



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Mark R. Chassin, M.D., M.P.P., M.P.H.
Commissioner

Paula Wilson
Executive Deputy Commissioner

August 19, 1994

RECEIVED

AUG 19 1994

REG. - COND. OF

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Frank J. Ballesteros, M.D.
REDACTED

Manuel Gonzalez, Jr., Esq.
1531 N.W. 13th Court
Miami, Florida 33125

Frank J. Ballesteros, M.D.
REDACTED

Kevin Donovan, Esq.
NYS Department of Health
Corning Tower - Room 2438
Albany, New York 12237

Re Matter of Frank J. Ballesteros, M.D.

Dear Dr. Ballesteros, Mr. Gonzalez and Mr. Donovan :

EFFECTIVE DATE
AUGUST 26, 1995

Enclosed please find the Determination and Order (No. 94-161) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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
Corning Tower - Fourth Floor (Room 438)
Empire State Plaza
Albany, New York 12237

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), "(t)he

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 all action 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
Empire State Plaza
Corning Tower, Room 2503
Albany, New York 12237-0030

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,

REDACTED

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:mmn

Enclosure

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

-----X
IN THE MATTER : DETERMINATION
OF :
FRANK J. BALLESTEROS, M.D. : AND
: ORDER
-----X
BPMC NO-94-161

A Notice of Hearing and Statement of Charges, both dated June 2, 1994, were served upon the Respondent, Frank J. Ballesteros, M.D. LEO FISHEL, JR., M.D. (Chair), ARSENIO G. AGOPOVICH, M.D., and SISTER MARY THERESA MURPHY, 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. LARRY G. STORCH, ADMINISTRATIVE LAW JUDGE, served as the Administrative Officer. The Department of Health appeared by Kevin P. Donovan, Esq., Associate Counsel. The Respondent failed to appear in person and was not represented by counsel. Evidence was received and witnesses sworn and heard and transcripts of these proceedings were made.

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

PROCEDURAL HISTORY

Date of Service of Notice of
Hearing and Statement of Charges: June 6, 1994
Answer to Statement of Charges: None
Pre-Hearing Conference: August 1, 1994
Dates of Hearing: August 4, 1994

Received Petitioner's Proposed Findings of Fact, Conclusions of Law and Recommendation: Not Applicable

Received Respondent's Proposed Findings of Fact, Conclusions of Law and Recommendation: Not Applicable

Witnesses for Department of Health: None

Witnesses for Respondent: None

Deliberations Held: August 4, 1994

STATEMENT OF CASE

The Department has charged Respondent with seven specifications of professional misconduct. More specifically, Respondent has been charged with obtaining his New York medical license fraudulently, moral unfitness, conviction of a crime under Federal law, conviction of a crime in another jurisdiction, and having had disciplinary action taken against his license by a duly authorized professional disciplinary agency of another state.

A copy of the Notice of Hearing and Statement of Charges is attached to this Determination and Order in Appendix I.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers in parentheses refer to transcript page numbers or exhibits. These citations represent 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.

1. Frank J. Ballesteros, M.D. (hereinafter, "Respondent"), was authorized to practice medicine in New York State on October 1, 1991 by the issuance of license number 187116 by the New York State Education Department. Respondent is not currently registered with the New York State Education Department to practice medicine in New York State. (Pet. Ex. #2).

2. Respondent submitted an application for licensure as a physician in New York State, dated January 22, 1990. Respondent fraudulently answered "NO" to the question "Have you ever been charged with a crime (felony or misdemeanor) in any state or country, the disposition of which was other than by acquittal or dismissal?". This answer was false in that Respondent had been charged in the state of Florida on November 3, 1987 with the felony crimes of possession of a controlled substance (cocaine), resisting an officer with violence to his person. In addition, Respondent was charged in the state of Florida on November 14, 1986, with the felony crime of issuance of a worthless check. These charges were not disposed of by acquittal or dismissal. (Pet. Ex. #6; Pet. Ex. #7).

3. On or about September 10, 1993, Respondent was convicted in the United States District Court for the Southern District of Florida, upon a plea of guilty, of conspiracy to defraud the United States in violation of 18 United States Code Section 287. Respondent was sentenced to five years of probation, six months in a community half-way house, six months home detention, and restitution in the amount of \$35,966.50,

among other conditions. (Pet. Ex. # 3).

4. As part of the guilty plea, Respondent admitted that he knowingly submitted fraudulent claims to Medicare for approximately \$13,370.00 for house visits which were not rendered and submitted fraudulent certificates of medical necessity for diagnostic testing for Medicare patients in the amount of \$71,550.00. (Pet. Ex. 3).

5. On December 21, 1987, Respondent was convicted, upon a plea of guilty, in the Circuit Court for Dade County, Florida, of the crime of issuance of a worthless check, in violation of Florida Statutes §832.05. Respondent was sentenced to two years of probation and restitution in the amount of \$398.90. (Pet. Ex. #7).

6. On December 21, 1987, Respondent was convicted, upon a plea of guilty, in the Circuit Court for Dade County, Florida, of the crime of possession of a controlled substance (cocaine), in violation of Florida Statutes §893.13. Respondent was sentenced to two years of probation and required to enter and complete a drug rehabilitation program. (Pet. Ex. #7).

7. On April 1, 1991, Respondent was convicted in the Circuit Court for Dade County, Florida, of the crime of resisting an officer with violence to his person, in violation of Florida Statutes §843.01. Respondent was sentenced to one year of probation. (Pet. Ex. #6).

8. By a Final Order dated October 3, 1992, the Board of Medicine of the state of Florida (hereinafter "Florida Board"), took disciplinary action against Respondent's Florida

medical license. The disciplinary action was based on conduct set forth in an Administrative Complaint, including a finding that Respondent was unable to practice medicine with reasonable skill and safety until the full extent of either his personality problems or abuse of chemicals were resolved. The Florida Board placed Respondent on probation for five years, imposed a fine in the amount of \$3,000.00, and required Respondent to continue to participate in and comply with the recommendations of the Florida Physician's Recovery Network. (Pet. Ex. #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 Specifications should be sustained. The citations in parentheses refer to the Findings of Fact which support each Specification:

First Specification: (2, 5-6);

Second Specification: (2, 5-6);

Third Specification: (3-4);

Fourth Specification: (8);

Fifth Specification: (6);

Sixth Specification: (5);

Seventh Specification: (7).

DISCUSSION

Respondent is charged with seven specifications alleging professional misconduct within the meaning of Education Law §6530. This statute sets forth numerous forms of conduct which constitute professional misconduct, but does not provide definitions of the various types of misconduct. During the course of its deliberations on these charges, the Hearing Committee consulted a memorandum prepared by Peter J. Millock, Esq., General Counsel for the Department of Health. This document, entitled "Definitions of Professional Misconduct Under the New York Education Law", sets forth suggested definitions for gross negligence, negligence, gross incompetence, incompetence, and the fraudulent practice of medicine.

The following definitions were utilized by the Hearing Committee during its deliberations:

Fraudulent Practice of Medicine is an intentional misrepresentation or concealment of a known fact. An individual's knowledge that he/she is making a misrepresentation or concealing a known fact with the intention to mislead may properly be inferred from certain facts.

Negligence is the failure to exercise the care that would be exercised by a reasonably prudent licensee under the circumstances.

Gross Negligence is the failure to exercise the care that would be exercised by a reasonably prudent licensee under the circumstances, and which failure is manifested by conduct

that is egregious or conspicuously bad.

Incompetence is a lack of the skill or knowledge necessary to practice the profession.

Gross Incompetence is an unmitigated lack of the skill or knowledge necessary to perform an act undertaken by the licensee in the practice of the profession.

Using the above-referenced definitions as a framework for its deliberations, the Hearing Committee unanimously concluded, by a preponderance of the evidence, that the Department has sustained its burden of proof with respect to each of the seven specifications of professional misconduct. The rationale for the Committee's conclusions regarding each specification of misconduct is set forth below.

Respondent submitted an application for licensure as a physician in New York State, dated January 22, 1990. Respondent answered "NO" to the question "Have you ever been charged with a crime (felony or misdemeanor) in any state or country, the disposition of which was other than by acquittal or dismissal?" Respondent's answer was patently false, given the fact that he had been convicted of two crimes in the State of Florida in December, 1987. Respondent failed to appear at the hearing and offered no evidence to indicate that his false statement was inadvertent or in error. Under the totality of the circumstances, the Hearing Committee concluded that Respondent intended to misrepresent his background and thus fraudulently obtained his New York medical license. As a result, the Hearing Committee voted to sustain the First Specification.

The Hearing Committee unanimously concluded that the Second Specification (moral unfitness) should also be sustained. Conduct which evidences moral unfitness can arise either from conduct which violates a trust related to the practice of the profession or from activity which violates the moral standards of the professional community. The Hearing Committee concluded that Respondent's actions in fraudulently obtaining a medical license constitute a serious violation of the moral standards of the profession. As a result, the Committee voted to sustain the Second Specification.

The record clearly demonstrated that on September 10, 1993, Respondent was convicted of conspiracy to defraud the United States. This constitutes a conviction of an act constituting a crime under federal law. As a result, the Hearing Committee voted to sustain the Third Specification.

By a Final Order dated October 3, 1992, the Florida Board placed Respondent on probation for five years, imposed a fine in the amount of \$3,000.00 and required him to continue to participate in and comply with the recommendations of the Florida Physician's Recovery Network. The disciplinary action was based upon a finding that Respondent was unable to practice medicine with reasonable skill and safety until the full extent of either his personality problems or abuse of chemicals were resolved. The conduct on which the discipline in Florida was based would, if committed in New York State, constitute being an habitual abuser of drugs or having a psychiatric condition which impairs the licensee's ability to practice the profession in violation of

New York Education Law §6530(8). As a result, the Hearing Committee voted to sustain the Fourth Specification.

The record also established that on December 21, 1987, Respondent was convicted in the Circuit Court for Dade County, Florida, of the crime of possession of a controlled substance (cocaine). This act, if committed in New York State, would have constituted the crime of possession of a controlled substance within the meaning of New York Penal Law §220.03. Therefore, the Committee voted to sustain the Fifth Specification.

Similarly, the record demonstrated that on December 21, 1987, Respondent was convicted in the Circuit Court for Dade County, Florida, of the crime of issuance of a worthless check. This act, if committed in New York State would have constituted the crime of issuance of a bad check within the meaning of New York Penal Law §190.05. As a result, the Hearing Committee voted to sustain the Sixth Specification.

The record further established that on April 1, 1991, Respondent was convicted in the Circuit Court for Dade County, Florida, of the crime of resisting an officer with violence to his person. This act, if committed in New York State would have constituted the crime of assault in the second degree within the meaning of New York Penal Law §120.05. Consequently, the Hearing Committee voted to sustain the Seventh Specification.

DETERMINATION AS TO PENALTY

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, unanimously determined

that Respondent's license to practice medicine as a physician in New York State should be revoked. 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.

Respondent obtained his New York medical license by fraud, and he was convicted of conspiracy to defraud the United States in a case involving thousands of dollars. Either one of these violations would be sufficient, on its own, to warrant revocation. Both violations, when considered together, make a compelling case for such a sanction. In addition, Respondent has been convicted of multiple crimes in Florida and was disciplined by the Florida Board.

It is apparent from the record that Respondent has had recurring problems with drug abuse and/or personality problems. Although Florida placed Respondent on probation and required him to participate in the Physicians' Recovery Network, such an option is not viable in New York. Respondent does not practice in New York, nor does he reside within the state. As a result, it would be impossible to maintain a realistic program of supervised probation here. Moreover, Respondent failed to appear at the hearing or to present any mitigating evidence in his own behalf. Under the totality of the circumstances, the Hearing Committee determined that revocation was the only appropriate sanction to be imposed upon Respondent.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED THAT:

1. The First through Seventh Specifications of professional misconduct, as set forth in the Statement of Charges (Petitioner's Exhibit # 1) are SUSTAINED;

2. Respondent's license to practice medicine as a physician in New York State be and hereby is REVOKED commencing on the effective date of this Determination and Order.

DATED: Albany, New York
 , 1994

REDACTED

~~LEO FISHEL, JR., M.D. (CHAIR)~~

ARSENIO G. AGOPOVICH, M.D.
SISTER MARY THERESA MURPHY

TO: Kevin P. Donovan, Esq.
Associate Counsel
New York State Department of Health
Corning Tower Building - Room 2429
Empire State Plaza
Albany, New York 12237

Frank J. Ballesteros, M.D.

REDACTED

Manuel Gonzalez, Jr., Esq.
1531 N.W. 13th Court
Miami, Florida 33125

APPENDIX I

3

PETITIONER'S
EXHIBIT
1 Ed.
8/1/94 JC

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

-----X

IN THE MATTER : NOTICE
OF : OF
FRANK J. BALLESTEROS, M.D. : HEARING

-----X

TO: FRANK J. BALLESTEROS, M.D.
REDACTED

PLEASE TAKE NOTICE:

A hearing will be held pursuant to the provisions of N.Y. Pub. Health Law §230 (McKinney 1990 and Supp. 1994) and N.Y. State Admin. Proc. Act, Sections 301-307 and 401 (McKinney 1984 and Supp. 1994). The hearing will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct on the 4th day of August, 1994, at 10:00 in the forenoon of that day at Hearing Room 1, New York State Court of Claims, Seventh Floor, Justice Building, Empire State Plaza, Albany, New York and at such other adjourned dates, times and places as the committee may direct.

At the hearing, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the hearing will be made and the witnesses at the hearing will be sworn and examined. You shall appear in person at the hearing and may be represented by counsel. You have the right to produce witnesses and evidence on your behalf, to issue or have subpoenas issued on your behalf in order to require the production of witnesses and documents and

you may cross-examine witnesses and examine evidence produced against you. A summary of the Department of Health Hearing Rules is enclosed.

The hearing will proceed whether or not you appear at the hearing. Please note that requests for adjournments must be made in writing and by telephone to the Administrative Law Judge's Office, Empire State Plaza, Tower Building, 25th Floor, Albany, New York 12237, (518-473-1385), upon notice to the attorney for the Department of Health whose name appears below, and at least five days prior to the scheduled hearing date. Adjournment requests are not routinely granted as scheduled dates are considered dates certain. Claims of court engagement will require detailed Affidavits of Actual Engagement. Claims of illness will require medical documentation.

Pursuant to the provisions of N.Y. Pub. Health Law Section 230 (McKinney 1990 and Supp. 1994), you may file an answer to the Statement of Charges not less than ten days prior to the date of the hearing. If you wish to raise an affirmative defense, however, N.Y. Admin. Code tit. 10, Section 51.5(c) requires that an answer be filed, but allows the filing of such an answer until three days prior to the date of the hearing. Any answer shall be forwarded to the attorney for the Department of Health whose name appears 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.

At the conclusion of the hearing, the committee shall make

findings of fact, conclusions concerning the charges sustained or dismissed, and, in the event any of the charges are sustained, a determination of the penalty to be imposed or appropriate action to be taken. Such determination may be reviewed by the administrative review board for professional medical conduct.

THESE PROCEEDINGS MAY RESULT IN A DETERMINATION THAT YOUR LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE BE REVOKED OR SUSPENDED, AND/OR THAT YOU BE FINED OR SUBJECT TO THE OTHER SANCTIONS SET OUT IN NEW YORK PUBLIC HEALTH LAW SECTION 230-a (McKinney Supp. 1994). YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: Albany, New York
June 2, 1994

REDACTED

~~PETER D. VAN BUREN~~
Deputy Counsel

Inquiries should be directed to:

Kevin P. Donovan
Associate Counsel
Division of Legal Affairs
Bureau of Professional
Medical Conduct
Corning Tower Building
Room 2429
Empire State Plaza
Albany, New York 12237-0032
(518) 473-4282

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

-----X
IN THE MATTER : STATEMENT
OF : OF
FRANK J. BALLESTEROS, M.D. : CHARGES
-----X

FRANK J. BALLESTEROS, M.D., the Respondent, was authorized to practice medicine in New York State on October 1, 1991, by the issuance of license number 187116 by the New York State Education Department. The Respondent is not currently registered with the New York State Education Department to practice medicine in New York State. Respondent's last known address is 11709 S.W. 114th Terrace, Miami, Florida 33186.

FACTUAL ALLEGATIONS

A. Respondent fraudulently answered "NO" on his application for licensure as a physician in New York state, dated January 22, 1990, to the question "Have you ever been charged with a crime (felony or misdemeanor) in any state or country, the disposition of which was other than by acquittal or dismissal?", when in fact he had been charged in the state of Florida on November 3, 1987, with the felony crimes of possession of a controlled substance (cocaine), resisting an officer with violence to his person, and was charged in the state of Florida

on Novmeber 14, 1986, with the felony crime of issuance of a worthless check, which charges were not disposed of by acquittal or dismissal.

B. Respondent was convicted in the United States District Court for the Southern District of Florida of the federal crime of conspiracy to defraud the United States in violation of 18 United States Code Section 287, in that on September 10, 1993, after having pled guilty, Respondent was sentenced to five years of probation, six months in a community half-way house, six months home detention, and restitution in the amount of \$35,966.50, among other conditions.

C. By final order dated October 3, 1992, Respondent had disciplinary action taken against his license by the Board of Medicine of the state of Florida, requiring the payment of a fine by Respondent and his being placed on probation for five years; the disciplinary action was based on conduct set forth in an Administrative Complaint, including Respondent being found unable to practice medicine with reasonable skill and safety until the full extent of either his personality problems or abuse of chemicals are resolved.

D. The conduct on which the discipline in Florida was based would, if committed in New York state, constitute professional misconduct under the laws of New York state, namely being an habitual abuser of drugs or having a psychiatric

condition which impairs the licensee's ability to practice within the meaning of New York Education Law §6530(8).

E. On December 21, 1987, Respondent was convicted in the Circuit Court for Dade County, Florida, of the crime of possession of a controlled substance (cocaine), which act, if committed in New York state, would have constituted a crime under New York state law, namely possession of a controlled substance (cocaine) within the meaning of New York Penal Law Section 220.03.

F. On December 21, 1987, Respondent was convicted in the Circuit Court for Dade County, Florida, of the crime of felony issuance of a worthless check, which act, if committed in New York state, would have constituted a crime under New York state law, namely issuing a bad check within the meaning of New York Penal Law Section 190.05.

G. On April 1, 1991, Respondent was convicted in the Circuit Court for Dade County, Florida, of the crime of resisting an officer with violence to his person, which act, if committed in New York state, would have constituted a crime under New York state law, namely assault in the second degree within the meaning of New York Penal Law Section 120.05.

SPECIFICATION OF CHARGES

FIRST SPECIFICATION

OBTAINING THE LICENSE FRAUDULENTLY

Respondent is charged with obtaining the license fraudulently within the meaning of N.Y. Educ. Law §6530(1)(McKinney Supp. 1994) in that Petitioner charges:

1. The facts of paragraph A.

SECOND SPECIFICATION

MORAL UNFITNESS

Respondent is charged with conduct in the practice of medicine which evidences moral unfitness to practice medicine within the meaning of N.Y. Educ. Law §6530(20)(McKinney Supp. 1994) in that Petitioner charges:

2. The facts of paragraph A.

THIRD SPECIFICATION

CONVICTION OF A CRIME UNDER FEDERAL LAW

Respondent is charged with misconduct of having been convicted of an act constituting a crime under federal law within the meaning of N.Y. Educ. Law §6530(9)(a)(ii)(McKinney Supp. 1994) in that Petitioner charges:

3. The facts of paragraph B.

FOURTH SPECIFICATION

DISCIPLINARY ACTION BY ANOTHER STATE

Respondent is charged with misconduct within the meaning of N.Y. Educ. Law §6530(9)(d)(McKinney Supp. 1994) in that he had disciplinary action taken against his license after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, and 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:

4. The facts of paragraphs C and D.

FIFTH THROUGH SEVENTH SPECIFICATIONS

CONVICTION OF A CRIME IN ANOTHER JURISDICTION

Respondent is charged with misconduct within the meaning of N.Y. Educ. Law §6530(9)(a)(iii)(McKinney Supp. 1994) in that he was convicted of committing an act constituting a crime under the law of another jurisdiction which act, if committed within this state, would have constituted a crime under New York state law, in that Petitioner charges:

5. The facts of paragraph E.
6. The facts of paragraph F.
7. The facts of paragraph G.

DATED: Albany, New York

June 2, 1994

REDACTED

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