



STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

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

Dennis P. Whalen
Executive Deputy Commissioner

Public

November 24, 2006

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Alta Lois Brubaker, M.D.
3715 Hidden Meadow Lane
Keezletown, Virginia 22832-2033

Baird Joslin Esq.
O'Connor, O'Connor, Bresee & First
20 Corporate Woods Boulevard
Albany, New York 12211

Robert Bogan, Esq.
NYS Department of Health
Office of Professional Medical Conduct
Hedley Building
433 River Street, Suite 303
Troy, New York 12180-2299

RE: In the Matter of Alta Lois Brubaker, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 06-265) 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), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "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,

A handwritten signature in cursive script that reads "Sean D. O'Brien".

Sean D. O'Brien, Director
Bureau of Adjudication

SDO:djh

Enclosure

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

COPY

DETERMINATION

AND

ORDER

IN THE MATTER
OF
ALTA LOIS BRUBAKER, M.D.

BPMC NO. 06-265

A hearing was held on November 15, 2006, at the offices of the New York State Department of Health ("the Petitioner"). A Notice of Referral Proceeding and a Statement of Charges, both dated February 22, 2006, were served upon the Respondent, **Alta Lois Brubaker, M.D.** Pursuant to Section 230(10)(e) of the Public Health Law, **Mr. Peter S. Koenig, Sr.**, Chairperson, **Rajan K. Sriskandarajah, M.D.**, and **Diane M. Sixsmith, M.D.**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter. **John Wiley, Esq.**, Administrative Law Judge, served as the Administrative Officer.

The Petitioner appeared by **Donald P. Berens, Jr., Esq.**, General Counsel, by **Robert Bogan, Esq.**, of Counsel. The Respondent appeared in person and was represented by O'Connor, O'Connor, Bresee & First, **Baird Joslin, Esq.**, of Counsel.

Evidence was received and transcripts of these proceedings were made.

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

BACKGROUND

This case was brought pursuant to Public Health Law Section 230(10)(p). The statute provides for an expedited hearing when a licensee is charged solely with a

violation of Education Law Section 6530(9). In such cases, a licensee is charged with misconduct based upon a prior criminal conviction in New York State or another jurisdiction, or upon a prior administrative adjudication regarding conduct that 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, the Respondent is charged with professional misconduct pursuant to Education Law Section 6530(9)(b) and (d). Copies of the Notice of Referral Proceeding and the Statement of Charges are attached to this Determination and Order as Appendix 1.

WITNESSES

For the Petitioner:

None

For the Respondent:

Alta Lois Brubaker, M.D.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers below in parentheses refer to exhibits, denoted by the prefix "Ex." These citations refer to 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. All Hearing Committee findings were unanimous.

1. Alta Lois Brubaker, M.D., the Respondent, was authorized to practice medicine in New York State on October 27, 1986, by the issuance of license number 168329 by the New York State Education Department (Petitioner's Ex. 4).

2. On June 29, 2005, the Virginia Board of Medicine ("Virginia Board"), by a Consent Order ("Virginia Order"), reprimanded the Respondent, placed her on probation,

and required her to take medical record keeping and professional boundaries courses.

This action was based on the Virginia Board's findings that:

- from December 23, 2000, to October 11, 2002, the Respondent prescribed the following Schedule VI controlled substances for her personal and unauthorized use: 186 dosage units of Cyclobenzaprine, 450 dosage units of Prevacid, 270 dosage units of Synthroid, 2,160 dosage units of Topamax 25 mg., 1,800 dosage units of Topamax 100 mg., 540 dosage units of Celexa, 20 dosage units of Veetids, and 260 dosage units of Claritin;
- failure to provide promptly patient records requested by the Virginia Board;
- failure to maintain accurate patient records; and
- sharing personal information with patients.

HEARING COMMITTEE CONCLUSIONS

The Hearing Committee concludes that the conduct of the Respondent would constitute professional misconduct under the laws of New York State, had the conduct occurred in New York State, pursuant to:

- New York Education Law Section 6530(28) - "Failing to respond within thirty days to written communications from the department of health and to make available any relevant records with respect to an inquiry or complaint about the licensee's professional misconduct...;" and
- New York Education Law Section 6530(32) - "Failing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient. Unless otherwise provided by law, all patient records must be retained for at least six years.

Obstetrical records and records of minor patients must be retained for at least six years, and until one year after the minor patient reaches the age of eighteen years...”

The Statement of Charges also alleged that the Respondent’s conduct, had it occurred in New York State, would have constituted professional misconduct in two other ways:

- New York Education Law Section 6530(3) - “Practicing the profession with negligence on more than one occasion;” and
- New York Education Law Section 6530(20) - “Conduct in the practice of medicine which evidences moral unfitness to practice medicine...”

For reasons to be stated below, the hearing record does not support these allegations.

VOTE OF THE HEARING COMMITTEE

FIRST SPECIFICATION

“Respondent violated New York Education Law Section 6530(9)(b) by having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state, where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state...”

VOTE: Sustained (3-0)

SECOND SPECIFICATION

“Respondent violated New York Education Law Section 6530(9)(d) by having disciplinary action taken by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the disciplinary action would, if committed in New York state, constitute professional misconduct under the laws of New York state...”

VOTE: Sustained (3-0)

HEARING COMMITTEE DETERMINATION

The Virginia Order found that the Respondent had committed professional misconduct, as that term is defined in Virginia, in four ways. Those four ways are described in finding of fact 2, above. The Petitioner contended that all four types of professional misconduct under Virginia law would also have been professional misconduct under New York State law, had the acts occurred in New York State. The Hearing Committee concludes that the hearing record supports the Petitioner's position on two of the four categories.

The Virginia Board held that the Respondent committed professional misconduct by prescribing "Schedule VI controlled substances for her personal and unauthorized use..." (Petitioner's Ex. 5). The parties agreed that, unlike the law in Virginia, it is not a violation of law in New York State for a physician to prescribe Schedule VI controlled substances to herself. The Petitioner argued, however, that the words "unauthorized use" in the Virginia Order mean that the Virginia Board found that there was no medical necessity for these medications. Prescribing controlled substances when there is no medical necessity for the prescription is professional misconduct in New York State.

The Hearing Committee disagrees with the Petitioner's interpretation of "unauthorized use." Nothing in the Virginia Order supports this argument. The Virginia Board placed the Respondent on probation pending successful completion of courses on medical record keeping and professional boundaries. There was no requirement that the Respondent be evaluated for dependence on or addiction to controlled substances. If the Virginia Board had meant by "unauthorized use" that there was no medical necessity for the many Schedule VI controlled substance prescriptions, it is inconceivable that no drug dependence evaluation would have been ordered. The Petitioner argued that the Respondent's answers on cross-examination showed that there was no medical necessity

for these prescriptions. The Hearing Committee does not agree that the Respondent's answers disclose the absence of medical necessity. Her inability to answer some questions about the medications is explained by the fact that these prescriptions were written four to six years prior to the date of her testimony.

The Respondent prescribed Schedule VI controlled substances to herself, but the hearing record does not support the claim that there was no medical necessity for the prescriptions. The words "unauthorized use" in the Virginia Order should be interpreted to mean that physicians are unauthorized by Virginia law to prescribe Schedule VI controlled substances for their own use. Therefore, these prescriptions, had the Respondent written them in New York State, would not have been acts of any category of professional misconduct.

The Virginia Board also found that the Respondent "on, occasion, ...shared personal information with patients in order to further the treatment process." (Petitioner's Ex. 5). The Respondent questioned whether this constituted a finding of professional misconduct, but failed to advance a credible explanation for why this subject was mentioned in the Virginia Order if it was not a finding of professional misconduct. The Respondent also did not explain what the purpose was for requiring her to take a professional boundaries course if this language was not a finding of professional misconduct. It is concluded that this was a finding of professional misconduct under Virginia law. It does not follow, however, that the hearing record supports a finding that these disclosures to patients, had they occurred in New York State, would have been acts of professional misconduct under New York State law. The Petitioner argued that they were acts of negligence and moral unfitness. The Petitioner did not explain how such disclosures constituted moral unfitness and nothing in the hearing record sheds any light on such a theory. Likewise, there is nothing in the hearing record that supports a

conclusion that the disclosures constituted negligent treatment of the Respondent's patients. The hearing record does not even disclose what the subject matter of these statements was. The Respondent committed professional misconduct as defined in Virginia by disclosing personal information to her patients, but there is nothing in the hearing record that supports a conclusion that, had she made such disclosures in New York State, these acts would have been professional misconduct under New York State law.

The remaining findings of professional misconduct in the Virginia Order are failing to turn over requested medical records to the Virginia Board in a timely manner and inadequate record keeping. There was no dispute between the parties that the Respondent committed these two types of professional misconduct under Virginia law. Likewise, there was no dispute that, had these acts been committed in New York State, they would have constituted professional misconduct under New York State Education Law Section 6530(28) and (32).

In addition to the allegations regarding Education Law Section 6530(28) and (32), the Statement of Charges also alleged that the Respondent's acts, had they occurred in New York State, would also have constituted professional misconduct under Education Law Section 6530(3), which defines negligence on more than one occasion as professional misconduct, and Education Law Section 6530(20), which defines conduct in the practice of medicine which evidences moral unfitness as professional misconduct.

The Petitioner argued during the hearing that the negligence allegation applies to the inadequate record keeping, sharing personal information and prescribing of controlled substances charges. As stated above, the Respondent's prescribing of controlled substances and sharing of personal information, as far as this hearing record discloses, do not constitute negligence or professional misconduct of any other type under New

York State Law. The Respondent's inadequate record keeping also does not constitute negligence. Not all acts of inadequate record keeping are serious enough to constitute negligent treatment of a patient. There is not enough information in the hearing record about the nature and the scope of the record keeping inadequacies to conclude that negligence was committed.

The Petitioner argued during the hearing that the moral unfitness allegation applies to the prescribing of controlled substances and sharing of personal information charges. As stated above, the Respondent's prescribing of controlled substances and sharing of personal information do not constitute any type of professional misconduct under New York State law. Therefore, the moral unfitness allegation cannot be sustained.


The Petitioner recommended that the Respondent be censured and reprimanded and that she be placed on probation for two years. Because the Respondent is not presently practicing medicine in New York State, the Petitioner recommended that the probation commence when and if the Respondent returns to New York State to practice medicine. The Hearing Committee agrees that there should be a censure and reprimand for the Respondent's failure to turn over records promptly to the Virginia Board and for her record keeping inadequacies, but sees no reason for imposing probation on her. The Respondent has taken the record keeping course required by the Virginia Order and the Virginia Board has reviewed recent patient records and found them to be improved to the Virginia Board's satisfaction (Respondent's Ex. 2 and 3). The Virginia Board, therefore, terminated the Respondent's probation on March 21, 2006 (Respondent's Ex. 3). This Hearing Committee concludes that the record keeping problems require no additional supervision or review.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Respondent is censured and reprimanded.
2. This Order shall be effective upon service on the Respondent in accordance with the requirements of Public Health Law Section 230(10)(h).

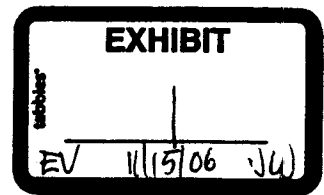
DATED: Dewitt, New York
12/22, 2006



Peter S. Koenig, Sr.
Chairperson

Rajan K. Sriskandarajah, M.D.
Diane M. Sixsmith, M.D.

APPENDIX 1



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

ORIGINAL

IN THE MATTER

NOTICE OF

OF

REFERRAL

ALTA LOIS BRUBAKER, M.D.
CO-05-08-4165-A

PROCEEDING

TO: ALTA LOIS BRUBAKER, M.D.
3715 Hidden Meadow Lane
Keezletown, VA 22832-2033

PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of New York Public Health Law § 230(10)(p) and New York State Administrative Procedure Act Sections 301-307 and 401. The proceeding will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct (Committee) on the 22nd day of March 2006, at 10:00 in the forenoon of that day at the Hedley Park Place, 5th Floor, 433 River Street, Troy, New York 12180.

At the proceeding, evidence will be received concerning the allegations set forth in the attached Statement of Charges. A stenographic record of the proceeding will be made and the witnesses at the proceeding will be sworn and examined.

You may appear in person at the proceeding and may be represented by counsel. You may produce evidence or sworn testimony on your behalf. Such evidence or sworn testimony shall be strictly limited to evidence and testimony relating to the nature and severity of the penalty to be imposed upon the licensee. Where the charges are based on the conviction of state law crimes in other jurisdictions, evidence may be offered that would show that the conviction would not be a crime in New York state. The Committee also may limit the number of witnesses whose testimony will be received, as well as the length of time any witness will be permitted to testify.

If you intend to present sworn testimony, the number of witnesses and an estimate of the time necessary for their direct examination must be submitted to the New York State Department of Health, Division of Legal Affairs, Bureau of Adjudication, Hedley Park Place, 5th Floor, 433 River Street, Troy, New York, ATTENTION: HON. SEAN O' BRIEN, DIRECTOR, BUREAU OF ADJUDICATION, (hereinafter "Bureau of Adjudication") as well as the Department of Health attorney indicated below, on or before March 10, 2006.

Pursuant to the provisions of New York Public Health Law §230(10)(p), you shall file a written answer to each of the Charges and Allegations in the Statement of Charges no later than ten days prior to the hearing. Any Charge of Allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such an answer. The answer shall be filed with the Bureau of Adjudication, at the address indicated above, and a copy shall be forwarded to the attorney for the Department of Health whose name appears below. You may file a brief and affidavits with the Committee. Six copies of all such papers you wish to submit must be filed with the Bureau of Adjudication at the address indicated above on or before March 10, 2006, and a copy of all papers must be served on the same date on the Department of Health attorney indicated below. Pursuant to Section 301(5) of the State Administrative Procedure Act, the Department, upon reasonable notice, will provide at no charge a qualified interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person.

The proceeding may be held whether or not you appear. Please note that requests for adjournments must be made in writing to the Bureau of Adjudication, at the address indicated above, with a copy of the request to the attorney for the Department of Health, whose name appears below, at least five days prior to the scheduled date of the proceeding. Adjournment requests are not routinely granted. Claims of court engagement will require detailed affidavits of actual engagement. Claims of illness will require medical documentation. Failure to obtain an attorney within a reasonable period of time prior to the proceeding will not be grounds for an adjournment.

The Committee will make a written report of its findings, conclusions as to guilt, and a determination. Such determination may be reviewed by the Administrative Review Board for Professional Medical Conduct.

SINCE THESE PROCEEDINGS MAY RESULT IN A DETERMINATION
THAT SUSPENDS OR REVOKES YOUR LICENSE TO PRACTICE
MEDICINE IN NEW YORK STATE AND/OR IMPOSES A FINE FOR
EACH OFFENSE CHARGED, YOU ARE URGED TO OBTAIN AN
ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: Albany, New York

February 22, 2006



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

Inquiries should be addressed to:

Robert Bogan
Associate Counsel
New York State Department of Health
Office of Professional Medical Conduct
433 River Street – Suite 303
Troy, New York 12180
(518) 402-0828

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

IN THE MATTER
OF
ALTA LOIS BRUBAKER, M.D.
CO-05-08-4165-A

STATEMENT
OF
CHARGES

ALTA LOIS BRUBAKER, M.D., Respondent, was authorized to practice medicine in New York state on October 27, 1986, by the issuance of license number 168329 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about June 29, 2005, the Virginia Board of Medicine (hereinafter "Virginia Board"), by an Order (hereinafter "Virginia Order"), REPRIMANDED Respondent and placed her license to practice medicine on PROBATION, subject to terms and conditions, that include, inter alia, that she successfully complete a professional boundaries course and a medical record keeping course, based on from December 23, 2000, to October 11, 2002, Respondent prescribed the following Schedule VI controlled substances for her personal and unauthorized use: 186 dosage units of Cyclobenzaprine, 450 dosage units of Prevacid, 270 dosage units of Synthroid, 2,160 dosage units of Topamax 25 mg, 1,800 dosage units of Topamax 100 mg, 540 dosage units of Celexa, 20 dosage units of Veetids, and 260 dosage units of Claritin; failure to provide the Virginia Board patient records; failure to maintain accurate patient records; and sharing personal information with patients.

B. The conduct resulting in the Virginia 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(20) (moral unfitness);
3. New York Education Law §6530(28) (failing to make available any relevant records with respect to an inquiry); and/or

4. New York Education Law §6530(32) (failure to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient provided).

SPECIFICATIONS

FIRST SPECIFICATION

11/14/06

Respondent violated New York Education Law §6530(9)(~~a~~)(b), by having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state, where the conduct upon which the finding was based, would, if committed in New York state, constitute professional misconduct under the laws of New York state, in that Petitioner charges:

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

SECOND SPECIFICATION

Respondent violated New York Education Law §6530(9)(d) by having disciplinary action taken by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the disciplinary action, would, if committed in New York state, constitute professional misconduct under the laws of New York state, in that Petitioner charges:

2. The facts in Paragraphs A and/or B.

DATED: *February 22*, 2006
Albany, New York


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