



Department of Health

KATHY HOCHUL
Governor

MARY T. BASSETT, M.D., M.P.H.
Commissioner

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

May 31, 2022

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Terence P. O'Connor, Esq.
Bresee & First, PC
20 Corporate Woods Boulevard
Albany, New York 12211

Gamal Eltabbakh, MD
Lake Champlain Gynecologic Oncology
1060 Hinesburg Road, Suite 301
South Burlington, Vermont 05463

John Thomas Viti, Associate Attorney
New York State Department of Health
Bureau of Professional Medical Conduct
Division of Legal Affairs
90 Church Street, 4th Floor
New York, New York 10007

RE: In the Matter of Gamal Eltabbakh, MD

Dear Parties:

Enclosed please find the Determination and Order (No. 22-129) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), (McKinney Supp. 2015) and §230-c subdivisions 1 through 5, (McKinney Supp. 2015), "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:

Jean T. Carney, 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 Judge Carney 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,



Dawn MacKillop-Soller
Acting Chief Administrative Law Judge
Bureau of Adjudication

DXM: cmg
Enclosure

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

COPY

-----X
IN THE MATTER
OF
GAMAL ELTABBAKH, MD
-----X

DETERMINATION
AND
ORDER
BPMC-22-129

A Notice of Referral Proceeding and Statement of Charges dated March 8, 2022, and Amended Statement of Charges dated April 4, 2022, were duly served pursuant to Public Health Law §230(10)(d)(i) upon Gamal Eltabbakh, MD (Respondent). (Exhibit 2.) The hearing was held on May 12, 2022 by videoconference at which the Respondent appeared represented by Terence O'Connor, Esq. (Exhibits 1-3.) **William A. Tedesco, MD**, Chairperson, **Mushtaq Sheikh, MD**, and **Gail S. Homick Herrling**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee. PHL §230(10)(e). The Department of Health, Bureau of Professional Medical Conduct (Department), appeared by John Thomas Viti, Esq. Dawn MacKillop-Soller served as the Administrative Law Judge. The Hearing Committee examined documents from the Department (Exhibits 1-4) and the Respondent (A2, R). A transcript of the proceeding was made.

The Hearing Committee voted 3-0 to sustain the charge that the Respondent committed professional misconduct as defined in Education Law §6530(9)(d) but determined not to impose any further penalty under PHL §230-a.

JURISDICTION

The Respondent is charged with professional misconduct pursuant to Education Law §6530(9)(d), "having (his) license to practice medicine revoked, suspended or having other disciplinary action taken..." where the conduct upon which the finding resulting in disciplinary action

against his medical license would, if committed in New York, constitute professional misconduct under the laws of the state of New York. A licensee charged solely with a violation of Education Law §6530(9) is entitled to a hearing, the scope of which is limited to whether there is a relevant conviction or administrative determination and if so, the nature and severity of the penalty to be imposed. PHL §230(10)(p). Hearing procedures are set forth in Department regulations at 10 NYCRR Part 51. The Department had the burden of proving its case by a preponderance of the evidence. PHL §230(10)(f).

FINDINGS OF FACT

The following findings are the unanimous determinations of the Hearing Committee:

1. The Respondent was authorized to practice medicine in New York on May 30, 1995, by the Education Department and was issued license number 199493. (Exhibit 3.)
2. On January 12, 2016, the Respondent entered into a Settlement Agreement with United States Department of Justice and the Office of Inspector General of the Department of Health and Human Services. The Respondent agreed to pay \$500,000 to settle allegations that between January 2010 and February 29, 2012, he purchased foreign-sourced versions of drugs used for chemotherapy at his gynecologic oncology medical practice in Vermont and billed for administering these drugs to patients, some of whom were Medicare or Medicaid beneficiaries. This resulted in the submission of false claims for payment to the Medicare and Medicaid programs because the drugs were not covered by Medicare or Medicaid since they had not received final FDA marketing approval. (Exhibit 4.)
3. By Stipulation and Consent Order with the Vermont Board of Medical Practice (Vermont Board) signed by the Respondent on October 5, 2018, the Respondent agreed to the imposition of a Reprimand and payment of a \$5,000 administrative penalty to resolve charges of unprofessional conduct based on the Department of Justice Settlement Agreement. (Exhibit 4.)

DISCUSSION

The Federal Food, Drug, and Cosmetic Act (21 USC §301, §331, and §355) prohibits the introduction into interstate commerce of any new drug that is not FDA approved. The Vermont Board found that the Respondent's violation of this federal statute by purchasing and administering non-FDA approved drugs as part of his medical practice constituted unprofessional conduct. (Exhibit 4.) New York also requires physicians to abide by federal statutes that apply to the practice of medicine. The Hearing Committee determined that the conduct upon which the Respondent's license was reprimanded in Vermont, if committed in New York, would support a finding of professional misconduct under Education Law §6530(9)(d) on the following basis: a willful or grossly negligent failure to comply with substantial provisions of federal, state, or local laws, rules, or regulations governing the practice of medicine (Education Law §6530(16)).

Having made a finding of professional misconduct, the Hearing Committee rejects the Respondent's request to dismiss the charge in the interest of justice under Education Law §6530. The Respondent claims his drug decisions were the result of a mistake, but the Hearing Committee believes that as a physician with 23 years' experience that includes holding dual licenses to practice medicine in Vermont and New York to prescribe chemotherapy and other drugs to patients, he should have been aware of federal drug purchasing rules that applied to his medical practice. His familiarity with such requirements is especially important given the specialized nature of his obstetrical gynecological care involving cancer patients in regions where access to such care is limited.

The Hearing Committee reviewed the spectrum of penalties that may be imposed under PHL §230-a and unanimously determined not to impose any penalty. The Department requested the penalties of censure and reprimand and a \$5,000 fine — the identical penalties imposed by the Vermont Board. The Hearing Committee considers the Vermont Board's imposition of these same


penalties in 2018 for his conduct, for which he also already paid \$500,000 to the federal government, sufficient penalties. The Hearing Committee finds additional penalties superfluous considering the Respondent was already reprimanded and financially penalized for his conduct in Vermont and the extensive corrective measures he has taken to prevent this incident from reoccurring by hiring staff to ensure compliance with the FDA drug approval process, informing his patients of the dangers of counterfeit drugs by letters and postings at his office, and educating himself by completing online courses and reviewing drug updates on the FDA website. The Hearing Committee is satisfied that these safeguards address the Department's public health safety concerns and provide assurance that this incident will remain isolated.

ORDER

IT IS HEREBY ORDERED THAT:

1. The specification of professional misconduct set forth in the Statement of Charges is SUSTAINED.
2. No further penalty under PHL §230-a is imposed.
3. This Order shall be effective upon service on the Respondent in accordance with the requirements of PHL §230(10)(h).

DATED: Albany, New York
5/30, 2022


William A. Tedesco, MD
Chairperson

Mushtaq Sheikh, MD
Gail S. Homick Herrling

To: Terence P. O'Connor, Esq.
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90 Church Street, 4th Floor
New York, New York 10007

IN THE MATTER

OF

GAMAL ELTABBAKH, M.D.

AMENDED
STATEMENT
OF
CHARGES

GAMAL ELTABBAKH, M.D. was authorized to practice medicine in New York State on or about May 30, 1995, by the issuance of license number 199493 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about November 7, 2018, the Vermont Board of Medical Practice (“Board”) entered into a Consent Order (“Order”) with the Respondent, imposing a Reprimand and \$5,000.00 fine. The Order was based on a civil judgment with the United States Department of Justice. The federal civil judgment constituted unprofessional medical conduct in Vermont by violating Vermont statute 26 V.S.A. §1354 (a)(27) “a failure to comply with federal or state statutes or rules governing the practice of medicine or surgery”.

1. The conduct resulting in the Order would constitute misconduct under the laws of New York State, pursuant to:
 - a) New York Education Law Section 6530(16) (A willful or grossly negligent failure to comply with substantial provisions of federal, state or local laws, rules or regulations governing the practice of medicine.).

SPECIFICATION OF CHARGES


FIRST SPECIFICATION

HAVING HAD DISCIPLINARY ACTION TAKEN

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(9)(d) by having his or her license to practice medicine revoked, suspended or having other disciplinary action taken, or having his or her application for a license refused, revoked or suspended or having voluntarily or otherwise surrendered his or her license after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation, suspension or other disciplinary action involving the license or refusal, revocation or suspension of an application for a license or the surrender of the license would, if committed in New York state, constitute professional misconduct under the laws of New York state, namely N.Y. Educ. Laws §6530(16) as alleged in the facts of the following:

1. The facts in Paragraph A, A1 and its subparagraphs.

DATE: April 4, 2022
New York, New York


Henry Weintraub
Chief Counsel
Bureau of Professional Medical Conduct