief, pages 5, 12-13) that Patient A's testimony is somehow contradicted by the text messages themselves, or that there is a "missing text message," are not supported by the testimony and evidence he cites, and indeed are contradicted by it. Patient A heard her telephone ring when the Respondent sent his first text message at 11:39 pm, but understandably did not reply to it until the next morning. (Transcript, pages 190-92.) There is no inconsistency in the evidence about this. The Respondent also claimed in his brief that Patient A testified she "had no contact with him" on July 14 between a daytime ambulation she made and the 11 pm encounter, and "failed to reveal" that she saw him in the early evening. (Respondent brief, pages 6, 12-13.) She did not do either of these things. Her testimony at the transcript page he cites was "[t]here may have been, I don't recall... If he came by, it was not a significant stand-out incident." (Transcript, pages 241-42.)

The Respondent claimed that the last time he saw Patient A on July 14 was when he examined her and made an entry in her chart at 7:44 pm. (Transcript, pages 438-41; Exhibit 4, page 40.) He denied he returned to her room later that night and denied that he made sexual advances. (Transcript, pages 442-43.) He denied he sent his first, 11:39 pm text message to her while he was in her room, as she testified he did. (Transcript, pages 189, 497-99.) The Committee credited Patient A's account of these events and did not credit the Respondent's denials. The absence of a chart entry for his 11 pm visit did not persuade the Committee that he was not there. It merely corroborated the conclusion that his visit, like his flowers and candy, had no legitimate medical purpose.

The Hearing Committee agreed with Dr. Zulick that while asking for a patient's cell phone number is not necessarily improper, it is a violation of appropriate standards of professional behavior if the purpose in asking for it is inappropriate. (Transcript, pages 393-94.) The purpose was inappropriate in this case. The Hearing Committee did not credit the Respondent's testimony that he exchanged cell phone numbers with Patient A:

> Just to communicate with the patient... During the hospital – hospital admission... So she can contact me if she has any problems. She can ask any questions regarding medical. (Transcript, page 481.)

He conceded he did not do this with any other patients and did not suggest that this was a customary way to stay in contact with inpatients. (Transcript, page 482.) He further admitted his job did not include any responsibility for contact with patients other than when he was on duty at the hospital. (Transcript, page 552.)

The Hearing Committee agreed that Patient A's initially friendly responses to the Respondent's text messages did not constitute encouragement of his inappropriate behavior. The text message exchange is consistent with her testimony about it. He was in the room

with her when he sent his initial text message, and she noticed that "he seemed pleased that I had actually given him my phone number, my correct phone number." (Transcript, page 189.) She did not respond to the text message until the next morning. (Transcript, pages 190-91.) This is understandable because he was in the room with her when he sent it and she "really had no interest to really know what it said." (Transcript, page 190.)

The next morning, she decided to respond as if he were concerned and friendly about her care. She testified:

> I thought that if I complied, if I was nice, that he would not hurt me. If I was nice, that I would be able to control the situation...
>
> I wasn't able – I mean I – I wasn't able to defend myself, so if I was nice, if I was friendly, if it was light, I felt like I wouldn't have to – because I had no defense, so to be nice was my defense. (Transcript, pages 192-93.)

She understandably felt frightened, unsafe, and at his mercy because she knew that while she remained hospitalized she could always be found by him. (Transcript, pages 202-204.) She remained compliant and tried to politely discourage him but his persistence alarmed her and finally she flatly told him to leave her alone. (Transcript, pages 197-99.) He continued his unwanted attentions with messages and another visit that clearly demonstrated that she had good reason for alarm. (Transcript, pages 200, 205-207.)

The Hearing Committee did not credit the Respondent's assertions that his text messages, flowers and candy were simply meant as "kind gestures." (Transcript, pages 448-49.) While he claimed he was just responding to Patient A in an empathetic and caring way, he also said that he has never sent any such messages or given flowers or candy to any other patients. (Transcript, pages 447-54, 500.) The Committee did not credit his claim that texting "a lot of love" was an expression of respect made without any "romantic intention." (Transcript, page 451.)

The Respondent claimed that in their initial encounters Patient A was angry and upset, highly distraught, emotional and crying on his shoulder, and that she voluntarily confided to him information about her personal life. (Transcript, pages 431, 439, 470.) Patient A credibly denied that she did this. (Transcript, pages 216-18.) The Hearing Committee credited her testimony and did not credit the Respondent's.

The Respondent's claims that Patient A displayed emotional distress and reached out to him are not supported by or even consistent with any other evidence. Her two hundred fifty-nine page hospital record (Exhibit 4) contains no reference to such behavior. The Respondent's own chart entries characterize her demeanor as "delightful" and "very pleasant" during the encounters in which he now claims she was distraught, crying and cursing at a former husband. (Transcript, pages 475, 486; Exhibit 4, pages 29, 40.) His bizarre explanation for this - that he always documented his patient charts in this manner by writing that patients were pleasant regardless of their true behavior (Transcript, pages 486-89) – further diminished his credibility.

The Hearing Committee also agreed that even if they had any truth to them none of the Respondent's claims about what Patient A allegedly expressed to him would excuse his conduct. As Dr. Zulick pointed out, these text messages were clearly improper even if the Respondent's purpose was to "lift her spirits." If psychological or emotional support or treatment was appropriate the hospital had other means of providing it. This was not an acceptable way to do it. (Transcript, pages 396-97.)

PATIENT B

Patient B's allegations came to light when she was hired to be a medical assistant at another hospital, Rochester General Hospital, in August 2011. (Transcript, page 326.) As

part of her new employee orientation, she received HIPAA training given by Cynthia Bileschi, the senior director of clinical and regulatory compliance at Rochester General. After the training session, Patient B disclosed to Ms. Bileschi her May and June 2011 experience with the Respondent at Unity Hospital and asked for advice. (Transcript, pages 316-17, 351.) Ms. Bileschi notified Unity Hospital of the complaint. (Transcript, pages 321-22.) Unity Hospital had recently terminated the Respondent because of the complaint made by Patient A, and when Patient B's additional complaint was reported the connection with the Respondent was soon made. (Transcript, pages 301-306, 321-22.)

Patient B testified that in May 2011, toward the end of her last stay at Unity Hospital for complications associated with her hip replacement, the Respondent came to her room and began to ask intrusive, "out of line" questions about her marital status and personal life. (Transcript, pages 333-35.) The Respondent admitted he asked Patient B about her marital status while she was in the hospital. (Transcript, page 515.) Like Patient A, Patient B did not object to Respondent's inappropriate questioning at the time. She cooperated and complied because he was in a position of considerable control and authority in a situation that she simply wanted to get past and escape as soon as possible. (Transcript, page 335.) The Hearing Committee fully credited this account of her behavior.

When the Respondent subsequently came uninvited to her residence with flowers, Patient B found it "very, very unsettling." (Transcript, page 342.) When he telephoned her again later that day she became "nervous" and "shaken." (Transcript, page 346.) Finally, upon learning he had obtained her address and telephone number from hospital records, she became very angry and upset, "furious" that he had taken such liberties with her confidential information. She remains so to this day. (Transcript, pages 348-50.)

Kathleen O'Leary, the director of clinical quality and patient safety at Unity Health Systems, testified that Unity Hospital computer records confirm the Respondent accessed Patient B's demographic information, including address and telephone number, on May 29, 2011 while she was still an inpatient. (Transcript, pages 307-308.) The Respondent admits he obtained Patient B's telephone and address information in this manner. (Transcript, pages 512-13.) As with Patient A, he claims he only intended his behavior as a supportive gesture made out of sympathy for her because of her medical complications. (Transcript, pages 513-14.)

Dr. Zulick testified, and the Hearing Committee agreed, that it is a violation of ethical standards to access private patient information for personal nonmedical reasons. (Transcript, page 382.) All physicians are trained in and are responsible for understanding the concept of privacy of patient medical information regardless of their background. (Transcript, page 381.) The Respondent signed very explicit confidentiality agreements with the hospital about this. (Transcript, pages 491-95; Exhibits 12 and 13.) The Committee also agreed with Dr. Zulick that it is not appropriate for a physician to cultivate a personal relationship with a patient while he is treating her. (Transcript, pages 384-85.)

DETERMINATION ON SPECIFICATIONS OF CHARGES

The statement of charges included seven specifications in support of three charges of misconduct as defined in various subsections of Ed.L 6530. (Exhibit 1.) The three charges of misconduct are:

1. Harassing, abusing or intimidating a patient. First and second specifications. The Petitioner charges that the Respondent violated Ed.L 6530(31) by willfully harassing, abusing or intimidating patients.

The first specification concerns Respondent's conduct with Patient A and the second specification concerns his conduct with Patient B. The Hearing Committee unanimously sustained both specifications. Patient A and Patient B were frightened, intimidated and offended, and they felt trapped by situations in which the Respondent took advantage of his professional position to pursue them.

With regard to Patient A, the Committee specifically determined that the factual allegations to which the Respondent admitted (allegations A1 and A3-A8) were alone sufficient to sustain the specification. The behavior that he denies (allegations A2a-g) was the most egregious, but not the only misconduct under this specification.

The Respondent points out that Patient B had been discharged from the hospital by the time he brought flowers and telephoned her. Approaching her at that point, he suggests, did not constitute willfully harassing, abusing or intimidating a patient. (Respondent brief, page 2.) The fact that Patient B was discharged makes no difference. The Respondent did not ask her for her telephone number or address, nor did she consent to his calling or visiting her. He obtained the information for his pursuit of her without her permission and behind her back from her inpatient hospital records. He had no legitimate medical reason to access this information, and he exploited it for purposes entirely unrelated to patient care by using it to make uninvited and unwanted personal advances to which she strongly objected.

2. Moral unfitness. Third, fourth and fifth specifications. The Petitioner charges that the Respondent violated Ed.L 6530(20) by conduct that evidences moral unfitness to practice medicine.

The third specification concerns Respondent's conduct with Patient A and the fourth specification his conduct with Patient B. The fifth specification is based on factual

allegations C1 and C2, his statements in a deposition in a civil lawsuit against him that he had not telephoned or sent text messages to any patient other than Patient A.

The Hearing Committee unanimously sustained the third and fourth specifications charging that the Respondent's conduct with Patients A and B evidenced moral unfitness to practice medicine. The Respondent's exploitation of his position as a hospital physician and his aggressive pursuit of vulnerable patients was unacceptable behavior.

With regard to Patient A, the Committee again determined that the factual allegations to which the Respondent admitted (allegations A1 and A3-A8) were alone sufficient to sustain the specification. With regard to Patient B, the Committee again rejected the Respondent's arguments that her discharge from the hospital was a significant circumstance.

The Hearing Committee did not sustain the fifth specification based upon the Respondent's answers given in the April 12 deposition. Although factual allegations C1 and C2 were admittedly accurate, the Petitioner failed to meet its burden of proving that the Respondent's conduct evidenced moral unfitness.

The evidence in this hearing record is that the Respondent was asked if he had ever called or texted another "patient." (Transcript, pages 527-28, 550-51.) He took the position that telephone and text messages to Patient B were not made to a "patient" when the question, as put to him, left room for him to interpret "patient" to mean a patient at the time of the calls. (Transcript, pages 456-57, 530-32, 551.)

The Respondent was obviously less than completely forthcoming when he answered the questions he was asked in the way that he did, but the Petitioner failed to prove more than that he took advantage of an ambiguity in the questions he was asked. He was being deposed by an opponent in a lawsuit against him. Under the circumstances he was not required nor

could he reasonably be expected to provide a more expansive or a more self-incriminating answer than absolutely necessary.

3. Fraudulent practice. Sixth and seventh specifications. The Petitioner charges that the Respondent violated Ed.L 6530(2) by reason of having practiced medicine fraudulently.

The sixth specification involves the Respondent's assertions to Unity Hospital (allegation A8) that he had not sent text messages to Patient A. The seventh specification is based on his deposition statements (allegations C1 and C2) that he had not telephoned or sent text messages to any patient other than Patient A.

The Respondent admittedly lied to Unity Hospital investigators about sending text messages to Patient A, and even concocted a completely false story about lending her his telephone to try to explain the existence of the messages. (Transcript, pages 111-12, 198, 510, 549.) The Hearing Committee unanimously agreed that these lies were told in hopes of defeating an investigation into his medical conduct and constituted the fraudulent practice of medicine. The sixth specification of misconduct was sustained.

The Hearing Committee did not sustain the seventh specification based upon the Respondent's answers given in the April 12 deposition. Although factual allegations C1 and C2 were admittedly accurate, and the Respondent was not entirely candid in his deposition answers, the Committee concluded that the Petitioner failed to meet its burden of proving fraudulent practice.

PENALTY DETERMINATION

As a holder of a limited license the Respondent is fully subject to disciplinary penalties in this proceeding. PHL 230(7)(a). The Hearing Committee reviewed the penalties available to it under PHL 230-a.

The Respondent argues "Dr. Khan is innocent of all the charges arrayed against him" and asks that he be completely exonerated even though he admitted to most of the allegations. (Respondent brief, page 12, and proposed conclusions of law.)

The Respondent asks for complete exoneration even though Dr. Landsman, his own witness, recommended training in medical ethics and "interpersonal issues in patient care." (Exhibit D.) Dr. Landsman said that the behaviors the Respondent admitted to – the texting, telephoning, visits and flowers – were "inappropriate" and could be addressed by such training. (Transcript, page 639.) The Hearing Committee took note that while the Respondent was willing to commission Dr. Landsman for an extensive evaluation, written report, and testimony to dispute the charges, he has not undertaken remedial work or educational training with Dr. Landsman (Transcript, page 616) or, apparently, anyone else. His claim that some kind of "cultural misunderstanding" was the problem suggests that, in his view, he just needs to understand a little more about Western culture.

The Respondent's "cultural" excuse for his behavior is essentially an admission that he still does not think he did anything wrong, and demonstrates a fundamental and continuing lack of fitness to be entrusted with a license to practice medicine. If he is still able to believe that his behavior should be understood and excused because of, as his witness Dr. Landsman put it, "a certain social naivete about aspects of Western culture" (Transcript, page 607) then he is a poor prospect for rehabilitation.

The Hearing Committee concluded that whether or not the encounter with Patient A on the night of July 14, 2011 occurred, the acts to which the Respondent admitted are alone sufficient grounds to deny him the registration or issuance of a license to practice medicine.

As to the additional allegations (A2a-g) sustained by the Committee, even Dr. Landsman conceded that it was questionable whether training and education could help to address such matters as touching patients sexually. As he put it, in such cases and for certain acts "I think we err on the side of [patient and victim] safety and their protection and that we don't risk that an act like that would just disappear as a result of sitting through some additional courses." (Transcript, pages 640-41.) The Hearing Committee agreed with this view and unanimously agreed that in this case no penalty determination that permitted the Respondent to practice medicine could be considered.

Although the Respondent's termination by Unity Hospital presumably means that he no longer holds even a limited permit to practice medicine, the Respondent testified that it is his intention to obtain a medical license in New York. (Transcript, page 429.) It is the Hearing Committee's intention that he should be denied any such license.

ORDER

IT IS HEREBY ORDERED THAT:

1. The following charges of misconduct under Ed.L 6530 are sustained:

   Ed.L 6530(2). Practicing fraudulently
   Ed.L 6530(20). Moral unfitness to practice medicine
   Ed.L 6530(31). Willfully harassing, abusing or intimidating patients

2. Pursuant to PHL 230-a(6) the Respondent shall be denied the registration or issuance of any further license to practice medicine.

3. This order shall be effective upon service on the Respondent by personal service or by registered or certified mail as required under PHL 230(10)(h).

Dated: Albany, New York
12 August 2013

By: REDACTED
Charles J. Vacanti, M.D., Chair

Therese G. Lynch, M.D.
William W. Valence, Ph.D.

To: Cynthia M Fascia, Esq., Associate Counsel
New York State Department of Health
Bureau of Professional Medical Conduct
Corning Tower, Empire State Plaza
Albany, New York 12237-0032

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Rochester, New York 14610

Mushtaq Khan, M.D.
REDACTED

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

IN THE MATTER

OF

MUSHTAQ KHAN, M.D.

STATEMENT

OF

CHARGES

MUSHTAQ KHAN, M.D., Respondent, was issued a limited permit to practice medicine in New York State, P78485, on November 24, 2010.

FACTUAL ALLEGATIONS

A. Respondent provided medical care to Patient A (Patients are identified in the attached Appendix.), a then thirty-nine year old female, from on or about July 14, 2011 through on or about July 16, 2011 at Unity Hospital, Rochester, New York. Respondent's contact with and care of Patient A during her hospitalization was contrary to accepted standards, in that:

1. Respondent, during his pre-surgical medical contact with Patient A on or about July 14, 2011, engaged in conversation and/or conduct of a personal nature, including:

   a. Respondent told Patient A that since they lived in the same area and were practically neighbors, he could make a house call and visit her after her discharge from the hospital to see how she was doing, or words to such effect.

   b. Respondent asked Patient A for her cell phone number and/or exchanged cell phone numbers with Patient A.

2. Respondent, subsequent to surgery performed on Patient A on July 14, 2011, came to Patient A's room in the recovery area/extended stay area that night and engaged in the following conduct:

a. Respondent touched Patient A's face and told her she was beautiful, or words to such effect.

b. Respondent took Patient A's hand and placed it on his heart, and told her that she excited him, or words to such effect,

c. Respondent touched Patient A's breast without a legitimate medical purpose.

d. Respondent touched Patient A's buttocks without a legitimate medical purpose.

e. Respondent touched Patient A's vagina without a legitimate medical purpose.

f. Respondent took Patient A's hand and put it on the crotch of his pants, over his clothed penis, and told her again how much she excited him, or words to such effect.

g. Respondent exposed his unclothed penis to Patient A and asked her to kiss it, or words to such effect.

3. Respondent, while he was in Patient A's room in the recovery area/extended stay area the night of July 14, 2011, sent Patient A a text message **"Have good night. With lot of love."**

4. Respondent, on or about July 15, 2011 at approximately 9:24 a.m., sent Patient A a text message:

> **"Dear [Patient A]; get well soon. Let me know when discharge from Hospital. Love u."**

5. Respondent, at various times during the day and evening of July 15, 2011, sent Patient A text messages that were inappropriate and/or of a personal nature.

6. Respondent, on or about July 16, 2011, brought Patient A flowers and a box of chocolates.

7. Respondent, on or about July 16, 2011, in response to a text message from Patient A in which she told him she was not comfortable with him and told him not to contact her again, sent Patient A a text message:

> **I apologise if anything hurt you. I am so upset. I will still love you even you (sic) trash me. I feel very empty. Thanks for breaking my heart.**

8. Respondent, on or about July 22, 2011, was questioned by Unity Hospital personnel in the course of Unity Hospital's investigation of Respondent's conduct after Patient A had reported Respondent's conduct toward her. Respondent told Unity Hospital personnel who were investigating his conduct that he had not sent any text messages to Patient A, when in fact Respondent had sent text messages to Patient A. Respondent's statement was made with intent to deceive or with reckless disregard for the truth.

B. Respondent provided medical care to Patient B, a then forty-four year old female, on various occasions from approximately March 17, 2011 through approximately June 1, 2011, at Unity Hospital, Rochester, New York. Patient B underwent surgery at Unity Hospital on March 17, 2011, and was discharged on March 21, 2011. She was subsequently readmitted on March 26, 2011; April 2, 2011; May 23, 2011 and May 27,

2011. Concurrent with or subsequent to Patient B's June 1, 2011 discharge from Unity Hospital, Respondent engaged in the following conduct:

1. Respondent, on or about June 2011, made an uninvited visit to Patient B's residence and, when Patient B was not there, left flowers and a card for Patient B.

2. Respondent, on or about June 2011, left Patient B a voice mail message on her cell phone saying that he was outside her door.

3. Respondent accessed Patient B's cell phone number and her address from her hospital discharge papers for the purpose of contacting Patient B personally and/or not for a legitimate medical purpose.

C. Respondent, on or about April 4, 2012, was deposed and gave testimony under oath in a civil lawsuit filed by Patient A against Respondent based on Respondent's conduct toward Patient A during her hospitalization at Unity Hospital in July 2011.

Numbers corrected at hearing JHT

1 4. Respondent stated under oath at said deposition that he had never sent a text message to any patient other than Patient A, and that Patient A was the only patient to whom he had sent a text message, when in fact Respondent had sent a text message to Patient B on or about June 14, 2011.

2 5. Respondent stated under oath at said deposition that Patient A was the first patient that he had ever called when he wasn't on duty, when in fact Respondent had called Patient B's cell phone and left her a voicemail on or about June 2011.

SPECIFICATION OF CHARGES

FIRST AND SECOND SPECIFICATIONS

HARRASSING, ABUSING OR INTIMIDATING A PATIENT

Respondent is charged with professional misconduct as defined in N.Y. Educ. Law § 6530(31) by reason of his willfully harassing, abusing or intimidating a patient either physically or verbally, in that Petitioner charges:

1. The facts in Paragraph A and A.1 and A.1(a) and/or A.1(b); and/or A.2; and/or A.3 and 3(a) and/or 3(b) and/or 3(c) and/or 3(d) and/or 3(e) and/or 3(f) and/or 3(g); and/or A.4 and/or A.5 and/or A.6 and/or A.7.
2. The facts in Paragraph B and B.1 and/or B.2 and/or B.3.

THIRD THROUGH FIFTH SPECIFICATIONS

MORAL UNFITNESS

Respondent is charged with professional misconduct as defined in N.Y. Educ. Law § 6530(20) by reason of his committing conduct in the practice of medicine that evidences moral unfitness to practice medicine, in that Petitioner charges:

3. The facts in Paragraph A and A.1 and A.1(a) and/or A.1(b); and/or A.2; and/or A.3 and 3(a) and/or 3(b) and/or 3(c) and/or 3(d) and/or

3(e) and/or 3(f) and/or 3(g); and/or A.4 and/or A.5 and/or A.6 and/or A.7 and/or A.8 and A.8(a) and/or A.8(b).

4. The facts in Paragraph B and B.1 and/or B.2 and/or B.3.

5. The facts in Paragraphs C and C.1 and/or C.2.

SIXTH AND SEVENTH SPECIFICATIONS

FRAUDULENT PRACTICE

Respondent is charged with committing professional misconduct as defined by N.Y. Educ. Law § 6530(2) by practicing the profession of medicine fraudulently as alleged in the facts of the following:

6. The facts in Paragraphs A and A.8.

7. The facts in Paragraphs C and C.1 and/or C.2.

DATE: February 6, 2013
Albany, New York

REDACTED

Peter D. VanBuren
Deputy Counsel
Bureau of Professional Medical Conduct