



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

May 19, 1997

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Jacob Neuman, M.D.
144-27 78th Avenue
Flushing, New York 11367

Anthony Z. Scher, Esq.
Wood & Scher
The Harwood Building
Scarsdale, New York 10583

Daniel Guenzburger, Esq.
NYS Department of Health
5 Penn Plaza Sixth Floor
New York, New York 10001

RE: In the Matter of Jacob Neuman, M.D.

Dear Dr. Neuman, Mr. Scher and Mr. Guenzburger:

Enclosed please find the Determination and Order (No.97-34) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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,

REDACTED

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

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

COPY

IN THE MATTER
OF
JACOB NEUMAN, M.D.

ADMINISTRATIVE
REVIEW BOARD
DETERMINATION
ARB NO. 97-34

Administrative Review from a Determination by a Hearing
Committee on Professional Medical Conduct

Before: **ROBERT M. BRIBER, SUMNER SHAPIRO, WINSTON S. PRICE, M.D., EDWARD C. SINNOTT, M.D., and WILLIAM A. STEWART, M.D., Board Members.**

After a hearing into charges that the Respondent **DR. JACOB NEUMAN** (Respondent) committed professional misconduct, a Hearing Committee on Professional Medical Conduct (Committee) sustained multiple, serious charges, revoked the Respondent's license to practice medicine in New York State (License) and imposed a Fifty Thousand Dollar (\$50,000.00) Fine. In this proceeding pursuant to N. Y. Pub. Health Law §230-c(4)(a) (McKinney's Supp. 1997), the Respondent asks the Administrative Review Board for Professional Medical Conduct (Board) to overturn the Committee's February 13, 1997 Determination, arguing that the Committee erred in finding that the Respondent fabricated slides and reports and that the Committee then compounded that error by basing their most serious findings on their conclusion that the Respondent lacked credibility due to the fabrications. In reply to the Respondent's arguments, the Department of Health asks the Board to sustain the Committee's revocation penalty, but to increase the fine that the Committee imposed. After reviewing the record in this case and conducting Deliberations by telephone conference on April 18, 1997, the Board votes to sustain the Committee's Determination that the Respondent committed professional misconduct in treating five patients, by practicing fraudulently, by practicing with repeated negligence, by ordering excessive tests, by filing false reports and by maintaining inaccurate records. We sustain the Committee's penalty in full.

Administrative Law Judge **JAMES F. HORAN** served as the Board's Administrative Officer and drafted this Determination. **ANTHONY Z. SCHER, ESQ.** represented the Respondent **DANIEL GUENZBURGER, ESQ.** represented the Petitioner.

COMMITTEE DETERMINATION ON THE CHARGES

Under N.Y. Pub. Health Law §230(7)(McKinney's Supp. 1997), three member Committees from the State Board for Professional Medical Conduct (BPMC) conduct disciplinary proceedings to determine whether physicians have committed professional misconduct. The Petitioner filed charges with BPMC alleging that the Respondent violated N.Y. Educ. Law §§ 6530(2), (3), (5), (20), (21) & (35)(McKinney's Supp. 1997), by committing misconduct under the following categories:

- practicing medicine fraudulently;
- practicing with negligence on more than one occasion;
- practicing with incompetence on more than one occasion;
- failing to maintain records that reflect accurately the patient's evaluation and treatment;
- filing a false report, and,
- ordering excessive tests unwarranted by the patient's condition.

The charges alleging negligence, incompetence, excessive tests and inaccurate records arose from the Respondent's treatment for five patients, whom the record refers to as A through E, to protect their privacy. The fraud and false report charges alleged that the Respondent made knowing and false misrepresentations concerning treatment or testing for Patients A, B, D and E.

Three BPMC Members, **DAVID T. LYON, M.D. (Chair)**, **ROBERT J. O'CONNOR, M.D.** and **CAROLYN C. SNIPE** comprised the Committee who conducted the hearing in the matter and who rendered the Determination which the Board now reviews. Administrative Law Judge **NANCY M. LEDERMAN** served as the Committee's Administrative Officer. The Committee determined that the Respondent ordered excessive tests and unwarranted procedures and attempted to justify them fraudulently by submitting false pathology reports to the Office for Professional Medical Conduct (OPMC), after OPMC began an investigation into the cases. The Committee found further that the Respondent failed to have pathology evaluations performed, failed to maintain records that reflected evaluation and treatment accurately and advised Patient A fraudulently about a pathological diagnosis, to induce further testing. The Committee concluded that the Respondent practiced medicine fraudulently and filed false reports by fabricating pathology reports and making

misrepresentations about reports for Patients A, B, D and E. The Committee concluded that the Respondent practiced with negligence on more than one occasion, ordered tests unwarranted by the patients' condition and failed to maintain accurate records in treating Patients A through E. The Committee found no grounds on which to sustain the charge that the Respondent practiced with incompetence on more than one occasion.

In reaching their findings and conclusions, the Committee found hearing testimony by the Respondent to be totally unbelievable. The Committee found that both parties produced essentially credible witnesses, but found no probative value in testimony by the Respondent's witnesses, who relied on tainted and non-credible evidence linked to the Respondent. The Committee voted to revoke the Respondent's License and to fine the Respondent Fifty Thousand Dollars (\$50,000.00). The Committee concluded that greed motivated the Respondent to perform unwarranted procedures and disregard his patients' welfare. The Committee noted that the Respondent exhibited no hesitation in subjecting Patient C, a twelve year-old, to unnecessary colonoscopies. The Committee noted with particular outrage that the Respondent subjected Patient A to numerous invasive endoscopic procedures and to living under stress from a pre-malignant condition diagnosis, without obtaining proper confirmation that the Patient actually suffered from a pre-malignant condition and with biopsies showing no justification for sequential, follow-up procedures. The Committee concluded that the Respondent's conduct warranted the most severe sanction available and that the Respondent's fraudulent actions and untruthful testimony warranted a financial penalty.

REVIEW HISTORY AND ISSUES

The Respondent filed a Notice requesting this review, which the Board received on February 20, 1997. The Record for review contained the Committee's Determination, the hearing transcripts and exhibits, the Respondent's brief and Petitioner's reply brief. The Board received the Petitioner's brief on March 26, 1997 and the Petitioner's reply on April 7, 1997.

The Respondent concedes that the Committee's penalty would be the appropriate sanction for any physician who committed the acts for which the Committee found the Respondent responsible. The Respondent alleges, however, that the Committee erred in finding the Respondent guilty for the

misconduct and that the Committee's error resulted from their conclusion the Respondent's mistake in his testimony resulted from dishonesty rather than his poor memory. The Respondent argues that all the Committee's most serious findings and conclusions derive directly and solely from the Committee's conclusions that the Respondent fabricated reports and test slides to justify procedures and deceive OPMC. The Respondent argues that without the foundations from the Committee's erroneous conclusion, the Committee's findings fail. We summarize below the accusations the Respondent makes concerning the hearing in this matter and the Committee's Determination:

- The Committee ignored evidence proving the slides' legitimacy.
- The Committee made irrational and inconsistent findings concerning testimony by the Petitioner's expert and erred in discounting testimony by the Respondent's expert.
- Committee Chair Lyon imposed his personal view unfairly in the case, without regard to expert testimony.
- The Committee's own findings and unrebutted evidence in the record contradict the Committee's conclusion that greed motivated the Respondent to perform unnecessary procedures.
- The Committee ignored evidence that the Respondent relied on information other than the pathology reports in performing the endoscopic procedures.
- The Committee's Administrative Officer erred in refusing to receive scholarly literature supporting the procedures at issue.
- The Committee erred in finding the Respondent guilty for conduct for which the Petitioner charged no misconduct.
- The Committee arrived at an almost impossible theory for what took place.
- The Committee erred in its findings concerning Patient A.

The Respondent asks that the Board remand to the Committee so that Patient A can testify and invites the Board to order date-testing for the disputed pathology records. The Respondent asks the Board to vacate the Committee's Order and impose a sanction on the record keeping charges alone or to remand with appropriate instructions to the Committee.

The Petitioner alleges that the Respondent failed to raise any issue warranting review and

urges the Board to deny the Respondent's arguments and defer to the Committee on the credibility issues on which the Respondent centers his review issues. In their reply brief, the Petitioner asks the Board to modify the Committee's Penalty by increasing the fine against the Respondent.

In a March 26, 1997 letter, the Respondent's attorney Mr. Scher argued that the Petitioner's failure to file a brief waived their right to file a reply. Mr. Scher asked the Board's Administrative Officer to either withhold the Petitioner's reply brief from the Board or to permit the Respondent to respond. Through an April 7, 1997 letter, our Administrative Officer informed the parties that, since the Petitioner's reply requested for the first time that the Board increase the Respondent's fine, the Respondent could submit a response to the request for the increased fine. The Respondent submitted no response.

THE BOARD'S REVIEW AUTHORITY

In reviewing a Committee's Determination, the Board determines: whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law, and whether the Penalty is appropriate and within the scope of penalties which the law permits [N.Y. Pub Health Law §230(10)(i), §230-c(1) & 230-c(4)(b)(McKinney's Supp. 1997)]. The Board may remand a case to the Committee for further consideration [N.Y. Pub. Health Law §230-c(4)(b)(McKinney's Supp. 1997)]. The Board's Determinations result from a majority concurrence among the Board's Members [N.Y. Pub. Health Law §230-c(4)(c)(McKinney's Supp. 1997)].

The Review Board may substitute our judgement for that of the Committee, in deciding upon a penalty **Matter of Bogdan v. Med. Conduct Bd.** 195 AD 2d 86, 606 NYS 2d 381 (Third Dept. 1993), in determining guilt on the charges, **Matter of Spartalis v. State Bd. for Prof. Med. Conduct** 205 AD 2d 940, 613 NYS 2d 759 (Third Dept. 1994), and in determining credibility **Matter of Minielly v. Comm. of Health** 222 AD 2d 750, 634 NYS 2d 856 (Third Dept. 1995).

THE BOARD'S DETERMINATION

The Board has considered the record below and the parties' briefs. The Board sustains the Committee's Determination that the Respondent committed misconduct by fabricating records and by

performing unwarranted procedures, but we amend certain findings concerning Patient E. The Board sustains the Committee's Determination to revoke the Respondent's License and to fine him Fifty Thousand Dollars (\$50,000.00), but we modify the reasons for imposing the fine. We discuss our Determination below, with emphasis on the procedural issues that the Respondent raised, on the Respondent's challenge to the Committee's Determination on the charges and on our own review on the Committee's Penalty Determination.

Procedural Issues: The Respondent's brief argued, at page 16, that the Committee's Administrative Officer erred by excluding certain scholarly literature from the record. The Board concludes that this argument raises a legal issue that we leave to the Courts to resolve.

At page 7 in the Respondent's brief, he invited the Board to order age-testing for the reports at issue in this proceeding. At page 20, the Respondent requested that we remand this case to the Committee so that Patient A could testify. The Board rejects both these requests to reopen the record to receive more evidence. The Board has reviewed the hearing record and we conclude that the Respondent had a full opportunity to present his case at the hearing. The Respondent had the chance to call Patient A as a witness and had the chance to request such testing during the hearing.

In his March 26, 1997 letter the Respondent's counsel argued against the Petitioner being able to submit only a reply brief, through which the Petitioner's counsel could raise all his arguments and preclude the Respondent from responding. The Board agrees with the Respondent's counsel to the extent that we find the practice unfair for a party to raise an issue for review (a request that the Board modify or annul the Committee's penalty, in whole or in part) for the first time in a reply brief. Such practice denies the other party a chance to respond, because the statute controlling the Board's review authority [N.Y. Pub. Health Law §230-c(4)(b)(McKinney's Supp. 1997)] limits the parties to submitting only a brief and reply brief and, because the Board has refused previously to consider any submissions from parties in addition to briefs and replies. The Board, therefore, disagrees with our Administrative Officer's solution on this issue (to offer the Respondent the opportunity to submit a sur reply addressing only the Petitioner's request for an increase in the Respondent's fine). The Board concludes that the solution lies in refusing to consider the Petitioner's request for the increased fine, just as we refuse to consider any submissions from parties, other than briefs and reply briefs. The

Board refuses to consider the Petitioner's request for an increase in the fine, because the Petitioner raised the request in a reply brief and denied the Respondent a chance to respond on that issue. We direct our Administrative Officer to alert the parties in future reviews that the Board will consider only issues for review that parties raise in their briefs. Reply briefs provide the other party the opportunity to respond to their adversary's issues for review, rather than to raise review issues for the first time.

The Board rejects the argument from the Respondent's March Letter, that the Petitioner waived the right to file a reply brief, by failing to file a brief. The controlling statute allows both parties to file briefs and replies [N.Y. Pub. Health Law §230-c(4)(b)(McKinney's Supp. 1997)]. A recent amendment to the statute provides that "a notice of review shall be perfected only if a brief is timely submitted"(see 1997 N.Y. Laws, Chapter 627), but nothing in the statute requires a non-appealing party to file a brief or provides that a non-appealing party loses the opportunity to file a reply, if the party files no brief. In practice before the Board, once either party files a review notice, the Board allows both parties to file briefs raising issues for review. If the non-appealing party has no review issues, they need file only a reply brief responding to their adversary's review issues. If the non-appealing party files a reply brief responding to their adversary's brief and raising review issues for the first time, as occurred in this case, the Board will consider the party's arguments in response and refuse to consider the review issues that the party raises for the first time in the reply brief.

Determination on the Charges: The Board votes unanimously to sustain the Committee's Determination that the Respondent practiced fraudulently and with repeated negligence, performed unwarranted procedures, filed false reports and maintained inaccurate records. The Respondent centered his challenge to the Committee's Determination on his argument that the Committee's most serious findings and conclusions resulted from the Committee's finding on the Respondent's credibility and that the Committee erred in making that finding. The Board finds no error here. The Committee viewed the Respondent's testimony, the reports in evidence and the testimony by other witnesses. The Committee as fact finder deserves great deference in their Determination about which witnesses testified truthfully. The record provided them with ample justification to find that the Respondent testified falsely and that he fabricated records. Those findings supported their conclusion

that the Respondent performed procedures unwarranted by the Patients' conditions and that he performed those procedures for his own enrichment, disregarding his Patients' welfare. The Respondent's contrary evidence merely raised factual issues for the Committee to resolve. The Committee acted within their authority and consistent with the evidence in finding that the Respondent testified falsely and fabricated records.

The Respondent's brief at page 8 contended that, although the Committee stated that they found testimony from the Petitioner's expert credible, the Committee rejected that expert's testimony in finding appropriate indications for thirty-four of the forty-eight procedures at issue in this matter. The Respondent's brief then alleged that the Committee in fact found the Petitioner's expert witness non-credible and that, in sustaining certain other charges concerning inappropriate procedures, the Committee relied on personal opinion from Committee Chair Lyon, rather than any expert testimony. The Board finds no merit to that argument and we find that the Committee's Determination clearly disproves the argument. At pages 27-28 in their Determination, the Committee stated that they rejected certain charges alleging inappropriate procedures, because they found insufficient evidence and had only the Respondent's records on which to rely. The Board finds that statement proves that the Committee made their Determination on the procedures solely from the record and from no outside sources.

The Board agrees with the Respondent that the Committee made findings concerning uncharged conduct involving Patient E, but we conclude that these findings had no effect on the Committee's Determination to sustain the misconduct specifications concerning Patient E's care. The Committee determined that the Respondent performed colonoscopies inappropriately on Patient E on August 15, 1985, September 23, 1985 and November 14, 1985 (Committee Determination pages 21 & 23), yet the Statement of Charges contained no allegations concerning those procedures (Petitioner Exhibit 1, pages 8-9, paragraphs E-2, E-4 & E-5). In **Matter of Dhabuwala v. State Board for Prof. Med. Cond.**, 225 AD2d 209, 651 NYS 2d 249 (Third Dept. 1996), the Appellate Division ruled that:

" the notice requirements of due process preclude an administrative agency from finding a professional guilty of conduct which was not specifically set forth in the statement of charges"

After reviewing the Committee's conclusions on the charges involving Patient E, the Board finds the

Committee based no guilt determinations on their findings concerning the three uncharged 1985 procedures. At pages 24-25 in their Determination, the Committee sustained Allegations E-2, E-4 & E-5, concerning performing unindicated colonoscopies, failing to have pathological evaluations performed and making representations about a pathology report. The Committee based their determination on those charges solely on their findings concerning procedures about which allegations appear in the Statement of Charges. The Board concludes that those findings support the Committee's Determination on the charges and we amend the Committee's Determination to delete the findings concerning the uncharged conduct.

Penalty: We noted previously that the Respondent conceded that a person who committed the misconduct alleged against the Respondent would warrant the penalty the Committee imposed. We also noted that we refuse to consider the Respondent's request to increase the Respondent's fine. Even though this leaves no issues for review, from the parties, challenging the Committee's Penalty, the Board reviewed the Committee's Penalty Determination nonetheless, because the Board may modify a Committee's Penalty even though neither party to the review requests such modification, **Matter of Kabnick v. Chassin**, 89 NY2d 828 (1996).

The Board sustains the Committee's Determination to revoke the Respondent's License. Fabricating patient records, standing alone, warrants License revocation as a penalty. Such conduct demonstrates that a physician lacks integrity, an attribute as important in medical practice as knowledge or skill. Subjecting patients to medical procedures, without obtaining tests concerning the patients' conditions, places those patients at risk and, standing alone, warrants License revocation. Subjecting patients to unwarranted procedures only for the physician's personal gain and in disregard for the patients' welfare constitutes reprehensible misconduct that, standing alone, warrants License revocation.

The Board sustains the Committee's Determination to fine the Respondent Fifty Thousand Dollars (\$50,000), but we modify the Committee's Penalty Determination because the Committee relied on uncharged misconduct as a ground for imposing the fine. At pages 31-32 in their Determination, the Committee stated that the Respondent's egregious, fraudulent conduct, including his untruthful hearing testimony, warranted a financial penalty and the Committee fined the

Respondent Ten Thousand Dollars (\$10,000.00) for each Patient he exploited. The Statement of Charges in this proceeding, however, contains no allegations concerning untruthful testimony. As we noted already, due process precludes depriving a person from substantial rights in an administrative proceeding due to uncharged misconduct, Matter of Dhabuwala v. Board for Prof. Med. Cond. (supra). For that reason, the Board ruled earlier this year that a Committee's conclusion, that a Respondent gave untruthful testimony at a hearing, provides no independent ground on which the Committee may base a penalty (Matter of Behnam, ARB No. 96-267). After eliminating the uncharged misconduct as a basis for the fine, the Board concludes that the charges the Committee sustained still provide sufficient grounds to support a fine against the Respondent for each Patient in this proceeding.

In addition to mentioning untruthful testimony as a basis for fining the Respondent, the Committee also stated that the Respondent's fraudulent conduct warranted a financial penalty. The Respondent's fraudulent conduct, in fabricating records and filing false reports relating to the care for Patients A, B, D & E, certainly provided the Committee with ample grounds on which to impose a Ten Thousand Dollar (\$10,000.) fine for the Respondent's conduct in each of those cases. The Committee also imposed a fine concerning Patient C's case, yet the Committee made no findings and the charges made no allegations that the Respondent fabricated records or committed other fraudulent conduct relating to Patient C's case (Petitioner's Exhibit 1, pages 13-14). Other findings by the Committee do, however, provide a basis on which to impose a fine in Patient C's case. In addition to fraudulent conduct as a basis, negligent or incompetent medical care also provide grounds on which a Committee or the Board may impose a financial penalty, Matter of Colvin v. Chassin, 214 A.D.2d 854; 625 N.Y.S.2d 351(Third Dept. 1995). The Committee determined that the Respondent performed a colonoscopy on Patient C without indication, that he failed to refer the Patient to a Specialist for an abscess and that he failed to have certain tests performed. Such conduct exposed the Patient to risk and demonstrated the Respondent's disregard for the Patient's welfare. The Board concludes that such conduct warrants a Ten Thousand Dollar (\$10,000.00) fine. The Board, therefore, sustains the total fine that the Committee imposed against the Respondent, but we modify the grounds for imposing such fine, for the reasons we discussed above.

This constitutes the Board's Determination that the Respondent violated the Education Law provisions defining physician professional misconduct. Due to our concerns about whether the Respondent's conduct violates other statutes as well, the Board directs OPMC to provide a copy of this Determination to the appropriate District Attorney.

ORDER

NOW, based upon this Determination, the Review Board issues the following **ORDER**:

1. The Board **SUSTAINS** the Hearing Committee's February 13, 1997 Determination finding the Respondent guilty for professional misconduct.
2. The Board **SUSTAINS** the Hearing Committee's penalty revoking the Respondent's License and fining him Fifty Thousand Dollars (\$ 50,000.00).

ROBERT M. BRIBER

SUMNER SHAPIRO

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

WILLIAM A. STEWART, M.D.

IN THE MATTER OF JACOB NEUMAN, M.D.

ROBERT M. BRIBER, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Neuman.

DATED: Schenectady, New York

5/5, 1997

REDACTED

ROBERT M. BRIBER

IN THE MATTER OF JACOB NEUMAN, M.D.

EDWARD C. SINNOTT, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Neuman.

DATED: Roslyn, New York

May 5, 1997

REDACTED

EDWARD C. SINNOTT, M.D.

IN THE MATTER OF JACOB NEUMAN, M.D.

SUMNER SHAPIRO, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Neuman.

DATED: Delmar, New York
May 6, 1997

REDACTED

~~SUMNER SHAPIRO /~~

IN THE MATTER OF JACOB NEUMAN, M.D.

WILLIAM A. STEWART, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Neuman.

DATED: Syracuse, New York

8 May, 1997

REDACTED

WILLIAM A. STEWART, M.D.

IN THE MATTER OF JACOB NEUMAN, M.D.

WINSTON S. PRICE, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Neuman.

DATED: Brooklyn, New York

MAY 16, 1997

REDACTED

WINSTON S. PRICE, M.D.