



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

September 29, 1997

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Paul Stein, Esq.
NYS Department of Health
5 Penn Plaza - Sixth Floor
New York, New York 10001

Eric Chun Chu, M.D.
105 Melanie Drive
East Meadow, New York 11554

Judi Abbott Curry, Esq.
Jill K. Gormley, Esq.
Lester, Schwab, Katz & Dwyer
120 Broadway
New York, New York 10271

RE: In the Matter of Eric Chun Chu, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No.97-118) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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 T. Butler". The signature is written in a cursive style with a large, prominent initial "T".

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

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

COPY

-----X
IN THE MATTER : ADMINISTRATIVE
: REVIEW BOARD
OF : DECISION AND
: ORDER NUMBER
ERIC CHUN CHU, M.D. : ARB# 97-118
-----X

Before: ROBERT 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, Eric Chun Chu, M.D. engaged in the fraudulent practice of medicine, a Hearing Committee on Professional Medical Conduct (Committee) sustained the charges and reprimanded the Respondent. The Committee further determined that it needed more information in order to impose the most appropriate sanction. The Committee further ordered that the Respondent's license to practice medicine be suspended for three years, provided that the suspension shall be stayed on condition that Respondent commence an educational assessment to include a psychiatric evaluation. In this proceeding pursuant to New York Public Health Law (Pub. H.L.) §230-c(4) (a) (McKinney's Supp. 1997), the Petitioner asks that the Administrative Review Board for Professional Medical Conduct to modify the Determination and Order of the Committee and to revoke the Respondent's license to practice medicine in New York. After reviewing the record in this case and conducting deliberations on July 25, 1997¹, the Board votes to overturn the Committee's Determination regarding the sanction to be imposed.

¹Dr. Stewart participated in the deliberations via telephone.

We vote to revoke the Respondent's license to practice medicine, because we agree with the Petitioner that the Respondent's conduct in falsely making and filing applications to participate in a health plan warrants revocation.

Administrative Law Judge **LARRY G. STORCH** served as the Board's Administrative Officer. **LESTER, SCHWAB, KATZ & DWYER, JUDI ABBOTT CURRY, ESQ.** and **JILL K. GORMLEY, ESQ.**, of counsel, represented the Respondent in this proceeding. **PAUL STEIN, ESQ.** represented the Petitioner.

COMMITTEE DETERMINATION ON THE CHARGES

Pub. H.L. §230 authorizes three member committees from the State Board for Professional Medical Conduct (BPMC) to conduct disciplinary proceedings to determine whether physicians have committed professional misconduct by violating Educ. L. §6530. The Petitioner filed two specifications of charges with BPMC alleging that the Respondent practiced the profession of medicine fraudulently, in violation of Educ. L. §6530(2).

Three BPMC Members, **RICHARD N. PIERSON, JR., M.D. (CHAIR)**, **HILDA RATNER, M.D.** AND **NANCY J. MACINTYRE, R.N., Ph.D.** comprised the Committee which conducted a hearing pursuant to Pub. H.L. §230(10) and which rendered the May 12, 1997 Determination that the Board now reviews. Administrative Law Judge **STEPHEN BERMAS** served as the Committee's Administrative Officer.

The Committee found that on or about December 7, 1990, the Respondent executed and submitted an application for

membership in Queens Physicians Association, Inc. The Committee further found that in this application, the Respondent, knowing his answer to be false and with intent to defraud, answered "No" to a question asking whether, *inter alia*, the Respondent had ever been excluded from the Medicaid program. The Committee further found that in August, 1989 the Respondent received a termination notice from Medicaid stating that he was to be excluded from the program for five years. The Committee further found that although the Respondent may have appealed his termination, he was aware that he could no longer bill Medicaid once the exclusion took effect.

The Committee also found that on or about March 17, 1992 or February 4, 1992, the Respondent again submitted an application for membership in Queens Physicians Association, Inc. in which he falsely and with intent to defraud, answered "No" to the identical question. The Committee further found that the Respondent admitted to an Office of Professional Medical Conduct (OPMC) investigator that at the time he signed the February 4, 1992 application, he was aware that he had been excluded from the Medicaid program for five years.

The Committee concluded that the specifications of professional misconduct brought against the Respondent had been sustained. The Committee unanimously concluded that the Respondent engaged in professional misconduct by reason of practicing the profession of medicine fraudulently within the meaning of Educ. L. §6530(2) (McKinney's Supp. 1997).

The Committee voted to reprimand the Respondent. The

Committee further determined that it needs more information in order to impose the most appropriate sanction. The Committee therefore ordered that the Respondent's license be suspended for three years, provided, however, that the suspension shall be stayed on condition that the Respondent promptly, but not later than three months after the service of the Determination and Order, undergo an educational assessment to include a psychiatric evaluation. The Committee further ordered that the assessment shall include the Respondent's capacity to understand the seriousness of the charges in this proceeding, and his capacity to fulfill, without impairment, the requirements of the practice of medicine. The Committee further ordered that a report be made to the Committee within three months after commencement of the assessment, and that upon receipt of said report, the Committee will conduct further deliberations on the issue if the appropriate sanction to be imposed upon the Respondent.

REVIEW HISTORY AND ISSUES

The Petitioner filed a Notice requesting a review on the Committee's Determination, which the Board received on June 2, 1997. The Record on review contained the hearing transcript and exhibits and the parties' briefs. The Board received the Petitioner's brief on July 7, 1997, the Respondent's brief on July 2, 1997, the Petitioner's reply brief on July 10, 1997 and the Respondent's reply brief on July 10, 1997.

The Petitioner raises the following arguments on his appeal:

I. The imposition of a three year suspension stayed on the condition of undergoing an educational assessment and psychological evaluation, with subsequent further deliberations as to sanction, is not supported by any findings of fact. The Petitioner notes that the Committee made no findings of fact regarding Respondent's professional competence or regarding his psychological state, nor were there any allegations regarding them in the Statement of Charges.

II. The penalty imposed is not consistent with the findings of fact and conclusions of law and is totally inappropriate given the finding of fraud. The Petitioner contends that the appropriate penalty for fraud in the practice of medicine is revocation, actual suspension, and/or the imposition of a fine. The Committee imposed none of these. The Committee found that Respondent had the requisite mental state to commit fraud; therefore, there is no need for or relevance of any psychiatric evaluation. Given that there were no charges or findings of negligence or incompetence, an educational assessment is similarly inappropriate. It is improper to fashion a sanction that has no basis in the findings of fact and conclusions of law. Therefore, the entire sanction must be overturned and replaced with one that is appropriate for the facts found and the determination that the Respondent committed fraud in the practice of medicine.

III. The appropriate penalty is revocation of the Respondent's license to practice medicine. The Respondent's deliberate concealment of his Medicaid termination indicates that he cannot be trusted to provide information essential for participation in the health care delivery system. The only appropriate sanction is revocation.

The Respondent raises the following arguments:

I. The penalty imposed by the Hearing Committee is appropriate and consistent with the Committee's findings of fact and determination. Pub. H.L. §230-a(c) provides for a number of penalties which may be imposed upon a physician who is found to have committed professional misconduct. Reprimand and license suspension are among the penalties specifically set

forth in the statute, which further provides that the board may stay such penalties in whole or in part. Pub. H.L. §230(7) grants the Committee "the authority to direct a licensee to submit to a medical or psychiatric evaluation when the committee has reason to believe the licensee may be impaired by alcohol, drugs, physical disability or mental disability." Further, Pub. H.L. §230(10)(g) authorizes the Committee to determine the penalty to be imposed or "appropriate action to be taken." Thus, the penalties imposed upon the Respondent are appropriate penalties to impose after a finding of professional misconduct and within the scope of the Public Health Law.

II. The penalty imposed is supported by the hearing record. The Committee sustained the two charges of practicing fraudulently. However, it is clear from the sanction imposed that the Committee believed that the Respondent's mental state at the time of the fraud and at the present time is relevant to a final determination of penalty. The Respondent presented a credible and compelling explanation as to how he came to answer the questions on the two applications incorrectly. He misunderstood the process of appeal of his Medicaid exclusion and was inadequately counseled by an attorney who did not represent his interests appropriately.

III. The penalty imposed reflects the Committee's consideration of mitigating circumstances and is supported by New York law. In a recent Appellate Division decision, the Court examined whether the penalty imposed was appropriate where a Hearing Committee sustained a charge of fraudulent practice against a physician who had failed to reveal his suspension from Medicaid on an application for hospital privileges, and imposed as a penalty a six month period of probation. Upon appeal, the Board, citing the seriousness of the offense, revoked the physician's license. The Court found the Board's action "shocking to one's sense of fairness" and held that the physician's conduct did not warrant revocation. Sarfo v. DeBuono, 652 N.Y.S.2d 852, 854 (Third Dept., 1997). The courts have further held that a less harsh penalty may be appropriate if the Committee determines that the likelihood of rehabilitation is high and the licensee's conduct subsequent to the events which led to the charges merits leniency. Murray v. Chassin, 21 A.D.2d 858 (Third Dept., 1995). In the case of the

Respondent, the evidence clearly shows that the likelihood of rehabilitation is high and the likelihood of a repetition is extremely low.

The Petitioner's reply brief contends that:

I. The Hearing Committee made no findings of fact, explicitly or implicitly, that the Respondent misunderstood the process of appeal of his Medicaid exclusion or that he was inadequately counseled by an attorney who did not represent his interests appropriately. However, the Committee did explicitly find that the Respondent had the requisite intent to commit fraud. Therefore, the Respondent's argument for an "innocent" explanation of his incorrect answers on the applications is of no relevance, since it is not supported by any findings of fact, and is negated by the facts found by the Committee.

II. Respondent's behavior is significantly more fraudulent and distinguished from that found in the Sarfo case. The Court emphasized the fact that Dr. Sarfo voluntarily came forward before his inaccurate answers were discovered, when overturning the revocation imposed by this Board. There is no evidence or even any suggestion in the record that this Respondent came forward to inform the insurance plan of his Medicaid exclusion before the plan discovered the information independently. Dr. Sarfo's culpability was mitigated by his coming forward. There is no such mitigating factor in this case.

The Respondent's reply brief contends that:

I. The Committee's findings of fact support the penalty. The Committee found that the Respondent failed to reveal his exclusion from Medicaid and that he knew that he was misstating his status with Medicaid at the time that he submitted his applications. However, the Committee also found that the Respondent appealed his exclusion and that the termination letter did not provide for a stay. The Committee thus implicitly recognized a mitigating circumstance - that the Respondent felt his Medicaid exclusion was based on erroneous information and would not be final until he had an opportunity to be heard. Further, in his answer to the charges, the Respondent asserted that his capacity to fully appreciate the effect of his Medicaid exclusion was impaired. The Respondent's mental and emotional state at the time of the events which formed the basis of the charges comprised a significant

portion of the testimony offered to the Committee.

II. The penalty imposed is within the scope of the statute, consistent with the findings of fact and appropriate under the circumstances. The Petitioner can cite no statute or case law in support of its contention that the only appropriate penalty for fraud is revocation, actual suspension and/or a fine. Although the Respondent is willing to undergo the educational assessment and psychiatric evaluation, he agrees with the Petitioner that there is no basis in the Committee's findings of fact to support this aspect of the Determination. It may therefore be appropriate for the Board to vacate that portion of the Committee's penalty. It does not follow, however, that this mandates replacement of the educational assessment with revocation, actual suspension or monetary fine.

III. Revocation of the Respondent's license would be grossly disproportionate to the offense of incorrectly completing two credentialing applications.

THE BOARD'S REVIEW AUTHORITY

Pub. H.L. §230(10)(i), §230-c(1) and §230-c(4)(b) authorize the Board to review determinations by hearing committees for professional medical conduct and to decide:

- whether or not a hearing committee determination and penalty are consistent with the hearing committee's findings of fact and conclusions of law; and
- whether or not the penalty is appropriate and within the scope of penalties permitted by Pub. H.L. §230-a.

Pub. H.L. §230-c(4)(b) permits the Board to remand a case to the Committee for further consideration. Pub. H.L. §230-c(4)(c) provides that the Review Board's Determinations shall be based upon a majority concurrence of the Review Board.

The Board has the authority to substitute our judgement for that of the Hearing Committee, in deciding upon a penalty Matter of Bogdan 195 A.D.2d 86, 606 N.Y.S. 2d 381 (Third Dept.

1993), in determining guilt on the charges, Matter of Spartalis 205 A.D.2D 940, 613 N.Y.S.2d 759 (Third Dept. 1994), and deciding credibility issues Matter of Minielly 222 A.D.2D 750, 634 N.Y.S. 2d 856, 1995.

THE BOARD'S DETERMINATION

The Board renders this Determination after reviewing the hearing record, the Committee's Determination and Order and the parties' briefs. The Board sustains the Committee's Determination finding the Respondent guilty of professional misconduct. Neither party has challenged the conclusion that the Respondent fraudulently practiced the profession. The Committee's findings of fact amply support the conclusion that the Respondent knowingly, and with intent to defraud, submitted the two credentialing applications with false answers.

The Board votes to overturn the Committee's penalty. We vote 5-0 to revoke the Respondent's license to practice medicine in New York state. We agree with the Petitioner that the imposition of a stayed, three year suspension conditioned upon the Respondent undergoing an educational assessment and psychological evaluation, is neither supported by the facts, nor grounded in the charges. The Respondent was not charged with negligence or incompetence, nor was he charged with practicing while impaired. A sanction cannot be grounded on conduct not charged, but rather must be based on the Respondent's actual misconduct. Matter of Dhabuwala v. State Board for Professional Medical Conduct, 225 A.D.2d 209; 651 N.Y.S.2d 249 (Third Dept., 1996).

In this instance, the Committee found that the Respondent gave false answers on his applications to the health plan "knowing his answer to be false and with intent to defraud". (See, Determination and Order, pp. 2-3). Respondent's argument that the Respondent's actions were innocent mistakes based on misunderstandings and poor legal advice were clearly considered and rejected by the Committee.

Fraud in the practice of medicine is serious misconduct and the making of false statements on applications for staff privileges is grounds for revoking a physician's license. Matter of Glassman, 208 A.D.2d 1060, 617 N.Y.S.2d 413 (Third Dept. 1994). Integrity is essential to the practice of medicine. Physicians must deal truthfully with patients, with other physicians, with facilities, third-party payors and with regulators. The Respondent's fraudulent conduct demonstrates that he is not fit to be licensed as a physician by the State of New York. Neither retraining nor continuing medical education can correct this condition. A mere suspension or period of probation is similarly inadequate to protect the public.

The Respondent's reliance on the Sarfo case for the argument that revocation would be grossly disproportionate to his misconduct is misplaced. In that case, the physician voluntarily informed the company handling his employment application of the circumstances underlying the problems with his Medicaid status. There is no evidence or any suggestion in the record that this Respondent came forward to inform the insurance plan of his Medicaid exclusion before the plan discovered the information

independently.

The Respondent's fraudulent conduct represents a serious breach of the public trust granted to physicians and demonstrates that he is not morally fit to be a physician. The Board unanimously determined that revocation is the appropriate sanction for his misconduct.

ORDER

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

1. The Review Board **SUSTAINS** the Hearing Committee's May 12, 1997 Determination finding the Respondent guilty of professional misconduct.
2. The Review Board **OVERTURNS** the Hearing Committee's Determination that the Respondent be reprimanded and that his license to practice medicine be suspended for three years, provided, however, that the suspension shall be stayed on condition that Respondent undertake an educational assessment to include a psychiatric evaluation.
3. The Board **REVOKES** the Respondent's license to practice medicine in New York State.

SUMNER SHAPIRO

ROBERT M. BRIBER

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

WILLIAM A. STEWART, M.D.

IN THE MATTER OF ERIC CHUN CHU, 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. Chu.

DATED: Delmar, New York
September 17, 1997


SUMNER SHAPIRO

IN THE MATTER OF ERIC CHUN CHU, 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. Chu.

DATED: Roslyn, New York

Sept 17, 1997

A handwritten signature in cursive script, reading "Edward C. Sinnott", written over a horizontal line.

EDWARD C. SINNOTT, M.D.

NYS DOH - ADJUDICATION Fax:518-402-0751

Sep 17 '97 14:30

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IN THE MATTER OF ERIC CHUN CHU, 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. Chu.

DATED: Syracuse, New York

18 Sept., 1997

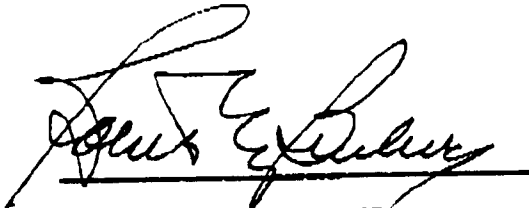
WILLIAM A. STEWART, M.D.

IN THE MATTER OF ERIC CHUN CHU, 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. Chu.

DATED: Schenectady, New York

September 19, 1997



ROBERT M. BRIBER

IN THE MATTER OF ERIC CHUN CHU, 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. Chu.

DATED: Brooklyn, New York

9/17/97, 1997

A handwritten signature in black ink, appearing to read 'W.S. Price', written over a horizontal line.

WINSTON S. PRICE, M.D.