



STATE OF NEW YORK DEPARTMENT OF HEALTH

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Antonia C. Novello, M.D., M.P.H., Dr.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

October 31, 2002

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

Jeffrey M. Eilender, Esq.
Schlam, Stone & Dolan
26 Broadway
New York, New York 10004

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

Dear Parties:

Enclosed please find the Reconsideration Motion (No. 00-01R) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Reconsideration Motion 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.

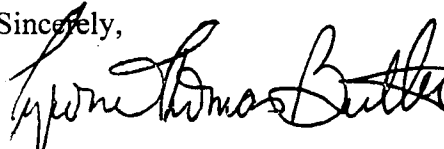
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified 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, appearing to read "Tyrone T. Butler". The signature is written in a cursive style with a large initial 'T'.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:cah
Enclosure

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

In the Matter of

Raul Lugo, M.D. (Respondent)

Administrative Review Board (ARB)

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

Reconsideration Motion 00-01R

COPY

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

**For the Department of Health (Department): Jean Bresler, Esq.
For Dr. Lugo: Jeffrey M. Eilender, Esq.**

After an Administrative Review in 2001, the ARB affirmed a BPMC Committee's Determination that found Dr. Lugo committed professional misconduct and the ARB suspended Dr. Lugo's Medical License for six months¹. In this motion, we consider whether to remand this case pursuant to N.Y. Pub. Health Law § 230-c (4)(b)(McKinney 2002) for the Committee to consider two additional documents. Dr. Lugo also challenges rulings that the BPMC Committee's Administrative Officer made in denying a similar motion to reopen. After considering submissions from the parties, the ARB holds that we possess the jurisdiction to consider the motion. On considering the motion, we hold that Dr. Lugo has failed to prove that either document would have affected the Committee's prior Determination. Upon denying the motion to reopen, we find the challenges concerning the Committee's Administrative Officer moot.

¹ Matter of Raul Lugo 2000 WL 3390817 (NYDOH-Admin. Rev. Bd).

Jurisdiction

Dr. Lugo concedes that no rules apply to re-open BPMC procedures. Although the Department opposes the motion on the merits, the Department raised no objections on jurisdiction.

The United States Court of Appeals for the Second Circuit previously has remanded a BPMC proceeding to determine whether BPMC denied a physician due process by failing to offer a procedure to reopen a case for new evidence, Hachamovitch v. DeBuono, 159 F. 3d 687 (2nd Cir. 1998). Further, the New York Supreme Court Appellate Division for the Third Department has held that the ARB may reopen a case on a motion by one of the parties, Matter of Berges v. Chassin, 216 A.D.2d 698, 627 N.Y.S.2d 855 (3rd Dept. 1995). Also, N.Y. Pub. Health Law § 230-c (4)(b) permits the ARB to remand a case to a hearing committee for further proceedings.

The ARB will consider this as 1.) a motion to remand to the original Lugo hearing committee (Committee) to consider additional evidence, 2.) a motion to overturn a ruling by the Committee's Administrative Officer, Judge Mary Noe, denying a motion to reopen the hearing and 3.) a motion to recuse Judge Noe from participation in any further proceedings. To reopen a case to receive new evidence, the party proposing the evidence must show the proposed evidence would 1.) likely affect the outcome of the proceeding and that 2.) the evidence could not have been obtained prior to the conclusion of the evidence portion of the initial hearing without due diligence, Matter of Hachamovitch v. Off. Of Prof. Med. Cond., 227 A.D.2d 686, 641 N.Y.S.2d 757 (3rd Dept. 1996).

The Original Determination

At the initial hearing in this matter, the Department charged that Dr. Lugo, a surgeon, performed pelvic/rectal examinations on a patient (Patient A) for other than a legitimate medical reason and initiated a social and then a sexual relationship with Patient A. The Respondent denied the charges. Following a hearing, the Committee found that Dr. Lugo 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, by a 2-1 vote, that the Respondent and the Patient began a social relationship in 1995 that became sexual in nature in December 1995.

The Committee majority found Patient A credible in her testimony supporting the misconduct allegations upon concluding that the Patient:

- knew private information about Dr. Lugo,
- 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 Dr. Lugo.

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

- 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 Dr. Lugo 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 Dr. Lugo's License for five years, but stayed all but one month of the suspension.

The Department's review brief requested that the ARB overturn the Committee, affirm additional charges and revoke the Respondent's License. On review, Dr. Lugo alleged error by the Committee and Judge Noe. Dr. Lugo contended that the Committee erred by finding Patient A more credible than the Respondent and by disregarding the Abel Report, that established the Respondent's credibility. The Respondent also alleged that Judge Noe showed partiality against the Respondent and that Judge Noe erred by withholding information from the parties as to the reason for the psychiatric evaluation on the Respondent.

The ARB affirmed the Committee's Determination that the Respondent engaged in conduct that evidenced moral unfitness, by engaging in a sexual relationship with Patient A and overturned the Committee and suspended the Respondent's License for six months.

The ARB rejected Dr. Lugo's request that we overturn the Committee's judgement on witness credibility. We held that the Committee, as fact-finder, possessed the authority to make judgements on witness credibility and that 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 Dr. Lugo and the ARB saw no error in the Committee's judgement.

We also found no error in the Committee's Determination to give no credit to the Abel Report's determination that the Respondent testified truthfully in denying Patient A's allegations. The ARB considered Dr. Lugo 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 rejected 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 the ARB saw no reason why the Committee required the Respondent to undergo the psychiatric evaluation in the first place, we saw no error by the Committee in rejecting the Abel Report's conclusion as the basis for the Committee's judgement on credibility.

The ARB rejected the Department's request that we revoke Dr. Lugo's License. We agreed with the Committee that this case involved a sexual relationship with one patient and that the conduct constituted an aberration in Dr. Lugo's career. We also agreed, however, that the relationship constituted egregious misconduct with a vulnerable Patient. We held that the conduct warranted actual time on suspension and we concluded that the conduct warrants a longer actual suspension than the Committee imposed. We vote to suspend Dr. Lugo from practice for six months. These six months included the one month that the Respondent had served on suspension already during the period of our review on the Committee's Determination. The ARB Determination constituted the final administrative step in the Lugo case.

The Current Motion

On April 22, 2002, Dr. Lugo submitted an initial motion (Initial Motion) to reopen the hearing before the Committee and to offer two documents for the Committee's consideration: a.) a letter from Patient A to Dr. Lugo (Letter) and b.) an affidavit from Dr. Abel (Affidavit), who performed the evaluation on Dr. Lugo that the Committee ordered. Dr. Lugo moved at the same time to recuse Judge Noe from considering the motion. Judge Noe denied the recusal motion and denied the motion to reopen the hearing to consider either the Letter or the Affidavit. Submissions on the April motion from Dr. Lugo and the Department and Judge Noe's decision appear as the appendices to Dr. Lugo's motion to the ARB.

By motion on September 16, 2002, Dr. Lugo now moves (Current Motion) for the ARB to consider the motion to reopen the case for the Committee to consider the Letter and Affidavit. Dr. Lugo also argues that Judge Noe should have recused herself from ruling on the Initial Motion and Dr. Lugo argues that Judge Noe erred in her ruling on the motion.

Determination On The Motion

The ARB votes unanimously to accept the request that we consider the Affidavit and the Letter. As we noted above, we possess jurisdiction to consider the Current Motion. We also hold that we constitute the proper body to receive the Current Motion, rather than the Committee, because the ARB made the final administrative determination in the case and because we may remand to the Committee for further proceedings. On the Current Motion, we hold that no basis exists for a remand for the Committee to consider either the Affidavit or the Letter. As we have considered the motion to reopen the proceeding, we find moot the issue as to whether Judge Noe

considered properly the motion to reopen. We also find moot the request to recuse Judge Noe from participation in any further proceedings in this case, because no further proceedings will take place.

Affidavit: At hearing, the Committee ordered Dr. Lugo to undergo an Evaluation by Dr. Abel. By the time Judge Noe accepted the Abel Report into evidence, controversy had erupted over the Report [Dr. Lugo's September 16 Motion Papers, Exhibit C, Intra-Hearing Conference Transcript]. In their Determination, the Committee found the Report not useful and in the ARB review of the Committee's Determination, Dr. Lugo alleged error by the Committee for failing to consider the Report. In the Current Motion, Dr. Lugo offers the Affidavit that discusses Dr. Abel's conversation with Judge Noe, explains Dr. Abel's practice in doing evaluations and explains that Dr. Abel never knew the limitations the Committee placed on the evaluation. Dr. Lugo argues that the Affidavit provides detailed corroboration for the Abel Report bearing on Dr. Lugo's innocence and on the danger that Patient A poses to other doctors. Dr. Lugo's September 25, 2002 submission to the ARB refers to the Affidavit as stunning new evidence.

As we noted above, to reopen a case to receive new evidence, the party proposing the evidence must show 1.) the proposed evidence would likely affect the outcome of the proceeding and that 2.) the evidence could not have been obtained prior to the conclusion of the evidence portion of the initial hearing without due diligence, Matter of Hachamovitch v. Off. of Prof. Med. Cond., (supra). The ARB holds that Dr. Lugo has shown neither that he could not have obtained the Affidavit by due diligence during the hearing or that the Affidavit would have effected the outcome of the hearing.

Dr. Lugo knew during the hearing that questions existed over the Abel Report [Dr. Lugo's September 16 Motion Papers, Exhibit C, Intra-Hearing Conference Transcript]. During an

Intra-Hearing Conference on September 12, 2001, Judge Noe informed the parties that they could offer additional evidence addressing the Abel Report [Transcript pages 18-19]. Judge Noe also indicated that the Committee could call Dr. Abel [Transcript page 20]. Judge Noe made no ruling or statement denying Dr. Lugo the chance to submit an affidavit from Dr. Abel. Nothing in the record supports the statement in Dr. Lugo's September 16 Motion Papers, page 8, that "the Panel did not allow Dr. Abel to testify about his report". We conclude that the record shows that Dr. Lugo could have requested and submitted the Affidavit to the Committee during the hearing.

We find nothing in the Affidavit that indicates that the Affidavit would affect the hearing's outcome. First, Dr. Abel's Report determined that Dr. Lugo testified truthfully in denying a relationship with Patient A. In the Administrative Review, the ARB found the Report attempted improperly to usurp the Committee's function as the fact finder which determines credibility. In a BPMC proceeding, the Committee's holds exclusive authority to determine witness credibility, Matter of Richstone v. Novello, 284 A.D.2d 737, 726 N.Y.S.2d 188 (3rd Dept. 2001). Next, in upholding the Committee's Determination to reject the Abel Report, the ARB noted that we saw no reason why the Committee ordered the Report in the first place. Under Pub. Health Law § 230(7), a BPMC Committee may order that a licensee undergo an evaluation to determine whether the licensee suffers an impairment in practice due to mental illness or substance abuse. Nothing in the statute allows the Committee to order an evaluation as an aid in making credibility findings. Further, in making his Report, Dr. Abel relied on a polygraph examination on Dr. Lugo. Results of a polygraph test are inadmissible, as unreliable, in a BPMC proceeding, Matter of Harris v. Novello, 276 A.D.2d 848, 714 N.Y.S.2d 365 (3rd Dept. 2000). Also, the Report made findings about Patient A, although Dr. Abel never examined Patient A. The ARB concludes that the Affidavit contradicts none of the reasons that the ARB

found the Report without weight previously and offers no new evidence that would contradict the Committee's Determination.

Letter: The Letter at issue on the Current Motion is a 1995 letter from Patient A to Dr. Lugo. The Current Motion contends that the Letter contradicts testimony by Patient A, in that Patient A testified at hearing that Dr. Lugo initiated the relationship by inviting Patient A to dinner. The Letter indicates that it was Patient A who suggested a social meal. Dr. Lugo argues that the Letter would have colored the Committee's view on credibility and that the Committee could have inferred from the Letter that the entire testimony by Patient A was false. Affidavits in the Dr. Lugo's Motion from Dr. Lugo and his wife indicate that Mrs. Lugo discovered the Letter only after the Initial ARB Determination in the matter, when Dr. Lugo moved his office [September 16 Motion, Appendix A]. The Department's counsel challenges the contention that the Letter is newly discovered and contends that she provided the Letter to Dr. Lugo's hearing counsel.

The ARB concludes that the Letter does constitute newly discovered evidence unavailable to Dr. Lugo during the hearing. We draw that conclusion from the Affidavits by Dr. and Mrs. Lugo. We find the statements to the contrary by the Department's counsel as argument only, rather than evidence, and we find nothing else in the record to corroborate the contention by the Department's counsel that Dr. Lugo's hearing counsel possessed a copy of the Letter during the hearing.

We hold that the information in the Letter would not have effected the Committee's Determination, because the Committee's Determination already rejected Patient A's testimony about who initiated the invitation to a social meal. At Finding of Fact 9 in their Determination [September 16 Motion, Exhibit A], the Committee found that Patient A suggested dinner to Dr.

Lugo. The Committee based Finding 9 on testimony by Dr. Lugo at Transcript page 449. The ARB concludes that the Letter would merely constitute repetitious evidence on a point on which the Committee already credited the Respondent's testimony.

Despite crediting the Respondent's testimony about who initiated the invitation for the social meal, the Committee found Patient A credible about the sexual relationship with the Respondent. The Committee majority found Patient A credible in her testimony supporting the misconduct allegations upon concluding that the Patient:

- knew private information about Dr. Lugo,
- 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 Dr. Lugo.

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

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

Nothing in the Letter contradicted the Committee's conclusions about this testimony by Dr. Lugo and Patient A.

Recusal: The ARB has made no previous rulings to recuse an Administrative Law Judge in a BPMC proceeding and we see no need to address Dr. Lugo's arguments about recusing or disqualifying Judge Noe in this case. Dr. Lugo challenged Judge Noe's decision to deny the Initial Motion. The ARB has accepted the Current Motion for review, in part because we found the ARB constituted the proper body to consider the Current Motion. We find the decision on the Initial Motion moot now following our review. We also note that to overturn a decision due to bias, the party attacking the decision must show that the outcome in the decision flowed from

bias, Matter of Moss v. Chassin, 209 A.D.2d 889, 618 N.Y.S.2d 931 (3rd Dept. 1994). On the Current Motion, we have ruled that the record supports a decision to deny re-opening the hearing.

Dr. Lugo also argued about disqualifying or recusing Judge Noe from further proceedings in the case. As a result from our ruling denying a remand, no further proceedings shall take place, so we find the argument about further recusal moot.

ORDER

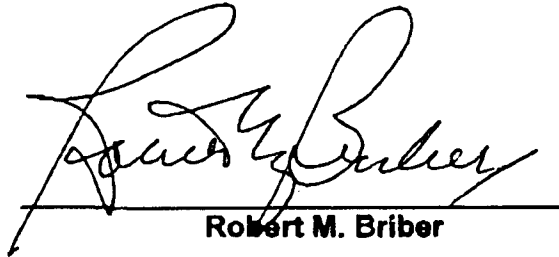
NOW, upon reviewing the September 16, 2002 Motion by Dr. Lugo, the September 23, 2002 Reply by the Department and the September 25, 2002 Reply by Dr. Lugo, the Administrative Review Board for Professional Medical Conduct denies the Motion to Remand this case to the Committee to consider additional evidence and we find moot the arguments on disqualification or recusal.

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.

Robert M. Briber, an ARB Member, concurs in the Determination and Order in the Matter of Dr. Lugo.

Dated: October 14, 2002

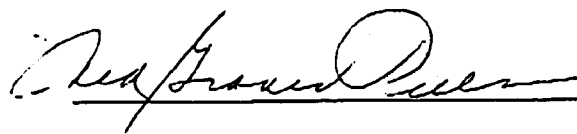


Robert M. Briber

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: 10/18, 2002



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: October 11, 2002

Stanley L. Grossman M.D.

Stanley L Grossman, M.D.

In the Matter of Raul Lugo, M.D.

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

Dated: Oct. 30, 2002



Therese G. Lynch, M.D.