



STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

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

Dennis P. Whalen
Executive Deputy Commissioner

August 10, 2001

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Anthony Benigno, Esq.
NYS Department of Health
ESP-Corning Tower-Room 2509
Albany, New York 12237-0032

Jeffrey M. Rubin, Esq.
Rubin & Shang
9 East 40th Street
New York, New York 10016

Rodolfo Byrne, M.D.
196 Graham Avenue
Brooklyn, New York 11206

RE: In the Matter of Rodolfo Byrne, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 00-177) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the 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 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.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

Request for review of the Committee's determination by the Administrative Review Board stays penalties other than suspension or revocation until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

All notices of review must be served, by certified mail, upon the Administrative Review Board and the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

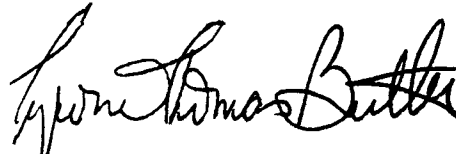
The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Hedley Park Place
433 River Street, Fifth Floor
Troy, New York 12180

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,

A handwritten signature in black ink, appearing to read "Tyrone T. Butler". The signature is written in a cursive style with a large initial "T".

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:cah
Enclosure

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

COPY

IN THE MATTER
OF
RODOLFO BYRNE, M.D.

DETERMINATION

AND

ORDER

BPMC # 01-177

ARSENIO G. AGOPOVICH, M.D., Chairperson, **PETER B. KANE, M.D.** and **REV. THOMAS KORNMEYER**, 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) and (19) of the Public Health Law. **JEFFREY ARMON, ESQ.**, served as Administrative Officer for the Hearing Committee. After consideration of the entire record, the Hearing Committee submits this Determination.

SUMMARY OF PROCEEDINGS

Notice of Violation of Probation: April 18, 2001

Date of Hearing: June 19, 2001

Department of Health appeared by: **DONALD P. BERENS, JR., ESQ.**
General Counsel, NYS Department of Health
BY: ANTHONY BENIGNO, ESQ.
NYS Department of Health
Corning Tower, Room 2509
Albany, New York 12237

Representative for Respondent : **JEFFREY M. RUBIN, ESQ.**
Rubin & Shang, Esqs
9 East 40th Street
New York, New York 10016

Witness for the Department of Health: Kimberly Haley, R.N.

Witness for the Respondent: Rodolfo Byrne, M.D. (Respondent)

Deliberations held: June 19, 2001

NOTE: Numbers in parenthesis refer to transcript pages or exhibits, and they denote evidence that the Hearing Committee found persuasive in determining a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the evidence cited. All Hearing Committee findings were unanimous unless otherwise specified.

Petitioner's Exhibits are designated by Numbers.

Respondent's exhibits are designated by Letters.

T = Transcript

A copy of the Notice of Violation of Probation (Ex. 1) is attached to this Determination and Order as Appendix I.

FINDINGS OF FACT

1. The Respondent was authorized to practice medicine in New York State on September 23, 1971 by the issuance of license number 110230 by the New York State Education Department. (Ex. 4)

2. By a Consent Agreement and Order of the New York State Board for Professional Medical Conduct dated December 14, 1999 (BPMC# 99-311), Respondent did not contest the Second through Eighth Specifications of professional misconduct contained in an August, 1999 Statement of Charges, which related to charges that Respondent had practiced the profession with incompetence on more than one occasion and had failed to maintain records that accurately reflected the care and treatment of patients. (Ex. 4)

3. By entering into said Consent Agreement and Order, Respondent agreed to a penalty of a five year suspension of his medical license with the suspension stayed contingent on his compliance with certain terms of probation, which included a clinical competency assessment, the successful completion of a three-part retraining program, enrollment in a course of personalized continuing medical education (CME) of between three and twelve months duration (which was to include an assigned preceptor and was to be approved by the Director of OPMC) and a restriction that he engage in the practice of medicine only when monitored by a board certified physician. Respondent was also required to maintain medical malpractice insurance coverage of at least \$2 million per occurrence and \$6 million per policy year and was further required to notify the Director of OPMC if he was not currently engaged in or intended to leave the active practice of medicine for at least thirty consecutive days. (Ex. 4 "Exhibit B")

4. In a letter from the Director of the OPMC dated April 18, 2001, Respondent was informed that it had been determined that he had violated the terms of his probation imposed by BPMC Order #99-311. Specific violations cited were Respondent's failure to notify the Director of an absence from New York State of approximately two months and failures to enroll in a course of personalized CME or to maintain the specified minimum amount of medical malpractice insurance coverage. (Ex. 1)

5. Respondent was trained and worked in the specialty of radiation oncology from approximately 1969 until 1983 when he began a general medical practice. He maintains a small part-time practice in which he treats about 5 to 7 patients per day. He has no medical staff assisting him and no affiliation with any hospital or medical group. (T. 51-4, 123-5)

6. During the period of November, 2000 through January, 2001, Respondent traveled to Florida to transport personal items in anticipation of his retirement. (T. 55-7)

7. In October, 1999, about two months before entering into the Consent Agreement, Respondent wrote to his malpractice insurance carrier requesting that his coverage be increased to \$2 million per occurrence/\$6 million per policy year. Subsequently, the carrier increased Respondent's premiums because of the disciplinary action taken against his medical license, but did not increase the coverage. Respondent's malpractice insurance coverage remained lower than the amount set forth in the Consent Agreement and Order. (Ex. B; T. 65-71)

8. Respondent obtained a clinical competency assessment and a physician to monitor his medical practice. He did not enroll in a course of personalized CME or obtain an assigned preceptor. (Ex. 6, A.L.J. 1; T. 87-9)

CONCLUSIONS OF LAW

The following conclusions were made pursuant to the Findings of Fact listed above. All conclusions resulted from a unanimous vote of the Hearing Committee.

The Hearing Committee concluded that the Department established by a preponderance of the evidence that Respondent had violated the terms of his probation, as set out in BPMC #99-311. Specific violations were #7 and #9 (failure to successfully complete a course of personalized CME) and #11(d) (failure to maintain medical malpractice insurance at the required limits).

DISCUSSION

Respondent offered a variety of explanations for his admitted failure to participate in an approved personalized CME course. He indicated his confusion about what such a requirement involved; however

there was no evidence that he ever contacted the OPMC for clarification. Respondent contended that the several medical conferences and meetings he annually attended met the CME requirement. There was no documentation that proof of such attendance had ever been submitted to OPMC for approval. Respondent also testified that he believed that the obligation to complete a course of retraining was equivalent to participating in a medical residency program and that such a program was not available near where he lived or to a person of his age. He also testified that his family obligations prevented him from enrolling in a hospital-based retraining program for an extended period.

Respondent also testified that he wrote to his malpractice insurance carrier requesting that his coverage be increased to \$2 million per occurrence/\$6 million per policy year. He believed that his coverage had been increased because the carrier thereafter increased the premiums. A review of the documents he submitted revealed that the basis for the increase in the premiums was the disciplinary action taken against his medical license following the execution of the Consent Agreement. Notwithstanding the higher cost of the premiums, Respondent's malpractice insurance coverage remained lower than the requisite amount as set forth in the Consent Agreement and Order.

DETERMINATION AS TO PENALTY

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, unanimously determined that Respondent's license to practice medicine in New York be revoked. This determination of penalty was reached upon due consideration for the full spectrum of penalties available pursuant to statute, including revocation, suspension and/or probation, censure and reprimand, and the imposition of monetary penalties.

The Committee believed it was clear that the Respondent lacked insight as to the limitations of his medical skill and knowledge. It was observed that Respondent was trained as a radiation oncologist and received no additional training when he changed to a general medical practice in the mid-1980's. Respondent has no hospital or HMO affiliation and retains no other employee with medical training in his current limited practice.


In the 1999 Consent Agreement, Respondent did not contest allegations that he practiced medicine with incompetence in his treatment of several patients. This was considered an acknowledgement that Respondent recognized that his abilities did not meet acceptable standards. A requirement was therefore imposed that he raise his level of medical skills through a significant amount of additional medical training and education. The Committee noted Respondent's age of approximately 75 years and his admitted intent to fully retire in the near future. It was determined that any retraining that would reasonably be expected to raise Respondent's skills to an acceptable level was neither accessible or appropriate. The Committee concluded that while his current practice may be limited, the only remedy to protect the public in this case would be the revocation of Respondent's medical license.

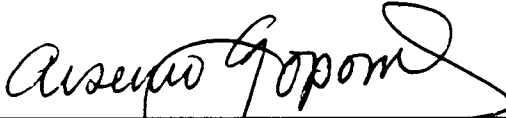
ORDER

Based on the foregoing, **IT IS HEREBY ORDERED THAT:**

1. The Determination that the Respondent violated the terms of probation imposed by BPMC #99-311, as set forth the Department's letter dated April 18, 2001 (Ex. 1) is **SUSTAINED**; and
2. Respondent's license to practice medicine in New York State be **REVOKED**; and
3. This Order shall be effective upon service on the Respondent or his attorney by personal service or by certified or registered mail.

DATED: Troy, New York

 , 2001


ARSENIO G. AGOPOYICH, M.D., Chairperson
PETER B. KANE, M.D.
REV. THOMAS KORNMEYER

TO:

Anthony Benigno, Esq.
New York State Department of Health
Bureau of Professional Medical Conduct
Corning Tower, Room 2509
Empire State Plaza
Albany, New York 12237-0032

Jeffrey M. Rubin, Esq.
Rubin & Shang
9 East 40th Street
New York, New York 10016

Rodolfo Byrne, M.D.
196 Graham Avenue
Brooklyn, New York 11206

APPENDIX I



STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

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

Dennis P. Whalen
Executive Deputy Commissioner

April 18, 2001

Rodolfo Byrne, M.D.
196 Graham Avenue
Brooklyn, NY 11206

Re: Notice of Violation of Probation
License No. 110230

Dear Dr. Byrne:

As the Director of the Office of Professional Medical Conduct of the New York State Department of Health, I have conducted an investigation and determined that you have violated the terms of probation imposed upon you by Order BPMC No. 99-311. My determination that you have violated the terms of your probation is based on the following:

1. By Order BPMC No. 99-311, your license to practice medicine was suspended for five years, the suspension was stayed based upon your successful completion of a three-part retraining program, and you were placed on probation for five years.
2. Term four of probation required that, "Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director again prior to any change in that status.@ You left New York State for Florida for a two month period (11/22/00- 1/20/01) and failed to notify the Director of your departure or return.
3. Terms seven, eight and nine of probation required you to, successfully complete a three-part retraining program. Within four months of the effective date of the Order, you were required to be enrolled in a course of personalized continuing medical education to be approved in writing by the Director of OPMC. Since the effective date of the Order, December 16, 1999, you have failed to enroll in the personalized continuing medical education. Additionally, your initial evaluation raised serious concerns about your abilities as a physician.
4. Term 11(d) required you to maintain medical malpractice insurance coverage with limits no less than \$2 million per occurrence and \$6 million per policy year. You failed to maintain the necessary coverage.

Rudolfo Byrne, M.D.
April 18, 2001
Page Two

By this letter, I am initiating a violation of probation proceeding against you pursuant to New York Public Health Law ' 230(19).

Be advised that if you do not dispute the facts forming the basis of my determination within 20 days of the date of this letter, I shall submit this matter to a committee on professional conduct for its review and determination. If within 20 days of the date of this letter, you dispute in writing the facts forming the basis of my determination, you shall be afforded a hearing before a committee on professional conduct. You have the right to such a hearing and may be represented by counsel.

A stenographic record of this hearing will be made. The committee, after providing you an opportunity to be heard, shall determine whether you have violated probation and, if so, shall impose an appropriate penalty as defined in New York State Public Health Law ' 230-a. In determining the appropriate penalty, the committee shall consider both the violation of probation and the prior adjudication of misconduct. The chairperson of the committee shall issue an order adopting the decision of the committee on professional conduct. This order may be reviewed by the Administrative Review Board of the State Board for Professional Medical Conduct.

Since this violation of probation proceeding may result in a determination that your license to practice medicine in New York be revoked, I urge you to consult with an attorney.

Very truly yours,



Dennis J. Graziano
Director
Office of Professional Medical Conduct

cc: Jeffrey M. Rubin, Esq.
Rubin and Shang, Esqs.
Nine East 40th Street
New York, NY 10016