



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

April 16, 2001

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Jean Bresler, Esq.
NYS Department of Health
145 Huguenot Street
New Rochelle, New York 10801

Raul Lugo, M.D.
870 Park Avenue
New York, New York 10021

T. Lawrence Tabak, Esq.
Kern Augustine Conroy & Schoppman
420 Lakeville Road
Lake Success, New York 11042

RE: In the Matter of Raul Lugo, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 01-01) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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,



Tyone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

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

In the Matter of

Raul Lugo, M.D. (Respondent)

**A proceeding to review a Determination by a
Committee (Committee) from the Board for
Professional Medical Conduct (BPMC)**

COPY

Administrative Review Board (ARB)

Determination and Order No. 01-01

**Before ARB Members Grossman, Lynch, Pellman, Price and Briber
Administrative Law Judge James F. Horan drafted the Determination**

For the Department of Health (Petitioner):

Jean Bresler, Esq.

For the Respondent:

T. Lawrence Tabak, Esq.

After a hearing below, a three-member BPMC Committee found that the Respondent committed professional misconduct by engaging in a consensual sexual relationship with a patient. The Committee voted to suspend the Respondent's License to practice medicine in New York (License) for five years and stayed all but one month in the suspension. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 2000), the both parties ask the ARB to nullify or modify that Determination. The Petitioner asks that the ARB sustain additional misconduct charges and revoke the Respondent's License, while the Respondent asks that the ARB overturn the Committee's factual findings and dismiss the action. After reviewing the record below and the parties' submissions, we affirm the Committee's Determination on the charges. We modify the Committee's Determination on penalty and vote to suspend the Respondent's License for six months.

Committee Determination on the Charges

The Petitioner commenced the proceeding by filing charges with BPMC alleging that the Respondent violated N. Y. Educ. Law §§ 6530(2), 6530(20) & 6530(31) (McKinney Supp. 2001) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- engaging in conduct that evidences moral unfitness, and,
- willfully abusing a patient.

The Petitioner charged that the Respondent, a surgeon, performed pelvic/rectal examinations on a patient (Patient A) for other than a legitimate medical reason [Factual Allegation A1] and initiated a social and then a sexual relationship with Patient A [Factual Allegation A2]. The record refers to the Patient by an initial to protect her privacy. The Respondent denied the charges and a hearing ensued before the Committee that rendered the Determination now on review.

The Committee found that the Respondent operated on Patient A for an abdominal wall tumor in 1995. The Committee found further that the Respondent performed pelvic/rectal examinations on the Patient at each post-operative visit. The Committee also found that the Respondent and the Patient began a social relationship in 1995 that became sexual in nature in December 1995. At the hearing on these charges on March 9, 2000, the Respondent testified that he performed pelvic/rectal examinations on the Patient to palpate the areas he considered at risk for tumor recurrence. The Respondent's expert witness testified subsequently that a pelvic rectal examination would make certain that surgical mesh remained in tact. Following that testimony, the Respondent testified that he performed pelvic/rectal examinations in part due to discomfort from surgical mesh.

The Committee found Patient A credible in her testimony supporting Allegations A1 and A2, upon the Committee's conclusions that the Patient:

- knew private information about the Respondent,

- told her Gynecologist about the sex shortly after the time the Patient alleged that the sex occurred,
- gave testimony both specific and convincing as to details and demeanor, and,
- brought no civil action against the Respondent.

The Committee found the Patient vulnerable, because the Patient had suffered from cancer and was grateful that the Respondent saved the Patient's life. The Committee found the Respondent's denial of the charges non-credible upon concluding that the Respondent:

- testified differently on issues,
- gave implausible explanations, and,
- failed to substantiate his position.

The Committee's 2-1 majority stated that they were "unconvinced" that the Respondent performed the pelvic rectal examinations for legitimate medical reasons.

The Committee voted to sustain the charge that the Respondent engaged in conduct that evidenced moral unfitness by engaging in sexual conduct with Patient A. The Committee dismissed charges that such conduct amounted to fraud or willful abuse. The Committee also dismissed all charges relating to the pelvic/rectal examinations. The Committee noted that they ordered the Respondent to undergo a psychiatric evaluation to aid the Committee in determining penalty, rather than as an aid in establishing credibility. The Committee stated that they found the report from the evaluation (Abel Report) not useful. The Committee voted to suspend the Respondent's License for five years, but stayed all but one month of the suspension.

Review History and Issues

The Committee rendered their Determination on January 10, 2001. This proceeding commenced on 12 & 18, 2001, when the ARB received the parties' Notices requesting Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and response brief and the Respondent's brief and response brief. The record closed when the ARB received the Petitioner's response brief on February 20, 2001.

The Petitioner's argued that the Committee made a determination inconsistent with their findings by dismissing charges that the Respondent committed fraud and abused a patient. The Petitioner contends that the Respondent abused Patient A by performing pelvic/rectal examinations on the Patient without any legitimate medical purpose. The Petitioner argues that the Respondent committed fraud by representing knowingly, falsely and with intent to mislead, that he needed to perform the examinations for legitimate purposes. The Petitioner also requests that the ARB revoke the Respondent's License for engaging in the misconduct involving Patient A.

The Respondent argued that the Committee and their Administrative Officer erred. The Respondent contends that the Committee erred by finding Patient A more credible than the Respondent and that the Committee erred in disregarding the Abel Report, that established the Respondent's credibility. The Respondent contends that the Committee's Administrative Officer showed partiality against the Respondent and that the Administrative Officer erred by withholding information from the parties as to the reason for the psychiatric evaluation on the Respondent. The Respondent asks that the ARB dismiss the charges.

Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination that the Respondent engaged in conduct that evidenced moral unfitness, by engaging in a sexual relationship with Patient A. We also affirm the Committee's Determination to dismiss all other charges. We overturn the Committee and suspend the Respondent's License for six months.

The Petitioner requested that the ARB sustain additional charges concerning the pelvic/rectal examinations. We reject that request. By a 2-1 vote, the Committee indicated that they were "unconvinced" that the Respondent performed the examinations for legitimate medical reasons. Factual Allegation A1 had charged the Respondent performed the examinations for other than legitimate medical reasons. The Committee, however, dismissed the fraud, moral unfitness and abuse charges related to Allegation A1. The ARB considers the Committee's finding ambivalent as to the pelvic/rectal exams' purpose. We also consider that ambivalent finding insufficient to support inferences that would support determinations that the Respondent's conduct rose to the level of fraud or willful abuse.

The Respondent states correctly that the Determination in this case turned on the Committee's judgement on credibility between the Respondent and Patient A. The Respondent asks that we overturn that judgement. We decline. The Committee, as fact-finder, possessed the authority to make judgements on witness credibility. The ARB owes the Committee deference in their role as fact-finder. The Committee gave detailed reasons here why they found the Patient's testimony credible and why the Committee rejected the testimony by the Respondent. We see no error in the Committee's judgement.

The Respondent also alleged error by the Committee for rejecting the Abel Report's determination that the Respondent testified truthfully in denying Patient A's allegations. The ARB considers the Respondent to be arguing in effect that the Committee erred because they failed to delegate their role as fact-finder to the Report's author, Dr. Abel. We reject that argument. The Abel Report noted that Dr. Abel interviewed the Respondent only and that Dr. Abel received information from the Respondent and his attorney. The Report also noted that the Report based its conclusions in part on the results from a polygraph examination that the

Respondent underwent. The Report conceded that the courts reject polygraphs in evidence due to unreliability. Although we see no reason why the Committee required the Respondent to undergo the psychiatric evaluation in the first place, we see no error by the Committee in rejecting the Abel Report's conclusion as the basis for the Committee's judgement on credibility.

The ARB rejects the Petitioner's request that we revoke the Respondent's License. We agree with the Committee that this case involves a sexual relationship with one patient and that the conduct constitutes an aberration in the Respondent's career. We also agree, however, that the relationship constitutes egregious misconduct with a vulnerable Patient. We hold that the Respondent's conduct warrants actual time on suspension and we conclude that the conduct warrants a longer actual suspension than the Committee imposed. We vote to suspend the Respondent from practice for six months. These six months includes the one month that the Respondent has served on suspension already under the Committee's Determination.

ORDER

NOW, with this Determination as our basis, the ARB renders the following **ORDER**:

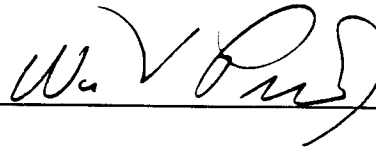
1. The ARB **AFFIRMS** the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB **OVERTURNS** the Committee's Determination as to penalty.
3. The ARB **SUSPENDS** the Respondent's License for six months.

Robert M. Briber
Thea Graves Pellman
Winston S. Price, M.D.
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.

In the Matter of Raul Lugo, M.D.

Winston S. Price, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Lugo.

Dated: 4/8, 2001



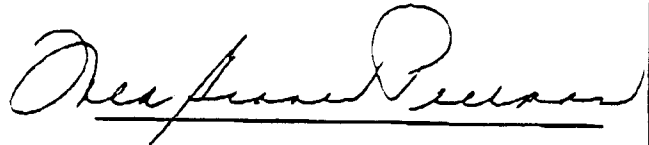
A handwritten signature in cursive script, appearing to read "W. S. Price", is written over a horizontal line.

Winston S. Price, M.D.

In the Matter of Raul Lugo, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the Matter of Dr. Lugo.

Dated: 4/5/01, 2001

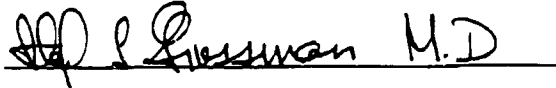


Thea Graves Pellman

In the Matter of Raul Lugo, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the Matter of Mr. Dr. Lugo.

Dated: April 2, 2001

Handwritten signature of Stanley L. Grossman, M.D. in black ink, written over a horizontal line.

Stanley L Grossman, M.D.

In the Matter of Raul Lugo, M.D.

Theresa G. Lynch, M.D., an ARB Member concurs in the Determination and Order in
the Matter of Dr. Lugo.

Dated: April 2, 2001

Theresa G. Lynch M.D.

Theresa G. Lynch, M.D.