

DOH 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

December 31, 1997

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Michael Bayer, M.D.
180 East End Avenue
New York, New York 10128

Michele Y. Tong, Esq.
NYS Department of Health
5 Penn Plaza - Sixth Floor
New York, New York 10001

Alan Lambert, Esq.
Law Offices of Lifshutz, Polland
& Associates, P.C.
675 Third Avenue
New York, New York 10017

RE: In the Matter of Michael Bayer, M.D. CORRECTED COPY

Dear Dr. Bayer, Ms. Tong and Mr. Lambert:

Enclosed please find the corrected Determination and Order (No.97-277) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. The previously mailed version contained an error in identifying the Hearing Committee and their Administrative Officer, that appears at the top of page 2. 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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 T. Butler". The signature is written in a cursive style with a vertical line at the end.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH (Petitioner)

IN THE MATTER

OF

MICHAEL BAYER, M.D. (Respondent)

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

ADMINISTRATIVE
REVIEW BOARD
(Board)
DETERMINATION
AND ORDER
ARB 97-277

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 committed professional misconduct due to a Federal criminal conviction for income tax evasion, a BPMC Committee sustained the charge and suspended the Respondent's New York Medical License for one year. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1997), the Respondent asks the Board to annul or reduce the penalty, arguing that the Committee ignored mitigating evidence and prior case holdings when determining the penalty. After considering the hearing record and the parties' briefs, the Board modifies the Committee's Determination and stays the final six months of the suspension.

Administrative Law Judge JAMES F. HORAN served as the Board's Administrative Officer.

ALAN LAMBERT, Esq. represented the Respondent.

MICHELE Y. TONG, Esq. represented the Petitioner.

COMMITTEE DETERMINATION ON CHARGES

The Petitioner filed charges with BPMC alleging that the Respondent violated N. Y. Educ. Law § 6530(9)(a)(ii)(McKinney's Supp. 1997), which defines physician professional misconduct to include conduct that results in a Federal criminal conviction. A hearing then proceeded pursuant to N.Y. Pub. Health Law § 230(10)(p) (McKinney's Supp. 1997), a statute that provides for an expedited hearing when the case against a licensee arises from a prior criminal conviction in New York or another jurisdiction. In such an expedited hearing, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, Matter of Wolkoff v. Chassin.

89 NY2d 250 (1996). Three BPMC Members, **DIANA E. GARNEAU, M.D., Chair, HOWARD SIMON, M.D. and MARY PATRICIA MEAGHER** comprised the Committee who conducted the hearing in this matter, and who rendered the Determination which the Board now reviews. Administrative Law Judge **MARC P. ZYLBERBERG** served as the Committee's Administrative Officer.

The Committee sustained the charge that the Respondent committed professional misconduct, upon finding that the Respondent entered a guilty plea, in United States District Court for the Southern District of New York, to conspiracy to defraud the Internal Revenue Service and to evade taxes. The Court sentenced the Respondent to three years on probation, including six months home confinement, to pay a fine and special assessment and to perform one hundred hours community service. The Committee found that the Respondent's conduct involved willfully and knowingly agreeing to create false and fraudulent deductions, to report as both business and charitable deductions, and filing false returns, containing bogus charitable and business deductions, that understated falsely the Respondent's income. In assessing a penalty pursuant to N. Y. Pub. Health Law § 230-a (McKinney's Supp. 1997), the Committee rejected revocation as too harsh a sanction and rejected probation and retraining as penalties, because the Respondent's criminal activity occurred outside his medical practice. The Committee found censure and reprimand wholly insufficient and rejected monetary penalties, because the Court had already assessed heavy monetary sanctions against the Respondent. The Committee concluded that a one year actual suspension would punish the Respondent and deter future misconduct.

REVIEW HISTORY AND ISSUES

The Committee rendered their Determination on November 10, 1997. The Respondent then commenced this proceeding on November 17, 1997, when the Board received the Respondent's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and the Petitioner's reply brief. The record closed when the Board received the Respondent's reply brief on December 18, 1997.

The Respondent asks that the Board set aside the Committee's Determination, because their penalty:

- failed to give adequate weight to mitigating factors;
- failed to conform with the statutory objective to rehabilitate physicians;
- violated the Respondent's statutory right to a penalty consistent with the factual findings; and
- failed to conform with the penalties for similar misconduct, see Matter of Milici (ARB 96-287); Matter of Richman (ARB 97-08).

The Respondent asks that the Board annul the penalty, or in the alternative shorten the penalty and stay the suspension to allow the Respondent to perform community service.

The Petitioner urges the Board to sustain the Committee's penalty or to at least retain some actual suspension time against the Respondent.

REVIEW BOARD DETERMINATION

All Board Members participated in this case and considered the record and the parties' submissions in reaching our Determination. Although we find the Committee's penalty legally permissible under N. Y. Pub. Health Law § 230-a (2)(a)(McKinney's Supp. 1997), we exercise our authority to modify that penalty, Matter of Bogdan v. Med. Conduct Bd. 195 AD2d 86, 606 NYS2d 381 (Third Dept. 1993).

We reject the Respondent's contention that the Committee ignored mitigating factors in this case. The Committee made clear that they recognized mitigating factors in rejecting revocation as a penalty. We further reject the Respondent's contention that the Committee rejected statutory retraining objective's or that the Committee failed to recognize the Respondent's ability for rehabilitation. The Committee decided against ordering retraining for the Respondent, because they found no retraining course could restore moral character. In so ruling, the Committee acted consistently with prior determinations, by other BPMC Committees and this Board, that neither continuing education nor retraining can correct a lack of integrity, see Matter of Bezar v. DeBuono, __ AD2d __, 659 NYS2d

547 (Third Dept. 1997). The Respondent demonstrated that he lacked integrity by engaging in a long term scheme to defraud the Internal Revenue Service, by listing false charitable and business deductions on his returns and by understating his taxable income. We also reject the Respondent's contention that the Committee acted inconsistently with prior Board decisions, such as Milici (supra) and Richman (supra), by imposing a one year actual suspension in this case. The Board finds that the Committee acted consistently with prior cases, in rejecting revocation as a penalty, in a case involving tax evasion outside a Respondent's medical practice, and in determining that the Respondent should serve an actual suspension for his criminal conduct. Finally, we reject the Respondent's assertion that the Committee erred by failing to impose the exact same period for suspension against the Respondent as the Board imposed in the Milici (supra) and Richman (supra) cases. The Committee and the Board must judge each case on its own individual facts and rulings in other similar cases are irrelevant, Matter of Bezar v. DeBuono, (supra).

The Committee concluded that the Respondent should spend one year on actual suspension as a penalty. The Board concludes that one year away from medical practice will provide an appropriate period for the Respondent to reflect and to realize that his actions, even outside his practice, can result in serious consequences to his Medical License. We also believe that the penalty will serve to deter future misconduct by the Respondent. The Board notes that the Respondent has already served six months in home confinement under his criminal sentence. The Board will consider that six months to be time away from his practice and we will count that time toward the suspension the Committee imposed. We, therefore, modify the Committee's Penalty to stay the final six months of the Respondent's suspension. The Respondent's six months actual suspension shall run from the time the Respondent went on suspension pursuant to the Committee's Order.

The Respondent requested that if the Board did impose an actual suspension, that the Board consider staying the suspension and ordering the Respondent to perform community service. The Respondent's request may indicate that he misunderstood the Board's rulings in the Milici (supra) and Richman (supra) cases. In both those cases, the Board's allowed limited stays against suspensions for time the Respondents spent performing community service. In Milici (supra), we placed Dr. Milici on actual suspension and permitted him to practice only to the extent necessary to satisfy his Federal

sentence. In this case, the Respondent has provided no information to the Board to indicate that the Respondent's suspension would interfere with any provision from his Federal sentence. In Richman (supra), we ordered that Dr. Richman perform two hundred hours community service in addition to serving a six month actual suspension. We permitted a limited stay, in the event Dr. Richman was able to find and begin appropriate community service while still on the suspension. The stay would have applied only to the time Dr. Richman was performing the community service, rather than permitting him to also return to his regular practice. Dr. Richman also had the obligation to complete the entire community service period whether during the suspension or after. The Board notes that the Respondent already completed community service under his criminal sentence and we see no reason to impose further community service in addition to the actual suspension in this case.

ORDER

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

1. The Board **SUSTAINS** the Committee's Determination that the Respondent committed professional misconduct.
2. The Board **MODIFIES** the Committee's Determination on the penalty.
3. The Board **SUSPENDS** the Respondent's License for one year and **STAYS** the final six months of the suspension.

ROBERT M. BRIBER

SUMNER SHAPIRO

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

WILLIAM A. STEWART, M.D.

IN THE MATTER OF MICHAEL BAYER, 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. Bayer.

DATED: Roslyn, New York

Dec 30, 1997

A handwritten signature in black ink, appearing to read "Ed C. Sinnott", written over a horizontal line.


EDWARD C. SINNOTT, M.D.

IN THE MATTER OF MICHAEL BAYER, 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. Bayer.

DATED: Brooklyn, New York

12/28/97, 1997



WINSTON S. PRICE, M.D.

IN THE MATTER OF MICHAEL BAYER, 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. Bayer.

DATED: Syracuse, New York

29 Dec, 1997



WILLIAM A. STEWART, M.D.

IN THE MATTER OF MICHAEL BAYER, 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. Bayer.

DATED: Delmar, New York
December 29, 1997


SUMNER SHAPIRO