

THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, N.Y. 12234

OFFICE OF PROFESSIONAL DISCIPLINE
ONE PARK AVENUE, NEW YORK, NEW YORK 10016-5802

May 8, 1991

Douglass N. Powell, Physician
38 Lyndon Road
Fayetteville, N.Y. 13066

Re: License No. 140371

Dear Dr. Powell:

Enclosed please find Commissioner's Order No. 11418. This Order goes into effect five (5) days after the date of this letter.

If the penalty imposed by the Order in your case is a revocation or a surrender of your license, you must deliver your license and registration to this Department within ten (10) days after the date of this letter. Your penalty goes into effect five (5) days after the date of this letter even if you fail to meet the time requirement of delivering your license and registration to this Department.

If the penalty imposed by the Order in your case is a revocation or a surrender of your license, you may, pursuant to Rule 24.7 (b) of the Rules of the Board of Regents, a copy of which is attached, apply for restoration of your license after one year has elapsed from the effective date of the Order and the penalty; but said application is not granted automatically.

Very truly yours,

DANIEL J. KELLEHER
Director of Investigations

By:

GUSTAVE MARTINE
Supervisor

DJK/GM/er

CERTIFIED MAIL - RRR

cc: William J. Leberman, Esq.
Scolaro Shulman
90 Presidential Plaza
Syracuse, N.Y. 13202

RECEIVED

MAY 15 1991

**OFFICE OF PROFESSIONAL
MEDICAL CONDUCT**

REPORT OF THE
REGENTS REVIEW COMMITTEE

DOUGLASS N. POWELL

CALENDAR NO. 11418



The University of the State of New York

IN THE MATTER
of the
Disciplinary Proceeding
against

DOUGLASS N. POWELL

No. 11418

who is currently licensed to practice
as a physician in the State of New York.

REPORT OF THE REGENTS REVIEW COMMITTEE

DOUGLASS N. POWELL, hereinafter referred to as respondent, was licensed to practice as a physician in the State of New York by the New York State Education Department.

The instant disciplinary proceeding was properly commenced.

Between December 14, 1989 and May 3, 1990 a hearing was held on eight sessions before a hearing committee of the State Board for Professional Medical Conduct. The hearing committee rendered a report of its findings, conclusions, and recommendation, a copy of which, without attachment, is annexed hereto, made a part hereof, and marked as Exhibit "A". A copy of the statement of charges is annexed hereto, made a part hereof, and marked as Exhibit "A-1". The charges were amended as shown on page five of the statement of charges, pages eight and nine of the transcript, and the hearing committee report.

DOUGLASS N. POWELL (11418)

The hearing committee found and concluded that respondent was guilty of the tenth specification to the extent of allegation B.4 insofar as they relate to birth control pills, guilty of the eleventh specification to the extent of allegation C.4, and was not guilty of the remaining specifications and allegations, and recommended that respondent receive a Censure and Reprimand (unanimous vote) and that respondent be placed on probation for one year with one term of probation being respondent's patient records are to be reviewed by the Department of Health (majority vote).

The Commissioner of Health recommended to the Board of Regents that the findings of the hearing committee be accepted, the conclusions of the hearing committee be accepted, except the eighth specification should be sustained to the extent of allegation B.4 insofar as it relates to birth control pills and the ninth specification should be sustained, the recommendation of the hearing committee as to the measure of discipline not be accepted, and, in lieu thereof, the respondent's license to practice medicine be suspended for three years and that such suspension be stayed on condition that respondent secure a second confirming opinion before each surgery during that three year period. A copy of the recommendation of the Commissioner of Health is annexed hereto, made a part hereof, and marked as Exhibit "B".

On January 25, 1991, respondent appeared before us and was

DOUGLASS N. POWELL (11418)

represented by his attorney, William J. Leberman. Daniel J. Persing, Esq., presented oral argument on behalf of the Department of Health.

We have considered the record in this matter as transferred by the Commissioner of Health as well as the briefs and submissions of respondent and petitioner.

Petitioner's written recommendation as to the measure of discipline to be imposed, should respondent be found guilty, which is apparently similar to the recommendation of the Commissioner of Health, was that respondent's license to practice medicine in the State of New York be suspended, that the suspension be stayed, that respondent be placed on probation for a probationary period during which a second confirming opinion would be required before each intended surgery during that period. Petitioner's attorney orally informed us that petitioner's written recommendation should be understood as including a three year suspension period which is fully stayed.

Respondent's recommendation as to the measure of discipline to be imposed, should respondent be found guilty, was Censure and Reprimand.

The tenth and eleventh specifications charge respondent with committing unprofessional conduct, under Education Law §6509(9) and 8 N.Y.C.R.R. §29.2(a)(3), by failing to maintain records accurately reflecting the evaluation and treatment as to Patients B and C,

DOUGLASS N. POWELL (11418)

respectively. Respondent's pre-operative notes indicated that Patient B had been treated with birth control pills and that Patient C had been treated with analgesics, prostaglandin inhibitors, and anovulation when there was no such treatment by respondent (see hearing committee findings 32-35 and 46-48).

Accordingly, in our unanimous opinion, in agreement with the hearing committee and Commissioner of Health, respondent is guilty of the tenth specification to the extent of allegation B.4 insofar as said specification relates to birth control pills and is guilty of the eleventh specification to the extent of allegation C.4.

We also agree with the hearing committee and Commissioner of Health that respondent is not guilty of the first through seventh specifications.

Regarding the eighth and ninth specifications alleging respondent practiced the profession fraudulently regarding Patients B and C, respectively, the Commissioner of Health and petitioner do not accept the hearing committee's conclusions that respondent is not guilty of both specifications. The term "fraudulently" in Education Law §6509(2) has been characterized as the intentional misrepresentation or concealment of a known fact Tompkins v. Board of Regents of University of State of New York, 299 N.Y. 469 (1949); and Brestin v. Commissioner of Education of the State of New York, 116 A.D.2d 357 (3rd Dept. 1986). The statute is not to be construed to require that anyone actually be misled so long as the

DOUGLASS N. POWELL (11418)

intent is present. Sherman v. Board of Regents or University of State of New York, 24 A.D.2d 315 (3rd Dept. 1966). Even though no one was actually deceived, injured, or improperly billed for services not rendered, fraud under Education Law §6509(2) may be established by proof that respondent knowingly acted regarding services that he knew he did not perform. Sanandaji v. Sobol, __ A.D.2d ___, 558 N.Y.S.2d 297 (3rd Dept. 1990).

The definition of practicing the profession fraudulently utilized by the hearing committee and Commissioner of Health adds, to the elements set by case law, the consideration that the representation or concealment be intended so that "the person may act upon it either to his/her detriment or to the gain of the licensee". In our unanimous opinion, this additional consideration should not have been entertained. Nevertheless the Commissioner of Health and petitioner have not shown that either the definition they utilized or the definition set by case law and accepted by the Board of Regents have been established by this record.

The Commissioner of Health and petitioner accept the findings of fact of the hearing committee, but conclude that there are circumstances which "support the inference of intent to deceive". In view of the standard of review in this matter being a preponderance of the evidence, Public Health Law §230(10)(f), the record herein as a whole does not sufficiently support the drawing of such an inference by a preponderance of the evidence.

DOUGLASS N. POWELL (11418)

The recommendation of the Commissioner of Health does not identify the standard of proof he employed, cite the location in the record of the particular evidence from which he finds support, and does not add any findings beyond those of the hearing committee. The Commissioner merely infers intent based upon false recording, as distinguished from drawing an inference of intent only if there was an initial finding of both false recording and a knowledge of such recording. Cf., Choudry v. Sobol, ____ A.D.2d ____ (3rd Dept. February 28, 1991). The hearing committee did not find that respondent knowingly falsified the patient's records and did not find what his motives were at the time he falsified those records. Although respondent's motives in making false records are not clear to us, we will not speculate as to respondent's possible intent or rely on conclusory "circumstances" not demonstrated in the record. Rather, we accept the hearing committee's conclusions that petitioner failed to prove, by a preponderance of the evidence, that respondent knowingly falsified the records with the intent to deceive someone and that, therefore, respondent is not guilty of the eighth and ninth specifications.

With respect to the penalty, in our unanimous opinion, respondent's license to practice as a physician in the State of New York should be suspended for one year, execution of that suspension should be stayed, and respondent be placed on probation for one year. The terms of probation should include requirements that

DOUGLASS N. POWELL (11418)

respondent's office records, patient records, and hospital charts be randomly reviewed and respondent be subject to quarterly visits as set forth in the terms of probation prescribed by this Committee.

The nature of the separate acts of unprofessional conduct committed by respondent warrants the penalty we recommend. The public would not be adequately protected without any review of respondent's records. The fact that respondent's acts occurred in a clinic setting does not excuse his professional misconduct. We note that respondent admitted that his pre-operative note for Patient C was incorrect and was an error on his part (see hearing committee finding 48). Furthermore, in view of our conclusions as to the eighth and ninth specifications, a requirement to secure a second opinion before surgery is not warranted. In any event, the recommendation of the Commissioner of Health of a conditional stay is unauthorized, unclear, and unworkable as determined by the Board of Regents in other prior matters.

We unanimously recommend the following to the Board of Regents:

1. The findings of fact of the hearing committee and the recommendation of the Commissioner of Health as to those findings of fact be accepted;
2. The conclusions of the hearing committee be accepted;
3. The recommendation of the Commissioner of Health as to

DOUGLASS N. POWELL (11418)

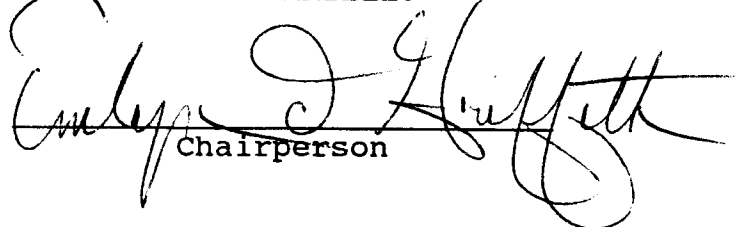
- those conclusions of the hearing committee be modified;
4. Respondent is, by a preponderance of the evidence, guilty of the eleventh specification to the extent of allegation C.4 and is guilty of the tenth specification of allegation B.4 insofar as said specification relates to birth control pills, and not guilty as to the remaining specifications and allegations;
 5. The measure of discipline recommended by the hearing committee and the Commissioner of Health not be accepted; and
 6. Respondent's license to practice as a physician in the State of New York be suspended for one year upon each specification of the charges of which respondent was found guilty, as aforesaid, said suspension to run concurrently, execution of said suspension be stayed, and respondent be placed on probation for one year as set forth under the terms of probation which are annexed hereto, made a part hereof, and marked as Exhibit "C".

Respectfully submitted,

EMLYN I. GRIFFITH

JANE M. BOLIN

PATRICK J. PICARIELLO


Chairperson

Dated: 1/3/91

24.7 Review in other cases. The committee on the professions shall review and submit its recommendation to the Board of Regents for final determinations in the following cases:

(b) petitions for restoration of a professional license which has been revoked or surrendered pursuant to Education Law, section 6510 or 6510-a. At least one year shall have elapsed from the date of service of the order of revocation, acceptance of surrender, or denial of a prior application for restoration or reinstatement by vote of the Board of Regents, for the acceptance by the department of a petition to the Board of Regents for restoration of a license or certificate, except that a period of time during which the license was suspended during the dependency of the discipline proceeding may reduce the one-year waiting period. This section shall not apply to restoration of licenses which have been temporarily surrendered pursuant to Education Law, section 6510-b, or Public Health Law, section 230(13).

(1) Materials submitted in response to the Committee on the Professions' recommendation to the Board of Regents shall be filed no later than 15 days following the postmarked date of the written notification of the decision or recommendation of the Committee on the Professions.

(2) If an applicant has failed to remain current with developments in the profession, and a substantial question is presented as to the applicant's current fitness to enter into the active practice of the profession, the Board of Regents may require that the applicant take and obtain satisfactory grades on a proficiency examination satisfactory to the department prior to the issuance of a license or limited permit.

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT
-----X

IN THE MATTER : REPORT OF
OF : THE HEARING
DOUGLASS N. POWELL, M.D. : COMMITTEE
-----X

TO: The Honorable David Axelrod, M.D.
Commissioner of Health, State of New York

Joseph K. Myers, Jr., M.D., Chairperson, Rev. Edward J. Hayes, and Glenda D. Donoghue, M.D., duly designated members of the State Board for Professional Medical Conduct, appointed by the Commissioner of Health of the State of New York pursuant to Section 230(1) of the Public Health Law, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. Debra L. Smith, Esq. served as the Administrative Officer for the Hearing Committee.

After consideration of the entire record, the Hearing Committee submits this report.

SUMMARY OF PROCEEDINGS

Stipulation by parties of proper service of Notice of Hearing and Statement of Charges on Respondent: December 14, 1989 (T:24-25)
Answer to Statement of Charges: Undated (Ex. A)
Amendment to Statement of Charges:
Department's motion to amend

Statement of Charges made and granted	December 14, 1989 (T: 8-9)
Prehearing conference (by telephone):	December 1, 1989
Hearing dates:	1989: December 14 1990: January 5, January 31, February 20, February 27, March 8, March 29, May 3
Additional transcripts included in record (as agreed by parties):	
Telephone conference call between attorneys, Hearing Committee chairperson and administrative officer	February 16, 1990
Intrahearing conference between attorneys and administrative officer	March 8, 1990
Deliberations:	June 5, 1990
Adjournments:	
Respondent's request for adjourn- ment of January 17, 1990 hearing date (Respondent's attorney ill) made and granted	January 16, 1990
Respondent's request for adjourn- ment of January 31, 1990 hearing date (inadequate time to present portion of Respondent's case in light of shortened hearing day due to Hearing Committee member's unavailability for portion of hearing day) made and denied	January 30, 1990
Place of hearing:	Syracuse Airport Inn and Hotel Syracuse, Syracuse, New York

Department of Health appeared by:

Daniel J. Persing, Esq.
Corning Tower - 25th Floor
Empire State Plaza
Albany, New York 12237

Respondent appeared by:

Walter D. Kogut, Esq.
Scolaro, Shulman, Cohen,
Lawler & Burstein, P.C.
90 Presidential Plaza
Syracuse, New York 13202

Witnesses for Department of Health:

Patient B
Patient C
Fred Storm, M.D.
Patient B's ex-husband
William J. Watts

Witnesses for Respondent:

Douglass N. Powell, M.D.
(Respondent)
John J. LaFerla, M.D.
Newton G. Osborne, M.D.
Dr. Omar Rashid
Harold J. Honig
Dr. Richard D. Semeran

Hearing Committee absences:

With the agreement of the parties' attorneys, the Hearing Committee members were not present during a portion of the March 8, 1990 and March 29, 1990 hearing dates. During that time legal issues and corrections to the transcript were discussed. The members of the Hearing Committee hereby affirm that they have read those portions of those hearing transcripts.

Key rulings by Administrative Officer:

Ruling on Respondent's third affirmative defense (laches, statute of limitations,

unreasonable delay)	March 8, 1990 (T:868-874)
Respondent's motion to dismiss fraud charges made and denied	March 8, 1990 (T:876-886)
Respondent's motion for more specific Statement of Charges made and denied	March 27, 1990 (telephone conference call)
Respondent's request to postpone submission of closing memoranda and deliberations until resolution of legal action concerning subpoena made and denied	May 9, 1990 (telephone conference call)

At the conclusion of the final hearing date of May 3, 1990, the record was held open for the possible receipt of additional exhibits. No additional exhibits were offered for receipt into evidence.

SUMMARY OF CHARGES

In the Statement of Charges (Ex. 1 - copy attached), the Respondent, Douglass N. Powell, M.D., was charged with professional misconduct pursuant to Education Law §6509. The specific charges were practicing the profession with negligence on more than one occasion (Education Law §6509(2)) (First Specification); ordering excessive tests, treatment or use of treatment facilities not warranted by condition of patients

(Education Law §6509(9), paragraph 29.2(a)(7) of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR)) (Second through Seventh Specifications); practicing the profession fraudulently (Education Law § 6509(2)) (Eighth and Ninth Specifications); and failing to maintain patient records which accurately reflect evaluation and treatment (Education Law §6509(9), 8 NYCRR 29.2(a)(3))(Tenth and Eleventh Specifications).

In the Respondent's Answer (Ex. A - copy attached), the allegations of the Statement of Charges were denied and three affirmative defenses were asserted.

FINDINGS OF FACT

Numbers in parentheses refer to transcript page numbers or exhibits. These citations represent evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence. When a citation to an exhibit includes a page number followed by the letter "R", the citation is to the back side of the numbered page.

1. Douglass N. Powell, M.D., the Respondent, was authorized to practice medicine in the State of New York on October 12, 1979 by the issuance of license number 140371 by the New York State Education Department. The Respondent is registered

with the New York State Education Department to practice medicine for the period January 1, 1989 through December 31, 1991 from 38 Lyndon Road, Fayetteville, New York 13066. (T:305; Ex. 6)

Patent A

2. Patient A, a 58 year old female, presented at St. Joseph's Hospital Health Center, Syracuse, New York on July 3, 1984. (Ex. 2A - p.3)

3. On July 9, 1984, Patient A appeared at St. Joseph's Hospital Health Center. She indicated a history of depression, chronic vaginitis and urinary problems for the previous three years. She complained of frequency, dysuria, vaginal burning and sharp pelvic pain. She also had intermittent mucus discharge. Previous diagnostic measures, including IVP, UGI and barium enema, were normal. The working diagnoses were chronic vaginitis and urethral syndrome. A laparoscopy was scheduled to rule out ovarian cancer versus old pelvic inflammatory disease. (Ex. 2A - p.3)

4. On July 23, 1984, Patient A returned to the Health Center and complained of pain in her vagina. The assessment was chronic pelvic pain. She was placed on Dolobid as needed. It was noted that the patient "may and probably does have underlying

depression and therapeutic trial of TCAs may be warranted if lap neg." (Ex. 2A - p.4)

5. On July 26, 1984, a laparoscopy was performed on Patient A. A report indicated findings of a normal pelvis. (Ex. 2B - pp. 10-11)

6. On August 6, 1984, Patient A presented at St. Joseph's Hospital Health Center clinic for her post-laparoscopy visit. She complained of the same pelvic pain, with right-sided abdominal pain after the laparoscopy. She also noticed one episode of bleeding five days previously and a whitish vaginal discharge for two days prior to presenting at St. Joseph's. Patient A was prescribed Vibramycin, Monistat, and Ponstel. She was also scheduled for an IVP and barium enema to rule out kidney or bowel pathology. (Ex. 2A - p.4)

7. On August 10, 1984, an IVP and barium enema were performed. The results were normal. (Ex. 2A - pp.4, 38)

8. On the same date, the patient was seen in the clinic. She indicated that her pain was the same and that she had less discharge and less itching. The assessment at that time was chronic pelvic pain and she was scheduled to have a total abdominal hysterectomy and bilateral salpingo-oophorectomy on September 10, 1984. The examining physician noted that "if

better, will cancel surgery". That note was countersigned by the Respondent. (Ex. 2A - p.4)

9. On August 23, 1984, Patient A returned to the clinic. She complained about dysuria, frequency of urination and vaginal itching. The working diagnosis was infection by Hemophilus vaginalis, for which the patient was prescribed Pyridium and Flagyl. Patient A was noted to have a cystocele and possibly a rectocele. (Ex. 2A - pp. 4R, 5)

10. The patient presented at the clinic again on August 27, 1984 with vaginal pain, itching and burning on urination. She was noted to have a cystocele and a rectocele. It was noted that Patient A was scheduled to have a total abdominal hysterectomy and bilateral salpingo-oophorectomy on September 10 for chronic pelvic inflammatory disease. (Ex. 2A - pp.5, 5R)

11. On September 1, 1984, Patient A presented at St. Joseph's Hospital Health Center emergency room. She complained of vaginal itching and burning. A pelvic exam revealed atrophic vaginal mucosa, with a working diagnosis of possible atrophic vaginitis or questionable Candida albicans. The patient was given Monistat and Premarin and was to return to the clinic the following week to discuss the hysterectomy. (Ex. 2A - p. 48)

12. On September 9, 1984, Patient A was admitted to St. Joseph's Hospital for a total abdominal hysterectomy and bilateral

salpingo-oophorectomy. In the pre-operative note, the Respondent noted that the patient had a four year history of debilitating pain, with treatment by antibiotics and narcotic analgesics with no relief. The Respondent noted the negative findings of the laparoscopy, IVP and barium enema, as well as negative urine cultures. In his pre-operative note, the Respondent noted uterine prolapse, first to second degree. The admitting physical exam indicated that the patient had chronic pelvic pain and contained an impression of pelvic inflammatory disease. (Ex. 2C - pp. 1-8)

13. On September 10, 1984, Patient A underwent a vaginal hysterectomy, bilateral salpingo-oophorectomy and McCall vaginal suspension. In the operative note it is indicated that the uterus showed first-degree decensus. The pathology report indicated that mostly muscular structures and fibrovascular structures were obtained, but they were not consistent with adnexa. There was reaction tissue, non-specific. A fallopian tube was identified but no ovarian tissue was noted. (Ex. 2C - pp.19-22)

14. Fred Storm, M.D. testified as an expert witness on behalf of the Department. John J. LaFerla, M.D. and Newton G. Osborne, M.D. testified as expert witnesses on behalf of the Respondent. All three are board certified and members of the

American College of Obstetricians and Gynecologists (ACOG). (Exs. 5, F, G)

15. Dr. Storm testified that the Respondent's surgery on Patient A (vaginal hysterectomy and bilateral salpingo-oophorectomy) was not within the boundaries of acceptable medical care. (T: 142, 144-145)

16. Dr. LaFerla and Dr. Osborne testified that this surgery was within the boundaries of acceptable medical care. (T: 453-456, 500, 506; 609, 641, 654)

17. Dr. Osborne testified that 90% of post-menopausal women have a good result when a hysterectomy is performed for chronic pelvic pain of unknown etiology. (T: 642)

18. Dr. Osborne testified that the vaginal approach in Patient A's hysterectomy was preferable to the abdominal approach. In addition, Dr. Storm endorsed the use of a vaginal hysterectomy for second degree prolapse. (T:612, 184)

Patient B

19. On February 13, 1984, Patient B went to St. Joseph's Hospital Health Center, Syracuse, New York. She presented with lower abdominal pain. She had been referred from her personal physician, Dr. Thomas Osborn. On that visit, the patient was prescribed Amoxicillin and Motrin, and a sonogram was

obtained. That sonogram showed that Patient B had an ovarian cyst. (Ex. 3A - pp. 2,13)

20. Patient B's history included a tubal ligation performed in February 1983. (Ex. 3A - p. 2R)

21. On March 12, 1984, Patient B felt somewhat better and stopped the Motrin. (Ex. 3A - p. 2)

22. Patient B returned to the clinic in November 1984. At that time she was experiencing lower abdominal pain. At that visit, a laparoscopy was planned if no improvement occurred. On December 17, 1984, the patient reported that the medication had not helped the pain. (T:28; Ex. 3A - pp. 2,3,3R)

23. On January 21, 1985, Patient B underwent a laparoscopy. The procedure was based on a pre-operative diagnosis of chronic pelvic pain. The post-operative diagnosis was chronic pelvic pain, mild endometriosis, and pelvic congestion. This diagnosis was based on findings of mild endometriosis in the cul de sac and enlarged pelvic vasculature. (Ex. 3B - p.11)

24. On January 28, 1985 and February 14, 1985 there were discussions between the Respondent and Patient B about possible options for Patient B. The Respondent fully discussed the options, including no therapy, having a hysterectomy and bilateral salpingo-oophorectomy, and further medical therapy with Danazol. (T:397-402; Ex. 3A - p.4, Ex. 3C - p.12)

25. After the Respondent gave Patient B these options (including medical therapy of Danazol), Patient B chose to have a hysterectomy and bilateral salpingo-oophorectomy. (T: 29, 397-402; Ex. 3A - p. 4, Ex. 3C - p.12)

26. On February 13, 1985 the Respondent admitted Patient B, a 27 year old multiparous female, to St. Joseph's Hospital Health Center with a diagnosis of pelvic congestion syndrome. (Ex. 3C)

27. On February 14, 1985, the Respondent performed a vaginal hysterectomy, bilateral salpingo-oophorectomy and McCall culdoplasty on Patient B. (Ex. 3C - p. 21)

28. Dr. Storm testified that a hysterectomy and bilateral salpingo-oophorectomy are not medically indicated in a patient with mild endometriosis. He said that the appropriate therapy is a trial of medical therapy for a period of at least 3 months. (T: 159, 162)

29. Dr. LaFerla testified that the Respondent's surgery on Patient B (vaginal hysterectomy and bilateral salpingo-oophorectomy) was within the boundaries of acceptable medical care. He based this opinion on the patient's pain being ascribed to a combination of endometriosis and pelvic congestion syndrome. Dr. LaFerla testified that a patient may have minimal

endometriosis and a considerable amount of pain from it. (T: 521, 535, 549)

30. Dr. Osborne testified that performing a hysterectomy and bilateral salpingo-oophorectomy is the definitive therapy for endometriosis "as opposed to one that is postponing the treatment for later on". He stated that the Respondent's surgery on Patient B was within the boundaries of acceptable medical care and that an average, reasonable obstetrician/gynecologist would have performed the surgery. Dr. Osborne also testified that the symptoms of endometriosis are not correlated with its severity. He said that a patient may have very mild endometriosis and very severe symptoms. (T: 668-669, 684-685)

31. The Respondent did not treat Patient B with Danocrine and/or Danazol, Provera or birth control pills before he performed this surgery. (Ex. 3A)

32. In his pre-operative note, the Respondent indicated that Patient B had multiple courses of prostaglandin inhibitors, analgesics and birth control pills, all of which he stated had failed. (Ex. 3C - p.12)

33. Prostaglandin inhibitors (Motrin) were prescribed for Patient B. (Ex. 3A - pp. 2, 2R, 3)

34. There was no evidence in the medical record that Patient B was prescribed birth control pills for the treatment of the pain of which she complained. (Ex. 3A)

35. Patient B stated that the last time that she took birth control pills was in 1976, immediately preceding her pregnancy with her second son. (T: 30, 36)

Patient C

36. On May 20, 1985, Patient C presented at St. Joseph's Hospital Health Center with back and right lower quadrant pain. At that time, there was a questionable diagnosis of endometriosis, post-operative adhesions or chronic PID. Patient C was scheduled for a laparoscopy. (Ex. 4A - p. 6)

37. On June 24, 1985, Patient C was admitted to St. Joseph's Hospital for a laparoscopy. The procedure determined that her ovaries were within normal limits, although several points of endometriosis were found on the uterosacral ligament. The examination under anesthesia noted first-degree prolapse, mild cystocele, and good urethral support. The post-operative diagnosis was mild endometriosis. (Ex. 4A - pp. 20, 21, Ex. 4C)

38. On July 1, 1985, Patient C and Dr. Omar Rashid, a resident at the clinic, discussed the options for Patient C. Dr.

Rashid talked about the options, including surgery and medical treatment. (T:814-815; Ex. 4A - p.6R)

39. On July 29, 1985, the Respondent admitted Patient C, a 31 year old multiparous female, to St. Joseph's Hospital Health Center with a diagnosis of uterine prolapse and pelvic endometriosis. (Ex. 4B)

40. On July 30, 1985, the Respondent discussed with Patient C her diagnosis, her prognosis and the surgical procedure. Patient C agreed to the surgery. (Ex. 4B - pp. 10, 11)

41. On July 30, 1985, the Respondent performed a vaginal hysterectomy and bilateral salpingo-oophorectomy on Patient C. (Ex. 4B)

42. Dr. Rashid's operative report indicated second degree uterine prolapse. In his pre-operative note of July 30, 1985, the Respondent found first to second degree uterine prolapse. (Ex. 4B - pp. 20, 10)

43. Dr. Storm testified that the Respondent's surgery on Patient C (vaginal hysterectomy and bilateral salpingo-oophorectomy) was not medically indicated because there first should have been a preliminary trial of medical therapy. (T:169-170, 173)

44. Dr. LaFarla testified that this surgery was within the boundaries of acceptable medical care due to the presence of

endometriosis and uterine prolapse. Dr. LaFerla also testified that medical therapy does not have to be prescribed before surgery. (T:574, 590)

45. Dr. Osborne testified that this surgery was within the boundaries of acceptable medical care due to the presence of endometriosis, uterine prolapse and salpingitis. Dr. Osborne testified that it is not necessary to treat a patient with Danazol or Danocrine before surgery. (T:689, 691-692)

46. The Respondent did not treat Patient C with medical therapy. (Ex. 4A)

47. In his pre-operative note concerning Patient C, the Respondent wrote that there were trials of analgesics, prostaglandin inhibitors and anovulation with a sign after all three which indicated that there was no relief therefrom. (Ex. 4B - p. 10)

48. The Respondent admitted that this pre-operative note was incorrect and was an error on his part. (T: 748)

CONCLUSIONS

The Hearing Committee first determined whether the factual allegations set forth in the Statement of Charges were sustained and then determined whether any sustained factual allegation constituted professional misconduct as charged. The

Hearing Committee unanimously reached each of the following conclusions unless otherwise noted.

Patient A (First, Second and Third Specifications)

The factual allegation set forth in paragraph A of the Statement of Charges should be sustained with two exceptions (Findings of Fact 2-13). The first exception concerns the clause "although the etiology was unclear" (first sentence of paragraph A). As the meaning of this clause is unclear, no determination can be made as to whether it should be sustained or not. The second exception is that the factual allegation that a laparotomy was performed (first sentence of paragraph A) should not be sustained. A laparoscopy, not a laparotomy, was performed on July 26, 1984 (Finding of Fact 5).

The Department did not prove, by a preponderance of the evidence, the factual allegations set forth in paragraphs A.1 and A.2 of the charges. Although the three expert witnesses who testified in this case (Dr. Storm, Dr. LaFerla and Dr. Osborne) had different opinions (Findings of Fact 14-18), the Hearing Committee found all three physicians to be credible. The Hearing Committee recognized that honest minds can have different, and yet acceptable, opinions. The Department did not rebut the testimony of Dr. LaFerla and Dr. Osborne. Therefore, the factual

allegations of paragraphs A.1 and A.2 should not be sustained (Findings of Fact 14, 16-18).

Because the factual allegations of paragraphs A.1 and A.2 should not be sustained, the First (as to Patient A), Second and Third Specifications should not be sustained.

Patient B (First, Fourth, Fifth, Eighth and Tenth Specifications)

The factual allegation set forth in paragraph B of the Statement of Charges should be sustained (Findings of Fact 19-27, 33).

The Department did not prove, by a preponderance of the evidence, the factual allegations set forth in paragraphs B.1 and B.2. The reasons for this conclusion are the same as those concerning paragraphs A.1 and A.2 of the charges (as set forth above but with Findings of Fact 14, 28-30). Therefore, the factual allegations of paragraphs B.1 and B.2 should not be sustained (Findings of Fact 14, 29-30).

The Department did not prove, by a preponderance of the evidence, the factual allegation set forth in paragraph B.3. The Respondent did not treat Patient B with certain medical therapy as set forth in Finding of Fact 31. However, Paragraph B.3 is really a restatement of the factual allegations of paragraphs B.1

and B.2. Furthermore, the Respondent offered Patient B the option of medical therapy and Patient B chose surgery (Findings of Fact 24-25). Therefore, the factual allegation of paragraph B.3 should not be sustained (Findings of Fact 14, 24-25, 29-31).

The factual allegation set forth in paragraph B.4 should be sustained in part and should not be sustained in part. The Respondent did falsely record that Patient B had been treated with birth control pills before surgery (Findings of Fact 27, 31-32, 34-35). The Respondent did not falsely record that Patient B had been treated with prostaglandin inhibitors before surgery (Findings of Fact 19, 21-22, 27, 32-33).

Because the factual allegations of paragraphs B.1, B.2, B.3 and B.4 (as to prostaglandin inhibitors) should not be sustained, the First (as to Patient B), Fourth, Fifth, Eighth (as to prostaglandin inhibitors), and Tenth (except as to paragraph B.4 concerning birth control pills) Specifications should not be sustained.

Practicing the profession fraudulently was defined as a false representation or concealment of a fact, made in connection with the practice of medicine, which is intended to deceive another person so that the person may act upon it either to his/her detriment or to the gain of the licensee (the Respondent). As set forth above, the Respondent did make a false representation during

his practice of medicine concerning treating Patient B with birth control pills. However, by a 2-1 vote, the Hearing Committee concluded that the Department failed to prove, by a preponderance of the evidence, that the Respondent intended to deceive another person. Therefore, by a 2-1 vote, the Eighth Specification as to birth control pills should not be sustained.

Since the factual allegation of paragraph B.4 of the charges should be sustained as to birth control pills, the Tenth Specification should be sustained as to the treatment of Patient B with birth control pills.

Patient C (First, Sixth, Seventh, Ninth and Eleventh Specifications)

The factual allegation set forth in paragraph C of the Statement of Charges should be sustained (Findings of Fact 36-42).

The Department did not prove, by a preponderance of the evidence, the factual allegations set forth in paragraphs C.1 and C.2. The reasons for this conclusion are the same as those concerning paragraphs A.1 and A.2 of the charges (as set forth above but with Findings of Fact 14, 18 (second sentence), 43-45). Therefore, the factual allegations of paragraphs C.1 and C.2 should not be sustained (Findings of Fact 14, 18 (second sentence), 44-45).

The Department did not prove, by a preponderance of the evidence, the factual allegation set forth in paragraph C.3. The Respondent did not treat Patient C with medical therapy (Finding of Fact 46). However, Paragraph C.3 is really a restatement of the factual allegations of paragraphs C.1 and C.2. Therefore, the factual allegation of paragraph C.3 should not be sustained (Findings of Fact 14, 18 (second sentence), 44-46).

The factual allegation set forth in paragraph C.4 should be sustained (Findings of Fact 41, 47-48).

Because the factual allegations of paragraphs C.1, C.2 and C.3 should not be sustained, the First (as to Patient C), Sixth, Seventh and Eleventh (as to paragraphs C.1 and C.2) should not be sustained.

As set forth above, the Respondent did make a false representation during his practice of medicine concerning treating Patient C with analgesics, prostaglandin inhibitors and anovulation. However, by a 2-1 vote, the Hearing Committee concluded that the Department failed to prove, by a preponderance of the evidence, that the Respondent intended to deceive another person. Therefore, by a 2-1 vote, the Ninth Specification should not be sustained.

Since the factual allegation of paragraph C.4 of the charges should be sustained, the Eleventh Specification should be

sustained as to the treatment of Patient C with analgesics, prostaglandin inhibitors and anovulation.

RECOMMENDATIONS

As set forth above and to the extent set forth above, the Hearing Committee recommends that the following specifications be sustained: Tenth (failing to maintain accurate patient records - only as to paragraphs B and B.4 (birth control pills) of the charges) and Eleventh (failing to maintain accurate patient records - only as to paragraphs C and C.4 of the charges). As set forth above and to the extent set forth above, the Hearing Committee recommends that the other specifications (First as to practicing the profession with negligence on more than one occasion; Second through Seventh as to ordering excessive tests, treatment or use of treatment facilities; Eighth and Ninth as to practicing the profession fraudulently; the remainder of Tenth and the remainder of Eleventh as to failing to maintain accurate patient records) not be sustained.

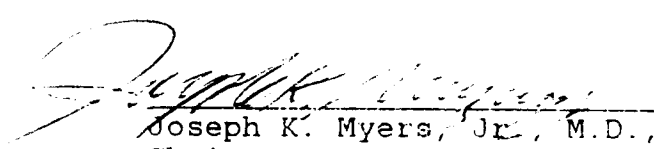
In light of the nature of the two sustained charges and after consideration of the possible sanctions, the Hearing Committee unanimously recommends that the Respondent receive a censure and reprimand. In light of the nature of the sustained charges and particularly because both patient records had the same

problem, by a 2-1 vote, the Hearing Committee further recommends that the Respondent be placed on probation for a period of one year with one term of probation. That term should be the review of the Respondent's patient records by the New York State Department of Health.

DATED: Syracuse, New York

 1990

Respectfully submitted,


Joseph K. Myers, Jr., M.D.,
Chairperson

Rev. Edward J. Hayes
Glenda D. Donoghue, M.D.

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

-----X

IN THE MATTER : STATEMENT
OF : OF
DOUGLASS N. POWELL, M.D. : CHARGES

-----X

DOUGLASS N. POWELL, M.D., the Respondent, was authorized to practice medicine in the State of New York on October 12, 1979 by the issuance of License Number 140371 by the State Education Department. The Respondent is currently registered with the New York State Education Department to practice medicine for the period January 1, 1989 through December 31, 1991 from 38 Lyndon Road, Fayetteville, New York 13066.

FACTUAL ALLEGATIONS

A. On or about September 9, 1984, Respondent admitted Patient A (all patient names appear in Appendix "A") a 58 year-old female to St. Joseph's Hospital Health Center in Syracuse, New York (hereinafter "the Hospital"), with a diagnosis of chronic pelvic inflammatory disease although the etiology was unclear following a laparotomy performed on July 1984, which found no organic pathology for Patient A's complaints of pelvic pain. On or about September 10, 1984, a

vaginal hysterectomy, bilateral salpingo-oophorectomy and McCall vaginal suspension were performed upon Patient A.

1. The vaginal hysterectomy was not medically indicated.
2. The bilateral salpingo-oophorectomy was not medically indicated.

B. On or about February 13, 1985, Respondent admitted Patient B, a 27 year-old multiparous female, to the Hospital with a diagnosis of pelvic congestion syndrome following a laparoscopy performed on January 21, 1985, indicating mild endometriosis and pelvic varicosities, and a course of treatment with Motrin. On or about February 14, 1985, a vaginal hysterectomy, bilateral salpingo-oophorectomy and McCall culdoplasty were performed upon Patient B.

1. The vaginal hysterectomy was not medically indicated.
2. The bilateral salpingo-oophorectomy was not medically indicated.
3. Respondent failed to treat Patient B with adequate medical therapy prior to performing surgery.
4. Respondent falsely recorded Patient B had been treated with trials of prostaglandin inhibitors and birth control pills prior to performing surgery.

C. On or about July 29, 1985, Respondent admitted Patient C, a 31 year-old multiparous female, to the Hospital with a diagnosis of uterine prolapse and pelvic endometriosis, following a laparoscopy performed on June 24, 1985. On or about July 30,

1985, a vaginal hysterectomy and bilateral salpingo-oophorectomy were performed upon Patient C.

1. The vaginal hysterectomy was not medically indicated.
2. The bilateral salpingo-oophorectomy was not medically indicated.
3. Respondent failed to treat Patient C with adequate medical therapy prior to performing surgery.
4. Respondent falsely recorded Patient C had been treated with trials of analgesics, prostaglandin inhibitors and anovulation prior to performing surgery.

SPECIFICATION OF CHARGES

FIRST SPECIFICATION

PRACTICING WITH NEGLIGENCE

ON MORE THAN ONE OCCASION

Respondent is charged with practicing the profession with negligence on more than one occasion under N.Y. Education Law §6509(2) (McKinney 1985), in that Petitioner charges two or more of the following:

1. The facts in Paragraphs A and A.1., A and A.2., B and B.1., B and B.2., B and B.3., C and C.1., C and C.2., and/or C and C.3.

SECOND THROUGH SEVENTH SPECIFICATIONS

COMMITTING UNPROFESSIONAL CONDUCT

BY TREATMENT NOT WARRANTED BY

PATIENT'S CONDITION

Respondent is charged with committing unprofessional conduct under N.Y. Education Law §6509(9) (McKinney 1985) and 8 NYCRR §29.2(a)(7) (1987), by ordering of excessive tests, treatment, or use of treatment facilities not warranted by the condition of his patient, in that Petitioner charges:

2. The facts in Paragraphs A and A.1.
3. The facts in Paragraphs A and A.2.
4. The facts in Paragraphs B and B.1.
5. The facts in Paragraphs B and B.2.
6. The facts in Paragraphs C and C.1.
7. The facts in Paragraphs C and C.2.

EIGHTH THROUGH NINTH SPECIFICATIONS

PRACTICING THE PROFESSION FRAUDULENTLY

Respondent is charged with practicing the profession fraudulently under N.Y. Education Law §6509(2) (McKinney 1985), in that Petitioner charges:

8. The facts in Paragraphs B and B.4.
9. The facts in Paragraphs C and C.4.

TENTH AND ELEVENTH SPECIFICATIONS

FAILING TO MAINTAIN ACCURATE PATIENT RECORDS

amended by
Dept. 12-14-87
dls

Respondent is charged with committing unprofessional conduct under N.Y. Education Law §6509(9) (McKinney 1985) and 8 NYCRR §29.2(a)⁽³⁾~~(7)~~ (1987), by failing to maintain records accurately reflecting the evaluation and treatment of his patient, in that Petitioner charges:

10. The facts in Paragraphs B and B.1., B and B.2. and B and B.4.

11. The facts in Paragraphs C and C.1., C and C.2., and C. and C.4.

DATED: Albany, New York
October 31, 1987



PETER D. VAN BUREN
Deputy Counsel

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

-----X

IN THE MATTER :
OF : COMMISSIONER'S
DOUGLASS N. POWELL, M.D. : RECOMMENDATION

-----X

TO: Board of Regents
New York State Education Department
State Education Building
Albany, New York

A hearing in the above-entitled proceeding was held on December 14, 1989, January 5, 1990, January 31, 1990, February 20, 1990, February 27, 1990, March 8, 1990, March 29, 1990 and May 3, 1990. Respondent, Douglass N. Powell, M.D. appeared by Walter D. Kogut, Esq. The evidence in support of the charges against the Respondent was presented by Daniel J. Persing, Esq.

NOW, on reading and filing the transcript of the hearing, the exhibits and other evidence, and the findings, conclusions and recommendation of the Committee,

I hereby make the following recommendation to the Board of Regents:

- A. The Findings of Fact of the Committee should be accepted in full;
- B. The Conclusions of the Committee should be accepted except as follows: the Eighth Specification should be sustained to the extent that it alleges that Respondent practiced fraudulently by falsely recording that Patient B had been treated with birth control pills prior

to surgery. The Committee failed to conclude that Respondent had practiced fraudulently because the Committee believed that Petitioner had not met its burden that Respondent's false recording was intended to deceive. Intent may be shown by inferences from the circumstances surrounding Respondent's acts. Among the circumstances in this case that support the inference of intent to deceive is Respondent's similar false recording with regard to both Patients B and C; Respondent's long term involvement in Patient B's case prior to surgery; and the hospital's requirement that simpler non-surgical treatment be tried prior to a hysterectomy. Respondent made the false entry to deceive any subsequent hospital, government or other reviewers who might question his recourse to surgery.

Similarly, I would sustain the Ninth Specification alleging fraudulent practice based on Respondent's false recording of treating Patient C with analgesics, prostaglandin inhibitors and anovulation. Respondent made more extensive false reporting about Patient C although admittedly he knew less of Patient C's history.

- C. In lieu of the Hearing Committee's recommendation, I recommend that Respondent's license to practice medicine be suspended for three years and that such suspension be stayed provided Respondent secure a second confirming opinion before each intended surgery during that three year period.
- E. The Board of Regents should issue an order adopting and incorporating the Findings of Fact and Conclusions and further adopting as its determination the Recommendation described above.

The entire record of the within proceeding is transmitted with this Recommendation.

DATED: Albany, New York

September 26 1990

David Axelrod

DAVID AXELROD, M.D., Commissioner
New York State Department of Health

EXHIBIT "C"

TERMS OF PROBATION
OF THE REGENTS REVIEW COMMITTEE

DOUGLASS N. POWELL

CALENDAR NO. 11418

1. That respondent shall make quarterly visits to an employee of and selected by the Office of Professional Medical Conduct of the New York State Department of Health, unless said employee agrees otherwise as to said visits, for the purpose of determining whether respondent is in compliance with the following:
 - a. That respondent, during the period of probation, shall be in compliance with the standards of conduct prescribed by the law governing respondent's profession;
 - b. That respondent shall submit written notification to the New York State Department of Health, addressed to the Director, Office of Professional Medical Conduct, Empire State Plaza, Albany, NY 12234 of any employment and/or practice, respondent's residence, telephone number, or mailing address, and of any change in respondent's employment, practice, residence, telephone number, or mailing address within or without the State of New York;
 - c. That respondent shall submit written proof from the Division of Professional Licensing Services (DPLS), New York State Education Department (NYSED), that respondent has paid all registration fees due and owing to the NYSED and respondent shall cooperate with and submit whatever papers are requested by DPLS in regard to said registration fees, said proof from DPLS to be submitted by respondent to the New York State Department of Health, addressed to the Director, Office of Professional Medical Conduct, as aforesaid, no later than the first three months of the period of probation; and
 - d. That respondent shall submit written proof to the New York State Department of Health, addressed to the Director, Office of Professional Medical Conduct, as aforesaid, that 1) respondent is currently registered with the NYSED, unless respondent submits written proof to the New York State Department of Health, that respondent has

DOUGLASS N. POWELL (11418)

advised DPLS, NYSED, that respondent is not engaging in the practice of respondent's profession in the State of New York and does not desire to register, and that 2) respondent has paid any fines which may have previously been imposed upon respondent by the Board of Regents; said proof of the above to be submitted no later than the first two months of the period of probation;

2. That respondent shall be subject to random selections of respondent's patient records, office records, and hospital charts to review respondent's professional performance;
3. If the Director of the Office of Professional Medical Conduct determines that respondent may have violated probation, the Department of Health may initiate a violation of probation proceeding and/or such other proceedings pursuant to the Public Health Law, Education Law, and/or Rules of the Board of Regents.

**ORDER OF THE COMMISSIONER OF
EDUCATION OF THE STATE OF NEW YORK**

DOUGLASS N. POWELL

CALENDAR NO. 11418



The University of the State of New York

IN THE MATTER

OF

DOUGLASS N. POWELL
(Physician)

**DUPLICATE
ORIGINAL
VOTE AND ORDER
NO. 11418**

Upon the report of the Regents Review Committee, a copy of which is made a part hereof, the record herein, under Calendar No. 11418, and in accordance with the provisions of Title VIII of the Education Law, it was

VOTED (April 26, 1991): That, in the matter of DOUGLASS N. POWELL, respondent, the recommendation of the Regents Review Committee be accepted as follows:

1. The findings of fact of the hearing committee and the recommendation of the Commissioner of Health as to those findings of fact be accepted;
2. The conclusions of the hearing committee be accepted;
3. The recommendation of the Commissioner of Health as to those conclusions of the hearing committee be modified;
4. Respondent is, by a preponderance of the evidence, guilty of the eleventh specification to the extent of allegation C.4 and is guilty of the tenth specification of allegation B.4 insofar as said specification relates to birth control pills, and not guilty as to the remaining specifications and allegations;
5. The measure of discipline recommended by the hearing committee and the Commissioner of Health not be accepted; and

DOUGLASS N. POWELL (11418)

6. Respondent's license to practice as a physician in the State of New York be suspended for one year upon each specification of the charges of which respondent was found guilty, as aforesaid, said suspension to run concurrently, execution of said suspension be stayed, and respondent be placed on probation for one year as set forth under the terms of probation prescribed by the Regents Review Committee;

and that the Commissioner of Education be empowered to execute, for and on behalf of the Board of Regents, all orders necessary to carry out the terms of this vote;

and it is

ORDERED: That, pursuant to the above vote of the Board of Regents, said vote and the provisions thereof are hereby adopted and **SO ORDERED**, and it is further

ORDERED that this order shall take effect as of the date of the personal service of this order upon the respondent or five days after mailing by certified mail.

IN WITNESS WHEREOF, I, Thomas Sobol, Commissioner of Education of the State of New York, for and on behalf of the State Education Department and the Board of Regents, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 30th day of

April, 1991.

Thomas Sobol

Commissioner of Education