



# STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Barbara A. DeBuono, M.D., M.P.H.  
*Commissioner*

Dennis P. Whalen  
*Executive Deputy Commissioner*

December 22, 1997

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Dianne Abeloff, Esq.  
NYS Department of Health  
5 Penn Plaza - Sixth Floor  
New York, New York 10001

Robert S. Asher, Esq.  
295 Madison Avenue  
New York, New York 10017

Adam Faiwischewski, M.D.  
66 Dover Street  
Brooklyn, New York 11222

**RE: In the Matter of Adam Faiwischewski, M.D.**

Dear Ms. Abeloff, Mr. Asher and Dr. Faiwischewski:

Enclosed please find the Determination and Order (No.97-225) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt **or** seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

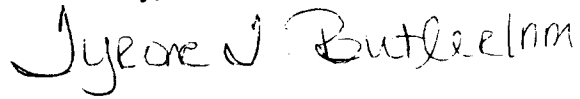
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified mail or in person** to:

Office of Professional Medical Conduct  
New York State Department of Health  
Hedley Park Place  
433 River Street-Fourth Floor  
Troy, New York 12180

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,

A handwritten signature in black ink that reads "Tyrone T. Butler nm". The signature is written in a cursive, flowing style.

Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:nm

Enclosure

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

COPY

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IN THE MATTER	:	ADMINISTRATIVE
	:	REVIEW BOARD
OF	:	DECISION AND
	:	ORDER NUMBER
ADAM FAIWISZEWSKI, M.D.	:	ARB# 97-225
-----X		

Before: ROBERT BRIBER, SUMNER SHAPIRO, WINSTON S. PRICE, M.D.,  
EDWARD C. SINNOTT, M.D., and WILLIAM A. STEWART, M.D., Board  
Members

After a hearing into charges that the Respondent, Adam Faiwiszewski, M.D. had been convicted of grand larceny in the second degree and filing a false instrument in the first degree, a Hearing Committee on Professional Medical Conduct (Committee) sustained the charges and revoked the Respondent's license to practice medicine, stayed the revocation, suspended the Respondent's license for a period to run concurrently with his period of incarceration, and placed the Respondent on probation for three years following his incarceration. In this proceeding pursuant to New York Public Health Law (Pub. H.L.) §230-c(4)(a) (McKinney's Supp. 1997), the Petitioner asks that the Administrative Review Board for Professional Medical Conduct overturn the penalty imposed by the Hearing Committee and revoke the Respondent's medical license. After reviewing the record in this case and conducting deliberations on December 5, 1997, the Board votes to uphold the Determination of the Hearing Committee finding the Respondent guilty of professional misconduct. By a vote of 4-1 we uphold the sanction imposed by the Committee, because we agree with the Committee that there are significant

mitigating factors which mandate a sanction lesser than revocation.

Administrative Law Judge **LARRY G. STORCH** served as the Board's Administrative Officer. **Robert S. Asher, Esq.** represented the Respondent in this proceeding. **Dianne Abeloff, Esq.**, represented the Petitioner.

#### **COMMITTEE DETERMINATION ON THE CHARGES**

Pub. H.L. §230 authorizes three member committees from the State Board for Professional Medical Conduct (BPMC) to conduct disciplinary proceedings to determine whether physicians have committed professional misconduct by violating Educ. L. §6530. The Petitioner brought this case as an expedited proceeding pursuant to Pub. H.L. §230(10)(p). This statute provides for an expedited hearing when the case against a licensee arises solely from a prior criminal conviction in New York or another jurisdiction, or from a prior administrative adjudication regarding conduct which would amount to professional misconduct, if committed in New York. The purpose for such a proceeding is limited to determination of the nature and severity for the penalty to be imposed for the misconduct, Matter of Wolkoff, 1996 N.Y. LEXIS 3165.

Three BPMC Members, **PETER D. KUEMEL, R.P.A. (CHAIR)**, **RUFUS A. NICHOLS, M.D. AND ROBERT B. BERGMANN, M.D.** comprised the Committee which conducted a hearing pursuant to Pub. H.L. §230(10) and which rendered the September 15, 1997 Determination

that the Board now reviews. Administrative Law Judge **JAMES F. HORAN** served as the Committee's Administrative Officer.

The Committee found that the Respondent, who was licensed in New York in 1981, had previously practiced in Israel. He emigrated to the United States in 1976. The Respondent specializes in ear, nose and throat (ENT) disorders and practices in Brooklyn. He provides care to an immigrant population who speak, Russian, Polish and Hebrew, and is fluent in those languages.

The Committee further found that the Respondent performed diagnostic procedures using an otolaryngal microscope. Few physicians used that instrument and until recently Medicaid had no code for the procedure. When billing Medicaid for such procedures during the years 1988-1992, the Respondent used the code number 31575, the code for the procedure under the Current Practice Codes (CPT) for insurers other than Medicaid. However, under the Medicaid codes, the number 31575 represented the code for "Microlaryngoscopy, with laser excision of the papillomata". The Respondent never performed such procedures.

The Committee further found that on June 25, 1996, the Respondent was found guilty on one count of grand larceny in the second degree and eleven counts of offering a false instrument for filing in the first degree, in connection with his billings to Medicaid from 1988-1992 for microlaryngoscopies that were never performed. On November 19, 1996, the Respondent was sentenced to serve four months incarceration, pay a \$100,000.00 fine, pay \$66,100.00 in restitution and to serve five years on

probation.

The Committee further found that although a stay exists against the criminal conviction pending appeal, the Respondent has paid the entire amount of restitution. They further found that the Respondent has been suspended from participation in Medicare, Medicaid and private insurance programs. Nevertheless, he continues to practice and see Medicare and Medicaid patients, even though he may not charge the patients for their care.

The Committee concluded that the Respondent was guilty of professional misconduct under N.Y. Educ. Law §6530(9)(a)(i) [McKinney's Supp. 1997] by virtue of his criminal conviction.

The Committee voted to revoke the Respondent's license, to stay the revocation, to suspend the Respondent's license for a period to run concurrently with his incarceration from his criminal sentence, and to place him on probation for three years following his suspension. The Committee decided against revocation because:

- His long service to his community;

- The criminal sentence and the penalty imposed by the Committee provide sufficient punishment for the Respondent's misconduct, and

- the criminal sentence and the penalty imposed by the Committee will provide a sufficient deterrent against such misconduct by others.

The committee noted that the Respondent has long provided medical services without regard to a patient's ability to pay and that he continues to do so now. The Respondent's fluency in many languages and his specialty make him a valuable asset in his community. The Committee believed that they could

best serve the public by allowing the Respondent to continue in practice. They noted that if the Respondent continues in practice, he may accept only self-paying or non-paying patients, so no danger exists that he could repeat his misconduct. Moreover, the terms of probation include a provision allowing for inspection of his billing records, as well as patient records.

The Committee concluded that no danger exists that a decision against revoking the Respondent's license will encourage other physicians to commit similar misconduct, since they would still have to be willing to risk incarceration, fines, restitution, suspension and the loss of third party reimbursement. The Committee further concluded that the Respondent has demonstrated integrity and compassion in his medical practice through the years, and that his misconduct resulted from inattention to or disregard for proper coding, rather than from greed or from a lack of integrity. Accordingly, the Committee concluded that the facts warrant acting with compassion toward the Respondent and his patients and in allowing him to continue to practice medicine.

#### **REVIEW HISTORY AND ISSUES**

The Petitioner filed a Notice requesting a review on the Committee's Determination, which the Board received on September 29, 1997. The Record on review contained the hearing transcript and exhibits and the parties' briefs. The Board received the Petitioner's brief on October 29, 1997, and the Respondent's brief on November 14, 1997. No reply briefs were

filed by either party.

The Petitioner raises the following arguments on her appeal:

-- A stayed revocation is not appropriate. Many other Medicaid fraud cases have been heard by the Review Board. Many of the physicians have been active in their community or worked in low socioeconomic, medically under-served areas, and/or received criminal sentences of incarceration, fine and restitution. The Review Board in those cases held that the criminal activity required actual revocation.

-- The Hearing Committee stated that the incarceration, fine and restitution were sufficient sanctions to punish the Respondent. The Review Board has previously held the opposite, finding that those factors are hallmarks of the severity of the misconduct which requires revocation, not a lesser sanction.

The Respondent contends that:

-- The Hearing Committee carefully listened to the evidence presented by the Respondent, as well as the written evidence and character testimony produced on his behalf. They also reviewed all evidence presented by the Petitioner and her arguments in favor of revocation. The Committee carefully deliberated on this case and reached an appropriate determination.

-- It would not be fair for the Review Board to substitute its judgment for that of the Hearing Committee and would tend to demean and denigrate those physicians and public servants who have devoted themselves to making appropriate determinations of guilt and to determine appropriate penalties.

-- The primary reason provided by the Petitioner in her appeal is that a revocation of license was imposed in certain cases selected by her for comparison. However, the penalty in each case must be decided on the particular merits of each case. There are no blanket penalties.

-- Although punishment is one factor to consider in assessing a penalty, it is not the only factor. Other



factors include the Respondent's age and health, his record including lack of prior convictions, and the potential for rehabilitation.

-- The Respondent is extremely remorseful; he has been convicted of a felony, he has been publicly embarrassed; he can no longer earn a living; he has been removed as a provider of medical services for all government health programs. Even if he suffers no further punishment his experience would serve as a deterrent to others who might embark on the same type of conduct.

#### THE BOARD'S REVIEW AUTHORITY

Pub. H.L. §230(10)(i), §230-c(1) and §230-c(4)(b) authorize the Board to review determinations by hearing committees for professional medical conduct and to decide:

- whether or not a hearing committee determination and penalty are consistent with the hearing committee's findings of fact and conclusions of law; and
- whether or not the penalty is appropriate and within the scope of penalties permitted by Pub. H.L. §230-a.

Pub. H.L. §230-c(4)(b) permits the Board to remand a case to the Committee for further consideration. Pub. H.L. §230-c(4)(c) provides that the Review Board's Determinations shall be based upon a majority concurrence of the Review Board.

The Board has the authority to substitute our judgement for that of the Hearing Committee, in deciding upon a penalty Matter of Bogdan 195 AD2d 86, 606 NYS 2d 381 (Third Dept. 1993), in determining guilt on the charges, Matter of Spartalis 205 AD2d 940, 613 NYS2d 759 (Third Dept. 1994), and deciding credibility issues Matter of Minielly 222 AD2d 750, 634 NYS 2d 856, 1995.

### THE BOARD'S DETERMINATION

The Board renders this Determination after reviewing the hearing record, the Committee's Determination and Order and the parties' briefs. The Board sustains the Committee's Determination finding the Respondent guilty of professional misconduct. The record clearly established that the Respondent was found guilty, following a jury trial, of committing crimes under New York law. This constitutes professional misconduct in violation of N.Y. Educ. Law §6530(9)(a)(i).

By a vote of 4-1, the Board votes to sustain the Committee's penalty. The majority of the Board agrees with the Hearing Committee that the unique merits of this case warrant a penalty less than full revocation. The Respondent has long proved himself to be an asset to his community, through his ability to communicate with his patients in their native languages, and through his willingness to provide care without regard to ability to pay. Moreover, there is no evidence which would call the Respondent's medical competence into question.

The Respondent is guilty of serious misconduct, and absent the mitigating factors cited above, revocation would be appropriate. However, contrary to the assertions of the Petitioner, revocation is not the sole penalty for all cases of Medicaid fraud. Each case must be determined upon its individual merits. It is the determination of the majority of this Board that the criminal penalties imposed, combined with the sanctions imposed by the Hearing Committee, provide a sufficient amount of punishment for the Respondent while maintaining a deterrent

effect against future misconduct by other physicians. More importantly, it provides an opportunity for the Respondent to be rehabilitated, and to continue to provide medical care to his patients.

#### **DISSENTING OPINION**

The dissenting member of the Board wishes to have his dissent fully set forth in the record. He believes that the Respondent willfully and fraudulently billed, on numerous occasions, for surgical procedures he did not do, and accepted payment for services he knew he did not provide. The Respondent knowingly enriched himself beyond that amount which he had earned. Ignorance or confusion about billing procedures is not excusable and cannot be used in mitigation. The Respondent should not be allowed to operate his office at a lower standard than that required of physicians in general.

The ability to communicate with patients is only one of many qualities, including honesty, which patients value and should expect in their physician. The loss of the Respondent to the patients in his practice may understandably grieve some of them but it will not deny them the opportunity to receive medical care. Failure to revoke his license for the criminal act of stealing from the publicly funded health care system sends the wrong message to the profession and to the public, whose welfare is our highest priority.

ORDER

NOW, based upon this Determination, the Review Board issues the following ORDER:

1. The Review Board SUSTAINS the Hearing Committee's September 15, 1997 Determination finding the Respondent guilty of professional misconduct.
2. The Review Board SUSTAINS the Hearing Committee's Determination regarding the penalty to be imposed.
3. The Board REVOKES the Respondent's license to practice medicine in New York State. Said revocation shall be STAYED, and the Respondent's license SUSPENDED for a period to run concurrently with his incarceration imposed by the criminal sentence, and thereafter PLACES THE RESPONDENT ON PROBATION for three years following his suspension, under the terms set forth in Appendix I of the Hearing Committee's September 15, 1997 Determination and Order.

SUMNER SHAPIRO

ROBERT M. BRIBER

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

WILLIAM A. STEWART, M.D.

**IN THE MATTER OF ADAM FAIWISZEWSKI, M.D.**

**SUMNER SHAPIRO**, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Faiwiszewski.

**DATED: Delmar, New York**  
**December 10, 1997**

  
**SUMNER SHAPIRO**

IN THE MATTER OF ADAM FAIWISZEWSKI, M.D.

WINSTON S. PRICE, M.D., a member of the  
Administrative Review Board for Professional Medical  
Conduct, concurs in the Determination and Order in the  
Matter of Dr. Faiwyszewski.

DATED: Brooklyn, New York

12/13/, 1997

A handwritten signature in black ink, appearing to read "W. S. Price, M.D.", written over a horizontal line.

WINSTON S. PRICE, M.D.

החלטת הוועדה: **להעביר את המסמך לשר הפנים** להחליט על צעדים נוספים.

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acknowledges  
that this was  
Administrative

**DATED: Syracuse, New York**

16 Dec, 1997

William A. Stewart

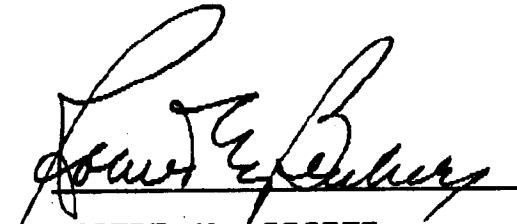
**WILLIAM A. STEWART, M.D.**

IN THE MATTER OF ADAM FAIWISZEWSKI, M.D.

ROBERT M. BRIBER, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Faiwiszewski.

DATED: Schenectady, New York

12/12, 1997



ROBERT M. BRIBER