

NEW YORK
state department of
HEALTH

Public

Nirav R. Shah, M.D., M.P.H.
Commissioner

Sue Kelly
Executive Deputy Commissioner

November 14, 2012

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Joel E. Abelove, Esq.
NYS Department of Health
ESP-Corning Tower – Room 2512
Albany, New York 12237

Jude Barbera, M.D.
c/o Andrew Greene & Associates, P.C.
202 Mamaroneck Avenue
White Plains, New York 10601

Andrew Greene, Esq.
Andrew Greene & Associates, P.C.
202 Mamaroneck Avenue
White Plains, New York 10601

RE: In the Matter of Jude Barbera, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 12-245) 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
Office of Professional Medical Conduct
Riverview Center
150 Broadway - Suite 355
Albany, New York 12204

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), (McKinney Supp. 2007) and §230-c subdivisions 1 through 5, (McKinney Supp. 2007), "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., Chief Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Riverview Center
150 Broadway – Suite 510
Albany, New York 12204

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,

REDACTED
James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH:cah

Enclosure

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

-----X
IN THE MATTER :

DETERMINATION

OF :

AND

JUDE BARBERA, M.D. :

ORDER

CO-12-03-1392-A :

-----X
BPMC #12-245

COPY

A Notice of Referral Proceeding and Statement of Charges, both dated June 27, 2012, were served upon the Respondent, Jude Barbera, M.D. **IRVING S. CAPLAN (Chair), ELISA E. BURNS, M.D., and LELAND DEANE, M.D., M.B.A.**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. **LARRY G. STORCH, ESQ., ADMINISTRATIVE LAW JUDGE**, served as the Administrative Officer. The Department of Health appeared by Joel E. Abelow, Esq., Associate Counsel. The Respondent appeared by Andrew Greene & Associates, P.C., Andrew Greene, Esq., of Counsel. A hearing was held on October 17, 2012. Evidence was received and witnesses sworn and heard and transcripts of these proceedings were made.

After consideration of the entire record, the Hearing Committee issues this Determination and Order.

STATEMENT OF CASE

This case was brought pursuant to Public Health Law Section 230(10)(p). The statute provides for an expedited hearing where a licensee is charged solely with a violation of Education Law §6530(9). In such cases, a licensee is charged with misconduct based upon a prior criminal conviction in New York or another jurisdiction, or upon a prior administrative adjudication regarding conduct which would amount to professional misconduct, if committed in New York. The scope of an expedited hearing is limited to a determination of the nature and severity of the penalty to be imposed upon the licensee.

In the instant case, Respondent is charged with professional misconduct pursuant to Education Law §6530(9)(a)(ii). A copy of the Statement of Charges is attached to this Determination and Order in Appendix I.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. 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.

1. Jude Barbera, M.D., (hereinafter "Respondent") was authorized to practice medicine in New York State on February 2, 1988 by the issuance of license number 173570 by the New York State Education Department. (Exhibit #3).

2. On or about March 8, 2012, in the United States District Court, Southern District of New York, Respondent pleaded guilty to one (1) count of Unlawful Wholesale Distribution of Prescription Drugs, in violation of Title 21 U.S.C. §353(e)(2)(B), a felony. Respondent was sentenced to 1 day imprisonment, 2 years and 364 days of supervised release, forfeiture of \$1,000,000.00, a \$15,000.00 fine, and a special assessment of \$100.00. (Exhibit #4).

3. In pleading guilty to the indictment, Respondent admitted the following facts: Respondent and co-defendant Peter S. Lehman engaged in an illegal scheme to defraud pharmaceutical manufacturers TAP/Abbott and AstraZeneca by obtaining, through false representations, large quantities of the prescription cancer medications Lupron and Zoladex from the manufacturers at steep discounts, and then reselling the medications to pharmaceutical wholesalers for profit in violation of their agreements with the manufacturers. (Exhibit A, Tab 9, ¶8).

4. Respondent further admitted that as part of the scheme to defraud, he took advantage of special discount prices offered

by the manufacturers to physicians who purchased the medications directly from them through physician "buy groups". These discounts were available to physicians only on the condition that the physicians could only dispense the medications directly to their patients and not resell or redistribute them. (Exhibit A, Tab 9, ¶9).

5. Respondent further admitted that he recruited four other physicians, who were not oncologists or urologists and thus had no need for the medications in their own practices to join "buy groups" and, in return for a profit, purchase Lupron and Zoladex on his behalf. Respondent falsely represented to some of these physicians that he needed their assistance to obtain Lupron and/or Zoladex because he had a large number of union patients to whom he administered these drugs, and that he was unable to obtain the amounts he needed from the Manufacturers. (Exhibit A, Tab 9, ¶11).

6. Respondent falsely represented to the pharmaceutical companies that the reason for such large orders of Lupron and Zoladex was that he treated a large number of patients from various unions, to whom he administered the medications, even though he intended to sell the medications to wholesalers for a profit. (Exhibit A, Tab 9, ¶12).

7. Respondent, by pleading guilty to Count 4 of the indictment, further admitted that he was the principal architect

of the scheme to defraud. Respondent fraudulently obtained the medications from the manufacturers at steep discount and then sold them for profit. Respondent was responsible for recruiting four other physicians to purchase Lupron and Zoladex for his benefit. (Exhibit A, Tab 9, ¶17).

8. Respondent further admitted that he unlawfully, willfully and knowingly did distribute drugs in violation of federal law. (Exhibit A, Tab 9, ¶31).

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 unless noted otherwise.

The evidence established that Respondent was convicted, upon a guilty plea, of a crime under Federal law. Therefore, he is guilty of professional misconduct in violation of Education Law §6530(9)(a)(ii). As a result, the Hearing Committee voted to sustain the specification of professional misconduct.

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 should be revoked. This determination was reached upon due consideration of the

full spectrum of penalties available pursuant to statute, including revocation, suspension and/or probation, censure and reprimand, and the imposition of monetary penalties.

We note at the outset, that this is the second time that Respondent has appeared before the Board. In October, 2005, Respondent was convicted, following a jury trial in the United States District Court Southern District of New York, of eleven felony counts, including conspiracy to submit false income tax returns, conspiracy to commit health care fraud, mail fraud, among others. He was subsequently sentenced, inter alia, to six months incarceration. Following an appearance before a Hearing Committee on December 21, 2005, Respondent's medical license was suspended for a period of six months, coinciding with his period of incarceration, and he received a censure and reprimand.

(Matter of Barbera, OPMC No. 06-01; Exhibit A, Tab 24).

Respondent argued that the underlying criminal conduct in the instant case had already ceased before his appearance in the 2005 OPMC proceeding, that it was far in the past, and that his exemplary medical skills, and charitable efforts should mitigate any sanction to be imposed. To that end, Respondent presented an impressive array of witnesses, who all testified that he was an excellent physician, and that he devoted many hours to free care in underserved areas. These character witnesses all testified sincerely as to what they believed to be a stellar individual who

happened to make a mistake.

Respondent also testified on his own behalf. His testimony was extremely troubling to this Committee. Despite his guilty plea under oath before a Federal Magistrate Judge, Respondent attempted to claim that he only pled guilty to avoid a worse outcome, and that he wasn't really guilty of engaging in a conspiracy to defraud. He also claimed that he actually brought the issue of the wholesale drug sales to the attention of federal prosecutors, and that he obtained a license as soon as they told him it was unlawful to sell the drugs without it. This claim was, at best disingenuous, and more likely blatantly false.

Respondent claimed to have initially raised the issue at his proffer conference with prosecutors on December 16, 2003. This was after the jury verdict in the tax fraud case, but before sentencing.

However, the documents tell a different story. Respondent's contract to purchase Lupron from TAP/Abbott had been terminated by the manufacturer on March 25, 2003, following an internal investigation of Respondent's purchasing practices. This decision was conveyed to Respondent in a letter dated March 25, 2003. The results of the investigation were also forwarded to the FBI and DEA at that time. (Exhibit A, Tab 19).

Respondent also claimed that he had never been sued for malpractice. When confronted with direct evidence to the

contrary, he then attempted to obfuscate the issue. Only after repeated questioning by counsel for the Department, as well as a member of this Committee, did he acknowledge that he had, in fact, been sued.

He also claimed that he was heavily indebted, and that he had to borrow money in order to pay the first installment on his forfeiture agreement. However, the financial documentation submitted by Respondent to the Government as part of the pre-sentence investigation revealed a very different story.

Respondent listed equity interests in several real estate investments totaling more than \$2,500,000. He listed stock, mutual fund and cash investments in excess of \$520,000. Respondent also disclosed an annual income well in excess of \$500,000. (Exhibit A, Tab 13).

Respondent attempted to present himself as a caring physician, whose desire to help those in need is the driving force in his life. This is an illusion. The record revealed that Respondent is an individual utterly lacking in integrity. He engaged in a pattern of criminal conduct extending for nearly a decade. Even as he was under investigation and subsequently on trial on the tax and health care fraud charges, he was engaged in a conspiracy to fraudulently acquire and re-sell cancer medications at a significant profit. This conspiracy allowed Respondent to reap millions of dollars' worth of ill-gotten

gains.

We take no position on the quality of Respondent's clinical skills, as they are not at issue in this case. We do note, however, that he has not had clinical privileges on a hospital staff for nearly ten years, and that his current practice has virtually no clinical oversight. Moreover, no amount of suspension, probation or monitoring could adequately address Respondent's fundamental dishonesty. Under the totality of the circumstances, revocation is the only sanction which will adequately punish Respondent for his actions, and protect the public at large.

ORDER

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

1. The Specification of professional misconduct, as set forth in the Statement of Charges (Exhibit # 1) is **SUSTAINED**;
2. Respondent's license to practice medicine in New York State be and hereby is **REVOKED**;
3. This Determination and Order shall be effective upon service. Service shall be either by certified mail upon Respondent at Respondent's last known address and such service shall be effective upon receipt or seven days after mailing by certified mail, whichever is earlier, or by personal service and

such service shall be effective upon receipt.

DATED: Albany, New York
10-30, 2012

REDACTED

~~IRVING S. CAPLAN / (CHAIR)~~

ELISA E. BURNS, M.D.
LELAND DEANE, M.D., M.B.A.

TO: Joel E. Ablove, Esq.
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202 Mamaroneck Avenue
White Plains, New York 10601

APPENDIX I

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

IN THE MATTER
OF
JUDE BARBERA, M.D.
CO-12-03-1392-A

STATEMENT
OF
CHARGES

JUDE BARBERA, M.D., Respondent, was authorized to practice medicine in New York state on February 2, 1988, by the issuance of license number 173570 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about March 8, 2012, in the United States District Court, Southern District of New York, Respondent pleaded guilty to one (1) count of Unlawful Wholesale Distribution of Prescription Drugs, in violation of Title 21 U.S.C. §353(e)(2)(B), a felony, and was sentenced to 1 day imprisonment, a special assessment of \$100.00, a \$15,000.00 fine, 2 years and 364 days of supervised release, and forfeiture of \$1,000,000.00.

SPECIFICATION

Respondent violated New York Education Law §6530(9)(a)(ii) by being convicted of committing an act constituting a crime under federal law, in that Petitioner charges:

1. The facts in Paragraph A.

DATED: *June 27*, 2012
Albany, New York

REDACTED

PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional Medical Conduct