



STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

January 6, 1999

Dennis P. Whalen
Executive Deputy Commissioner

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Virgiliu Necula, M.D.
168-03 67th Avenue
Fresh meadows, NY 11365-1909

Silvia P. Finkelstein, Esq.
NYS Department of Health
5 Penn Plaza - Sixth Floor
New York, NY 10001

RE: In the Matter of Virgiliu Necula, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 98-233) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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,

A handwritten signature in black ink that reads "Tyrone Butler" with a stylized flourish at the end.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:mla

Enclosure

STATE OF NEW YORK: DEPARTMENT OF HEALTH (Petitioner)

COPY

**In The Matter Of
Virgiliu Necula, M.D. (Respondent)**

**Administrative Review
Board (ARB)
Determination and
Order 98 - 233**

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

**Before Board Members: Briber, Grossman, Lynch, Price & Shapiro.
Administrative Law Judge James F. Horan served as the Board's Administrative Officer.**

**For the Respondent: Pro Se
For the Petitioner: Silvia P. Finkelstein, Esq.**

In this proceeding, the ARB considers whether to take action against the Respondent's License to practice medicine in New York State (License), after an administrative adjudication found the Respondent engaged in illegal fee splitting. Following a hearing on charges that the fee splitting constituted professional misconduct, a BPMC Committee sustained the charge, but imposed no sanction against the Respondent's License. The Petitioner then moved pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 1998) for the ARB to overturn the Committee's Determination and impose a censure and reprimand against the Respondent's License. The Respondent opposes the Petitioner's motion and the Respondent requests that the ARB grant a rehearing from the decision that found he engaged in illegal fee splitting. After considering the record and the parties' briefs, we vote 5-0 to sustain the Committee's Determination that the Respondent committed misconduct by engaging in illegal fee splitting and to deny the Respondent's request for a rehearing. We vote 3-2 to overturn the Committee and to censure and reprimand the Respondent for his professional misconduct.

Committee Determination on the Charges

In a proceeding before the former Department of Social Services (DSS)¹, Administrative Law Judge (ALJ) Ralph Erbaio, determined that the Respondent engaged in unacceptable practices under

¹ The New York Legislature dissolved DSS in 1997 and transferred its functions to other agencies, including the Department of Health (1997 Laws of New York , Chap. 436).

the Medicaid regulations at Title 18 NYCRR Parts 515 & 518, because 1.) he surrendered his Medicaid provider number to "non-medical entrepreneurs" who lacked authorization to submit bills to the Medicaid Program and 2.) he split fees with the non-physician, non-Medicaid Providers [Petitioner Exhibit 3]. The ALJ found the arrangement with the entrepreneurs an unacceptable practice, because the arrangement constituted illegal fee splitting under N. Y. Educ. Law § 6530(19) (McKinney Supp. 1998) and under the New York Education Department regulations (SED) at Title 8 NYCRR § 29.1(b)(4). That statute and the SED regulation define fee splitting to mean any arrangement in which a physician's payment for space, facilities, equipment or personnel services constitutes a percentage from or depends upon the physician's income or receipts. This fee splitting prohibition arose from concerns that such arrangements might threaten medical service quality and professionalism, Psychoanalytic Center, Inc. v. Burns, 46 N.Y.2d 237 (1979). The ALJ found that all Medicaid payments that the Respondent received resulting from the fee splitting arrangement constituted overpayment under Title 18 NYCRR § 518.1 and found that the fee splitting arrangement constituted abuse against the Medicaid Program under Title 18 NYCRR §515.1(b)(1). For a penalty, the ALJ recommended that the Respondent make restitution amounting to Two Hundred Thirteen Thousand Three Hundred Fifty-eight Dollars (\$213,358.00), and recommended the Respondent's exclusion from the Medicaid Program for two years. After DSS confirmed the ALJ's recommendations, the Respondent challenged the DSS decision in court. The New York State Supreme Court Appellate Division for the First Department sustained the DSS Decision on the charges, the restitution order and the two year Medicaid exclusion, Necula v. Glass, 231 A.D.2d 457, 647 N.Y.S.2d 501 (First Dept. 1996).

The Petitioner subsequently began a professional misconduct proceeding, by filing charges with BPMC alleging that the Respondent committed professional misconduct under N. Y. Educ. Law § 6530(9)(c) (McKinney Supp. 1998). That statute defines professional misconduct to include acts that result in a guilty finding, in an adjudicatory proceeding, for violating a state or federal statute or regulation, when those acts would constitute professional misconduct. The Petitioner charged further

that the Respondent's conduct would constitute professional misconduct under N. Y. Educ. Law § 6530(19)(McKinney Supp. 1998), by permitting unauthorized persons to share in fees for professional services. An expedited hearing ensued pursuant to N.Y. Pub. Health Law §230(10)(p) (McKinney Supp. 1998), before a BPMC Committee, who rendered the Determination that the ARB now reviews. In such an expedited hearing, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The Committee determined that DSS found the Respondent guilty for violating a State statute and regulation and determined that the guilty finding resulted from conduct that would constitute illegal fee splitting. The Committee found that the Respondent, a radiologist, entered into contracts with management companies under which the companies provided the Respondent facilities, supplies, equipment and non-physician staff to operate the Respondent's radiology practice. In return, the contracts obligated the Respondent to pay the companies a fixed percentage from his receipts for billing services and a fixed dollar amount for each procedure the Respondent performed. The Committee sustained the misconduct charges against the Respondent, but voted to impose no penalty against the Respondent's License. The Committee concluded that the fee splitting arrangement provided the only blemish on the Respondent's otherwise distinguished medical career. After observing the Respondent, the Committee concluded that the Respondent would never again enter into an improper arrangement.

Review History and Issues

The Committee rendered their Determination on October 5, 1998. This proceeding commenced on October 23, 1998 when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief, the Respondent's brief and the Respondent's reply brief. The record closed when the Respondent

submitted his reply brief on November 22, 1998.

The Petitioner argues that the Committee acted inappropriately by failing to impose any penalty for the misconduct that the Respondent committed and that the New York Legislature proscribed. The Petitioner asks that the ARB modify the Committee Determination, by censuring and reprimanding the Respondent. The Petitioner characterizes such sanction as consistent with the Committee's rationale and with the mitigating factors in the case. In his reply brief, the Respondent calls the Petitioner's request an outrage, due to the mitigating factors in the case.

The Respondent's brief thanked the Committee for their Determination imposing no penalty and the Respondent requested a rehearing on the underlying DSS Decision.

Determination

All ARB Members participated in this case, considered the record and considered the parties' briefs. We reject the Respondent's request for a rehearing on the DSS Decision. Our authority under N.Y. Pub. Health Law §§ 230(10)(i) & 230-c (4)(a)(McKinney's Supp. 1998) restricts the ARB to reviewing solely the Determination by the Committee on the Education Law misconduct charges. The ARB provides no forum for the Respondent to relitigate a prior administrative adjudication, even from another program within the Department of Health. The Appellate Division for the First Department has already reviewed and sustained the DSS Decision that the Respondent engaged in fee splitting, Necula v. Glass, (supra). We vote 5-0 to sustain the Committee's Determination that the fee splitting constituted professional misconduct under N. Y. Educ. Law §§ 6530(9)(c) & 6530(19)(McKinney Supp. 1998).

We split 3-2 over whether to impose a sanction against the Respondent's License for fee splitting. Members Briber, Price and Grossman hold that the Respondent's conduct warrants a sanction and this majority agrees with the Petitioner that a censure and reprimand provides the appropriate penalty. The majority sees no need for any more punitive sanction due to the mitigating factors in the

record and to the Committee's conclusion that the Respondent presents no risk for any further illegal activity during his career. The majority disagrees with the Respondent's argument that censure and reprimand would constitute a ridiculous sanction due to the mitigating factors in the case. The mitigating factors in the case convinced the majority to limit the sanction to only a censure and reprimand. Earlier this year, the ARB imposed a much more severe sanction for fee splitting, by revoking a physician's License in Matter of Pomerantz, N.Y.D.O.H. Adm. Rev. Bd. 98-45, 1998 WL 869811.

Members Shapiro and Lynch dissent from the Determination on the penalty. The minority concludes that the Respondent received sufficient punishment for his misconduct due to the fine and Medicaid exclusion that the DSS Decision imposed. Mr. Shapiro and Dr. Lynch conclude further that the fine and exclusion will deter similar misconduct.

ORDER

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

1. The ARB **REJECTS** the Respondent's request for a rehearing on the original charges from the DSS proceeding.
2. The ARB **SUSTAINS** the Committee's Determination that the Respondent committed professional misconduct.
3. The ARB votes 3-2 to **CENSURE and REPRIMAND** the Respondent for his misconduct.

Robert M. Briber

Sumner Shapiro

Winston S. Price, M.D.


Stanley L. Grossman, M.D.

Therese G. Lynch, M.D.

In The Matter Of Virgiliu Necula, 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. Necula.

Dated: 12/30, 1998

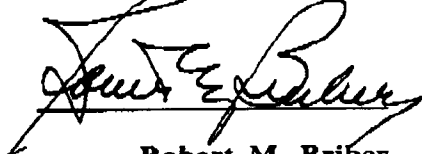


Winston S. Price, M.D.

In The Matter Of Virgiliu Necula, 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. Necula.

Dated : December 31, 1998

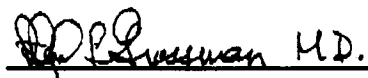


Robert M. Briber

In The Matter Of Virgiliu Necula, M.D.

Stanley L. Grossman, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Necula.

Dated : December 30, 1998



Stanley L. Grossman, M.D.

In The Matter Of Virgiliu Necula, M.D.

Sumner Shapiro, a member of the Administrative Review Board for Professional Medical Conduct, concurs in part and dissents in part on the Determination and Order in the Matter of Dr. Necula.

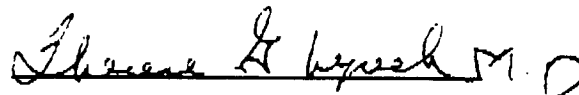
DATED: December 23, 1998


Sumner Shapiro

In The Matter Of Virgiliu Necula, M.D.

Therese G. Lynch, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in part and dissents in part in the Determination and Order in the Matter of Dr. Necula.

Dated : Dec 22 , 1998

A handwritten signature in cursive script that reads "Therese G. Lynch M.D." followed by a large, stylized capital letter "D".

Therese G. Lynch, M.D.