



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

March 4, 1997

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Ann Gayle, Esq.
New York State Department of Health
Bureau of Professional Medical Conduct
5 Penn Plaza - Suite 601
New York, New York 10001

Carmen Shang, Esq.
Rubin & Shang
112 State Street
Albany, New York 12207

Frank Garofalo, M.D.
1120 Morris Park Avenue
Bronx, New York 10462

RE: In the Matter of Frank Garofalo, M.D.

Dear Ms. Gayle, Ms. Shang and Dr. Garofalo:

Enclosed please find the Determination and Order (No. 97-53) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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.

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.

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., 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 that reads "Tyrone T. Butler". The signature is written in a cursive style with a large, stylized initial "T".

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:crc
Enclosure

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

COPY

IN THE MATTER

-OF-

FRANK GAROFALO, M.D.

DECISION
AND
ORDER
OF THE
HEARING
COMMITTEE

BPMC ORDER

NO. 97 - 53

This matter was commenced by a Notice of Summary Proceeding and Statement of Charges both dated July 31, 1996. All were served upon **FRANK GAROFALO, M.D.**, (hereinafter referred to as "Respondent").

F. MICHAEL JACOBUS, M.D., Chairperson, **ROBERT BRUCE BERGMANN, M.D.**, and **RANDOLPH MANNING**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. **JONATHAN M. BRANDES, ESQ.**, Administrative Law Judge, served as the Administrative Officer.

A hearing was held on November 7, and December 12, 1996 at 5 Penn Plaza, New York, New York. The State Board For Professional Medical Conduct (hereinafter referred to as "Petitioner") appeared by **HENRY M. GREENBERG, ESQ.**, General Counsel, by

ANN H. GAYLE, ESQ., Associate Counsel. Bureau of Professional Medical Conduct. Respondent appeared in person and by Rubin and Shang, CARMEN SHANG, ESQ of counsel. Evidence was received. A transcript of these proceedings was made. The parties submitted written closing arguments, proposed instructions and motions. Deliberations were held February 12, 1997.

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

STATEMENT OF CASE

This case was brought pursuant to Public Health Law Section 230(10)(p). This statute provides for an expedited hearing where a licensee is charged solely with a violation of Section 6530(9) of the Education Law. In such cases, a licensee is charged with misconduct based upon prior professional disciplinary action or criminal conviction. The scope of this expedited hearing is limited to a determination of the nature and severity of the penalty to be imposed by this state upon the licensee based solely upon the record of the previous conviction or discipline.

In the instant case, Respondent is charged with professional misconduct pursuant to the New York State Education Law, Section 6530(9)(c) (having been found guilty of violating a state statute or regulation). The charges in this proceeding arise from a proceeding before the New York State Department of Social Services wherein Respondent was found guilty of involvement in irregularities in Medicaid payments. The allegations in this proceeding and the underlying events are more

particularly set forth in the Notice of Referral Proceeding and Statement of Charges, a copy of which is attached to this Decision and Order as Appendix One.

FINDINGS OF FACT

The Committee adopts the factual statements set forth on pages one and two of the Statement of Charges (Appendix One) as its findings of fact and incorporates them herein.

CONCLUSIONS WITH REGARD TO FACTUAL ALLEGATIONS AND PENALTY

Petitioner herein has proven by a preponderance of the evidence that Respondent was found by the New York State Department of Social Services (hereinafter DSS) to have engaged in "unacceptable practices"¹ within the Medicaid program. The State has also proven by a preponderance of the evidence that Medicaid overpayments were made and that these overpayments involved Respondent. The findings of violation of state laws governing Medicaid were affirmed after an administrative hearing and further affirmed by the Supreme Court, Appellate Division, Third Department. Violation of state law constitutes professional misconduct. Therefore, the Factual

¹The Committee is aware that this is a term of art within the Medicaid program

Allegations and Specifications in this proceeding are sustained. The Committee now turns its attention to what penalty to impose.

Throughout this proceeding, Respondent has emphasized a dispute over the terminology to be applied to the findings of DSS. The Committee wishes to make it clear that it does not wish their findings to be clouded by this controversy. The Committee has based its conclusions on the following findings: DSS has found that excess Medicaid funds were paid for services attributed to Respondent. Respondent is, at least in part, financially liable for the return of these funds whether through direct reimbursement by Respondent or as an offset against agreed services rendered. Respondent was punished by DSS by a 5 year suspension from the Medicaid program.

The finding by DSS holds Respondent culpable for the misuse of Medicaid funds. This Committee therefore concludes that Respondent knowingly and willingly engaged in irregularities concerning the Medicaid program. Having so found, the Committee concludes that Respondent has misused his license to practice medicine for his own wrongful benefit. In the misuse of his license to practice medicine, Respondent has violated the trust conferred by the public by virtue of his profession. None of the evidence or testimony presented is sufficient to excuse this violation. Having violated the public trust, it therefore follows that Respondent is undeserving of the privilege to practice medicine in this state.

ORDER

WHEREFORE, Based upon the findings of fact and conclusions set forth above.

It is hereby **ORDERED** that:

1. The Factual allegations in the Statement of Charges are **SUSTAINED**;

Furthermore, it is hereby **ORDERED** that:

2. The Specifications of Misconduct contained within the Statement of Charges
(Appendix One) are **SUSTAINED**;

Furthermore, it is hereby **ORDERED** that:

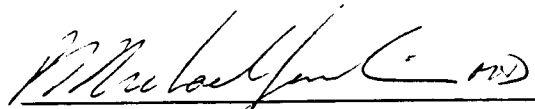
3. The license of Respondent to practice medicine in the State of New York is hereby
REVOKED;

Furthermore, it is hereby **ORDERED** that:

4. This order shall take effect **UPON RECEIPT** or **SEVEN (7) DAYS** after mailing of this order by Certified Mail to Respondent or Respondent's counsel.

Dated:
North Salem, New York

Feb. 26, 1997



F. MICHAEL JACOBIUS, M.D., Chairperson

ROBERT BRUCE BERGMANN, M.D.
RANDOLPH MANNING

TO:

ANN GAYLE, ESQ.
Associate Counsel
Bureau of Professional Medical Conduct
5 Penn Plaza, suite 601
New York, N.Y: 10001

CARMEN SHANG, ESQ.
Rubin & Shang
112 State Street
Albany, New York 12207

FRANK GAROFALO, M.D.
1120 Morris Park Avenue
Bronx, New York 10462

APPENDIX ONE

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

IN THE MATTER
OF
FRANK GAROFALO, M.D.

NOTICE OF
REFERRAL
PROCEEDING

TO: Frank Garofalo, M.D.
1120 Morris Park Avenue
Bronx, NY 10462



PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of N.Y. Pub. Health Law §§230(10)(p) (McKinney Supp. 1996) and N.Y. State Admin. Proc Act §§301-307 and 401 (McKinney 1984 and Supp. 1996). The proceeding will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct (Committee) on ~~September 10~~ ^{October 22, (R.V.)}, 1996, at 10:00 a.m., at the offices of the New York State Department of Health, 5 Penn Plaza, Sixth Floor, New York, New York 10001.

At the proceeding, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. 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 which 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, Corning Tower Building, 25th Floor, Empire State Plaza, Albany, New York 12237, ATTENTION: HON. TYRONE BUTLER, DIRECTOR, BUREAU OF ADJUDICATION, (henceforth "Bureau of Adjudication") as well as the Department of Health attorney indicated below, no later than twenty days prior to the scheduled date of the Referral Proceeding, as indicated above.

You may file a written answer, brief, and affidavits with the Committee. Six copies of all papers you wish to submit must be filed with the Bureau of Adjudication at the address indicated above, no later than fourteen days prior to the scheduled date of the Referral Proceeding, and a copy of all papers must be served on the same date on the Department of Health attorney indicated below. Pursuant to §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: New York, New York
1996



ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct

Inquiries should be addressed to:

Ann Gayle
Associate Counsel
NYS Department of Health
Division of Legal Affairs
5 Penn Plaza, Suite 601
New York, New York 10001
(212) 613-2615

IN THE MATTER
OF
FRANK GAROFALO, M.D.

STATEMENT
OF
CHARGES

Frank Garofalo, M.D., the Respondent, was authorized to practice medicine in New York State on or about June 30, 1950, by the issuance of license number 070397, by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. By Notice of Agency Action dated April 23, 1990, the New York State Department of Social Services (NYSDSS) notified Respondent that it had determined to exclude him from the Medicaid Program for five years and to collect restitution because he had engaged in unacceptable practices and received overpayments. This determination was the result of an audit of Respondent's records for Medicaid payments made to him for the period January 1986 to December 1987. Respondent appealed said determination.
- B. On or about May 21, 1993, in a Decision After Hearing, the Office of Administrative Hearings affirmed NYSDSS' determination to exclude Respondent from the Medicaid Program for five years and to collect restitution of Medicaid overpayments which were made to Respondent, in that Respondent was found to have engaged in unacceptable practice as defined in 18 NYCRR Section 515.2(b)(2), (11), and (12), in that he engaged in a course of conduct of making claims for payment under the medical assistance program for unfurnished, unnecessary or inappropriate care, services or

supplies or of making claims for improper amounts of payments to any person that he failed to maintain records necessary to fully disclose the extent of the care, services or supplies furnished, and that he failed to maintain records as are required by law and by regulations. Respondent appealed said decision.

C. On or about January 4, 1996, in a Memorandum and Judgment, the Supreme Court, Appellate Division, Third Judicial Department affirmed the Commissioner of NYSDSS' determination which, *inter alia*, excluded Respondent from the Medicaid Program for five years (for the reasons set forth in Paragraph B above), and dismissed Respondent's petition.

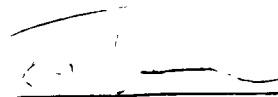
SPECIFICATION OF CHARGES

FIRST SPECIFICATION **HAVING BEEN FOUND GUILTY OF** **VIOLATING A STATE STATUTE OR REGULATION**

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(9)(c)(McKinney Supp. 1996) by having been found guilty in an adjudicatory proceeding of violating a state or federal statute or regulation, pursuant to a final decision or determination, and when no appeal is pending, or after resolution of the proceeding by stipulation or agreement, and when the violation would constitute professional misconduct pursuant to this section. (namely N.Y. Educ. Law §6530(32) and (35) (formerly N.Y. Educ. Law §6509 and 8 NYCRR 29.2(3) and (7), respectively), as alleged in the facts of the following:

1. Paragraphs A, B and C.

DATED: July 1, 1996
New York, New York



ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct