



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

October 16, 2002

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

2ND MAILING - NEW ADDRESS

Timothy Mahar, Esq.
NYS Department of Health
Corning Tower Room 2512
Empire State Plaza
Albany, New York 12237

Howard D. Markowitz, M.D.
1101 Beaumont Center Lane
Apartment #30302
Lexington, KY 40513

RE: In the Matter of Howard D. Markowitz, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 02-237) 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 licensee 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 black ink, appearing to read "Tyrone T. Butler". The signature is written in a cursive style with a large initial "T".

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm
Enclosure

COPY

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

IN THE MATTER
OF
HOWARD D. MARKOWITZ, M.D.

DETERMINATION
AND
ORDER

BPMC-02-237

CHARLOTTE S. BUCHANAN, ESQ. Chairperson, MOHAMMAD GHAZI-MOGHADAM., M.D. and DONALD CHERR, M.D. , duly designated members of the State Board for Professional Medical Conduct, appointed by the Commissioner of Health of the State of New York pursuant to Section 230(1) of the Public Health Law, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. CHRISTINE C. TRASKOS, ESQ., served as Administrative Officer for the Hearing Committee. The Department of Health appeared by DONALD P. BERENS, Jr., General Counsel, TIMOTHY MAHAR, ESQ., Associate Counsel, of Counsel. The Respondent appeared *Pro se*. Evidence was received and witnesses sworn and heard and transcripts of these proceedings were made.

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

STATEMENT OF CHARGES

The accompanying Statement of Charges alleged one (1) specification of professional misconduct for failure to provide records. The charges are more specifically set forth in the

Statement of Charges dated May 10, 2002, a copy of which is attached hereto as Appendix I and made a part of this Determination and Order.

WITNESSES

For the Petitioner:

None

For the Respondent:

Howard D. Markowitz, M.D.

FINDINGS OF FACT

1. Respondent was authorized to practice medicine in New York State on May 12, 1992 by the issuance of license number 188933 by the New York State Education Department. Respondent is not currently registered with the New York State Education Department to practice medicine in the State of New York.

2. On or about January 20, 1998, Respondent was served with a written request, dated January 16, 1998 from the Office of Professional Medical Conduct (OPMC) to produce records relating to , among other things, a settlement agreement which Respondent had entered into with Patient A and a second settlement agreement which Respondent had entered into with a female member of the office staff at Respondent's medical practice in Buffalo, New York, who had also received medical care from Respondent, Employee/Patient B. These settlement agreements were requested of Respondent pursuant to Education Law §6530 (28). (Ex. 3)

3. By letter dated February 13, 1998, Respondent's attorney at the time, informed OPMC that Respondent was not in possession of the requested documents. (Ex. S)
4. On July 10, 2000, the Supreme Court of Erie County ordered Patient A's attorney and Employee/Patient B and her attorney to comply with subpoenas issued by OPMC to them for documents related to the Respondent. The Court found a good faith basis for the Department's investigation and that OPMC had the authority to pursue this matter because Respondent's alleged conduct could support a claim that Respondent had engaged in conduct evidencing moral unfitness in the practice of medicine in violation of Education Law Section 6530(20.) On March 15, 2002, the Supreme Court's order was modified by the Appellate Division, Fourth Judicial Department by vacating the provision that had permitted the Petitioners to withhold privileged information from OPMC. (Ex. 4)
5. In written correspondence to the Department, Respondent maintains that he is not in possession of the requested records and that he will not contact his former attorney with respect to this matter. (Exs. H, I) Respondent further takes the position that the aforementioned court order does not apply to him because neither his name nor his former attorney's name appears in the court's directives. (T. 25-26,34-35)

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 Hearing Committee concluded that the following Factual Allegations should be sustained. The citations in parenthesis refer to the Findings of Fact which support each Factual Allegation:

Paragraph A: (2)

Paragraph B: (3-5)

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 Hearing Committee concluded that the following should be sustained.

FIRST SPECIFICATION

FAILURE TO PROVIDE RECORDS

SUSTAINED

DISCUSSION

Respondent is charged with one (1) specification alleging professional misconduct within the meaning of Education Law Section 6530. The Hearing Committee concluded, by a preponderance of the evidence, that one (1) specification of professional misconduct should be sustained. The rationale for the Committee's conclusions regarding each specification of misconduct is set forth below.

The Hearing Committee finds that Respondent received a specific request for the information as well as notice of the consequences of refusal in the OPMC letter dated January 16, 1998. (Ex. 3) They find that Respondent was advised up front that his failure to comply would constitute professional medical misconduct pursuant to §6530(28) of the Education Law if he did not turn over the documentation within 30 days. The Hearing Committee finds that Respondent has an obligation to turn over the documentation under this provision of the Education Law. They further find that if the records were not in his possession, Respondent had an obligation to make a good faith attempt to get them. They find Respondent's failure to contact his attorney or any other third party to release the information to be inexcusable. As a result, the Hearing Committee sustains the First Specification.

DETERMINATION AS TO PENALTY

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above determined by a unanimous vote that Respondent's license to practice medicine in New York State is suspended until such time that Respondent turns over the requested records to OPMC. The Hearing Committee further assesses a civil penalty in the amount of Five Thousand Dollars (\$5,000) This determination was reached upon due consideration of the full spectrum of penalties available pursuant to statute, including revocation, suspension and/or probation, censure and reprimand, and the imposition of monetary penalties.

The Hearing Committee finds that Respondent must comply with the law and turn the records over immediately. They further believe that a civil penalty is warranted because Respondent deliberately delayed the release of these documents since 1998 through his outright refusal to comply. The Hearing Committee concludes that Respondent has obstructed a legitimate investigation by OPMC. Therefore, under the totality of the circumstances, the Hearing Committee finds that an indefinite suspension until the documents are produced and a

\$5,000 civil penalty is the appropriate determination.

ORDER

Based upon the foregoing, **IT IS HEREBY ORDERED THAT:**

1. The First Specification of Professional Misconduct, as set forth in the Statement of Charges (Petitioner's Exhibit #1) is **SUSTAINED**; and
2. Respondent's license to practice medicine in New York State be and hereby is **SUSPENDED** until such time that he produces all documents requested by OPMC in their letter dated January 16, 1998; and
3. Respondent is assessed a civil penalty of **FIVE THOUSAND DOLLARS (\$5,000)**, payable within **90 days** of the effective date of this Order; and
4. That any civil penalty not paid by the date prescribed herein shall be subject to all provisions of laws relating to debt collection by the State of New York. This includes but is not limited to the imposition of interest, late payment charges and collection fees; and non-renewal of permits or licenses (Tax Law, section 171(27); State Finance Law, section 18; CPLR, section 5001; Executive Law, section 32)
5. This Order shall be effective upon service on the Respondent or the Respondent's attorney by personal service or by certified or registered mail.

DATED: Glenmont, New York

July 31, 2002

Charlotte S. Buchanan

CHARLOTTE S. BUCHANAN, ESQ.
(Chairperson)

MOHAMMAD GHAZI-MOGHADAM, M.D.
DONALD CHERR, M.D.

TO: Timothy Mahar, Esq.
NYS Department of Health
Corning Tower- 25th Fl.
Empire State Plaza
Albany, New York 12237

Howard D. Markowitz, M.D.
3070 Lakecrest Cir.
Ste. 400
Lexington, KY 40513

APPENDIX I

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

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IN THE MATTER : STATEMENT
OF : OF
HOWARD D. MARKOWITZ, M.D. : CHARGES

-----X

HOWARD D. MARKOWITZ, M.D., the Respondent, was authorized to practice medicine in New York State on May 12, 1992 by the issuance of license number 188933 by the New York State Education Department. Respondent is not currently registered with the New York State Education Department to practice medicine in the State of New York.

FACTUAL ALLEGATIONS

- A. On or about January 20, 1998, Respondent was served with a written request, dated January 16, 1998 from the Office of Professional Medical Conduct to produce records relating to, among other things, a settlement agreement which Respondent had entered into with Patient A and a second settlement agreement which Respondent had entered into with a female member of the office staff at Respondent's medical practice in Buffalo, New York, who had also received medical care from Respondent, Employee/Patient B. These settlement agreements were requested of Respondent pursuant to Education Law §6530(28).

B. Respondent has failed to provide the requested records.

SPECIFICATIONS


FIRST SPECIFICATION

FAILURE TO PROVIDE RECORDS

Respondent is charged with professional misconduct under N.Y. Educ. Law §6530(28) by reason of his having failed 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, in that Petitioner charges:

1. The facts set forth in paragraphs A and/or B.

DATED: May 10, 2002
Albany, New York


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