



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
February 26, 1998

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

David W. Smith, Esq.
NYS Department of Health
Bureau of Professional Medical Conduct
5 Penn Plaza, Suite 601
New York, New York 10001

Mark Burke, M.D.
83-36 Beverly Road, Apt. #5B
Kew Gardens, New York 11415

Michael S. Kelton, Esq.
Lippman, Krasnow & Kelton, LLP
711 Third Avenue
New York, New York 10017-4059

RE: In the Matter of Mark Burke, M.D.

Dear Mr. Smith, Dr. Burke and Mr. Kelton:

Enclosed please find the Determination and Order (No. BPMC 98-42) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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.

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 cursive script that reads "Tyrone T. Butler" followed by a stylized flourish.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:lcc
Enclosure

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

COPY

**IN THE MATTER
OF
MARK BURKE, M.D.**

**DETERMINATION
AND
ORDER
BPMC - 98 - 42**

PATRICK CARONE, M.D., (Chair), DONALD CHERR, M.D. and DENNIS GARCIA, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to § 230(10) of the Public Health Law.

MARC P. ZYLBERBERG, ESQ., ADMINISTRATIVE LAW JUDGE, served as the Administrative Officer.

The Department of Health appeared by **DAVID W. SMITH, ESQ.**, Associate Counsel.

Respondent, **MARK BURKE, M.D.**, appeared personally and was represented by **LIPPMAN, KRASNOW & KELTON, LLP, MICHAEL S. KELTON, ESQ.**, of counsel.

A Hearing was held on February 10, 1998. Evidence was received and examined, including witnesses who were sworn or affirmed. A transcript of the proceeding was made. After consideration of the record, the Hearing Committee issues this Determination and Order, pursuant to the Public Health Law and the Education Law of the State of New York.

STATEMENT OF CASE

The State Board for Professional Medical Conduct is a duly authorized professional disciplinary agency of the State of New York (§ 230 et seq. of the Public Health Law of the State of New York ["P.H.L."]).

This case, brought pursuant to P.H.L. § 230(10)(p), is also referred to as an "expedited hearing". The scope of an expedited hearing is strictly limited to evidence or sworn testimony relating to the nature and severity of the penalty (if any) to be imposed on the licensee¹ (Respondent).

MARK BURKE, M.D., ("Respondent") is charged, by the Department of Health ("Petitioner" or "Department"), with professional misconduct within the meaning of § 6530(9)(b) of the Education Law of the State of New York ("Education Law"), to wit: professional misconduct by reason of having "been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state;" (Petitioner's Exhibit # 1 and § 6530[9][b] of the Education Law).

Respondent is also charged with professional misconduct within the meaning of § 6530(9)(d) of the Education Law, to wit: professional misconduct by having his "application for a license refused, ... by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the ...refusal ... of an application for a license ... would, if committed in New York state, constitute professional misconduct under the laws of New York state;" (Petitioner's Exhibit # 1 and § 6530[9][d] of the Education Law).

¹ P.H.L. § 230(10)(p), fifth sentence.

A copy of the Statement of Charges is attached to this Determination and Order as Appendix I.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. These facts represent evidence found persuasive by the Hearing Committee in arriving at a particular finding. All Findings and Conclusions herein were unanimous. The State, who has the burden of proof, was required to prove its case by a preponderance of the evidence. All Findings of Fact made by the Hearing Committee were established by at least a preponderance of the evidence.

1. Respondent was authorized to practice medicine in New York State on March 22, 1993 by the issuance of license number 191751 by the New York State Education Department (Petitioner's Exhibits # 1 & # 3)²; (Respondent's Exhibits # A); (Admitted).

2. Robert Ramsey attempted to personally serve on Respondent a Notice of Referral Proceeding and a Statement of Charges on at least 3 separate occasions in November 1997 (Petitioner's Exhibit # 1).

3. On November 25, 1997, Robert Matson mailed, by certified mail, a copy of a Notice of Referral Proceeding and a Statement of Charges to Respondent (Petitioner's Exhibit # 2).

4. The State Board For Professional Medical Conduct has obtained personal jurisdiction over Respondent (Respondent was timely served and had no objection to the service effected); (P.H.L. § 230[10][d]); (Petitioner's Exhibits # 1 & 2); [T-7]³.

² Refers to exhibits in evidence submitted by the New York State Department of Health (Petitioner's Exhibit) or exhibits submitted by Dr. Burke (Respondent's Exhibit).

³ Numbers in brackets refer to transcript page numbers [T-].

5. The Department of Professional Regulation, Board of Medicine of the State of Florida ("Florida Board") is a state agency charged with regulating the practice of medicine pursuant to the laws of the State of Florida (Petitioner's Exhibit # 4); (Respondent's Exhibit # A); (not disputed).

6. On October 27, 1993, the Florida Board issued a determination that denied and rejected Respondent's application for licensure in the State of Florida (Petitioner's Exhibit # 4); (Respondent's Exhibits # A & # B).

7. The relevant portion of the October 27, 1993 Florida Board Order ("1993 Florida Order") indicates that Respondent's application for licensure was denied because Respondent knowingly omitted to list a year of training from his application during which year, Respondent received less than a favorable evaluation (Petitioner's Exhibit # 4); (Respondent's Exhibits # A & # B).

8. The Hearing Committee only accepts that portion of the 1993 Florida Order which indicates that Respondent knowingly omitted to list a year of training from his application during which year Respondent received less than a favorable evaluation in a pathology residency from Jacoby Hospital (Petitioner's Exhibit # 4); (Respondent's Exhibits # B); [T-28 - 63, 30-32].

9. Respondent completed his medical school education and obtained a valid medical school diploma (Petitioner's Exhibits # 1 & # 3); [T-28 - 63].

10. Between 1984 and 1987 Respondent was unable to obtain employment in a medical position. During that period of time, Respondent helped his father to run his business and obtained proof of his medical education, credentials and graduation from the Centro de Estudios Tecnicos located in Santo Domingo in the Dominican Republic [T-29, 35-39, 58]

11. From July 1, 1983 through June 30, 1984 Respondent was enrolled in a pathology residency at Jacoby Hospital in Bronx, New York (Respondent's Exhibit # B); [T-30-34].

12. Respondent did not disclose to the Florida Board, in his licensure application, that he was enrolled in a pathology residency at Jacoby Hospital in Bronx, New York and that he received a less than favorable evaluation in that residency (Petitioner's Exhibit # 4), (Respondent's Exhibit # B); [T-43].

CONCLUSIONS OF LAW

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

The Hearing Committee concludes that the Factual Allegations (paragraph A), from the October 30, 1997 Statement of Charges, are SUSTAINED.

The Hearing Committee further concludes, based on the above Factual Conclusion, and all of the evidence presented, that the SECOND SPECIFICATION OF CHARGES in the Statement of Charges is SUSTAINED.

The Hearing Committee concludes that the Department of Health has shown by a preponderance of the evidence that Respondent's licensure application to the State of Florida was refused. The Hearing Committee also concludes that Respondent's professional conduct in the submission of an incomplete application which knowingly omitted a less than favorable evaluation in a pathology residency program would constitute professional misconduct under the laws of New York State. The Department of Health has met its burden of proof.

The Hearing Committee determines, based on the above Factual Conclusion, and all of the evidence presented, that the FIRST SPECIFICATION OF CHARGES in the Statement of Charges is NOT SUSTAINED.

The Department of Health has not shown by a preponderance of the evidence that Respondent was found guilty of improper professional practice or professional misconduct by the State of Florida. The 1993 Florida Order does not find Respondent guilty of improper professional practice. Nor does the 1993 Florida Order indicate that Respondent committed professional misconduct. The Department of Health has not met its burden of proof as to this Charge.⁴

I Professional Misconduct under § 6530(9)(d) of the Education Law.

The Florida Board is a duly authorized professional disciplinary agency. In October 1993, the Florida Board denied Respondent's application for licensure which he had made or finalized on April 2, 1993. The 1993 Florida Order contains facts and conclusions which provides reasons for the denial of Respondent's licensure application. The Hearing Committee only accepts that portion of the 1993 Florida Order which finds that Respondent knowingly omitted a year of training from his application during which Respondent received an unfavorable evaluation. The remainder of the 1993 Florida Order is contrary to findings made by the New York Department of Education and by the Hearing Committee in its review of other evidence submitted at the Hearing in New York.

⁴ In addition and separate from the Hearing Committee's factual determination, the administrative officer rules that the First Specification (§ 6530[9][b]) should be dismissed on legal grounds in that no evidence was presented to show that Respondent was found guilty of improper professional practice or professional misconduct by the Florida Board.

The Hearing Committee does find and determine that Respondent's conduct, in his submission of an intentionally incomplete license application in Florida, would, if committed in New York State, constitute professional misconduct under § 6530(2)⁵ of the Education Law of New York State.

Respondent knowingly submitted a license application to the Florida Board which concealed a known fact with the intent to mislead the Florida Board into granting his application without having all of the necessary information. This act, if committed in New York, would constitute fraud.

Respondent's testimony was assessed according to his training, experience, credentials, demeanor and credibility. Obviously Respondent had the greatest amount of interest in the results of these proceedings. With regard to the testimony presented by Respondent, the Hearing Committee notes the existence of admission of conduct, true repentance and shamefulness. The Hearing Committee finds Respondent's recounting of what occurred after his graduation from medical school to the date of the Hearing in New York to be consistent and believable. Respondent was not evasive in answering questions and showed continuing remorse for his omission from his Florida application. The Hearing Committee notes that Respondent did submit a letter of explanation and amendment to his New York application in a timely manner after his Florida experience. The Hearing Committee finds Respondent's testimony credible.

However, based on the evidence presented, including Respondent's admission, the Hearing Committee finds that Respondent's conduct in Florida, if committed in New York State, would constitute professional misconduct under the Education Law of New York. Therefore, Respondent has committed professional misconduct pursuant to § 6530(9)(d) of the Education Law.

⁵ Each of the following is professional misconduct... Practicing the profession fraudulently or beyond its authorized scope;

DETERMINATION

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, determines by a vote of 2 to 1 that Respondent's license to practice medicine in New York State should be submitted to the following sanctions:

1. Respondent should be placed on probation for a period of three (3) years from the effective date of this Determination & Order and must comply with the terms of probation contained in Appendix II, and

2. The period of probation should be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State.

This determination is reached after due and careful consideration of the full spectrum of penalties available pursuant to P.H.L. § 230-a, including:

(1) Censure and reprimand; (2) Suspension of the license, wholly or partially; (3) Limitations of the license; (4) Revocation of license; (5) Annulment of license or registration; (6) Limitations; (7) The imposition of monetary penalties; (8) A course of education or training; (9) Performance of public service; and (10) Probation.

The Hearing Committee discussed the above sanctions. The Department of Health did not provide a specific recommendation, but indicated that revocation was not recommended but that a "strong sanction" was requested. Two members of the Hearing Committee agree that a three year period of probation is a sufficiently strong sanction to impose on Respondent. This sanction will provide continuing awareness to Respondent for his action as well as deter the future conduct of others. Respondent will be required to disclose this finding of misconduct in future applications for employment and other similar applications. The third member of the Hearing Committee recommended a lesser sanction than probation.

The Hearing Committee does not believe that Respondent's act is indicative of a deficiency in his moral character. Rather, the Hearing Committee views Respondent's omission as bad judgment which manifests itself in personal choices. The Hearing Committee is more concerned with Respondent's apparent low self-esteem and personal self-destructive tendencies. A quick review of Respondent's professional career paths, actions and decisions are indicative of some underlying personal problems.

The Hearing Committee suggests but does not order that Respondent consider psychiatric evaluation and, if indicated, therapy for his self-destructive behavior and low self-esteem.

The Hearing Committee does acknowledge and specifically recognize that no medical or quality of care issues were alleged by the Department of Health in these proceedings. Respondent's present clinical competence is also not at issue.

Respondent has provided meaningful mitigation as to the sanctions to be imposed. Respondent has acknowledged his guilt and error. Respondent notified New York as soon as he understood his error. Respondent's explanations and testimony were consistent and believable. The Hearing Committee believes that Respondent's omission in the Florida application, as well as the same omission in the New York application (later corrected), is a one time event and not a pattern of behavior. The Hearing Committee also believes that Respondent has learned from his experience. The Hearing Committee does believe that a period of probation will be of value to Respondent and will sufficiently protect the public under the totality of the circumstances presented.

All other issues raised have been duly considered by the Hearing Committee and would not justify a change in the Findings, Conclusions or Determination contained herein.

By execution of this Determination and Order, all members of the Hearing Committee certify that they have read and considered the complete record of this proceeding.

ORDER

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

1. The Second Specification of professional misconduct contained within the Statement of Charges (Petitioner's Exhibit # 1) is **SUSTAINED**, and:
2. The First Specification of professional misconduct contained within the Statement of Charges (Petitioner's Exhibit # 1) is **DISMISSED**, and:
3. Respondent is placed on probation for a period of three (3) years from the effective date of this Determination and Order and must comply with the terms of probation contained in Appendix II, and:
4. Respondent's period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State, and:
5. This Determination and Order shall be effective as provided by Public Health Law § 230(10)(h).

DATED: New York, New York
February 23, 1998



**PATRICK CARONE, M.D., (Chair),
DONALD CHERR, M.D.
DENNIS GARCIA.**

MARK BURKE, M.D.
83-36 Beverly Road, Apt. # 5B
Kew Gardens, NY 11415

Lippman, Krasnow & Kelton, LLP,
Michael S. Kelton, Esq., of Counsel.
711 Third Avenue
New York, NY 10017-4059

David W. Smith, Esq.
Associate Counsel
New York State Department of Health
Bureau of Professional Medical Conduct
5 Penn Plaza, Suite 601
New York, NY 10001

APPENDIX I

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

IN THE MATTER
OF
MARK BURKE, M.D.

STATEMENT
OF
CHARGES

MARK BURKE, M.D., the Respondent, was authorized to practice medicine in New York State on or about March 22, 1993, by the issuance of license number 91751 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. On or about November 4, 1993, the Department of Professional Regulation, Board of Medicine ("Board"), State of Florida denied the application of licensure by endorsement of Respondent which otherwise would have permitted him to practice medicine in Florida. The Board found that Respondent had committed fraud in his licensure application because he had omitted to disclose a pathology internship from which he had been terminated. The Board also found that Respondent had not completed his medical education at Centro de Estudios (CETEC) in the Dominican Republic. (Subsequent investigation by the NYS Education Department, however, established that he had completed his education and the diploma was valid.)

SPECIFICATION OF CHARGES

FIRST SPECIFICATION

HAVING BEEN FOUND GUILTY OF PROFESSIONAL MISCONDUCT

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(9)(b)(McKinney Supp. 1997) by having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York State, constitute professional misconduct under the laws of New York State (namely N.Y. Educ. Law §§ 6530(2) - practicing the profession fraudulently; and 6530(21) - willfully filing a false report) as alleged in the facts of the following:

1. Paragraph A.

SECOND SPECIFICATION

HAVING HIS APPLICATION FOR A LICENSE REFUSED

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(9)(d)(McKinney Supp. 1997) by having his or her license to practice medicine revoked, suspended or having other disciplinary action taken, or having his or her application for a license refused, revoked or suspended or having voluntarily or otherwise surrendered his or her license after a disciplinary action was

instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation, suspension or other disciplinary action involving the license or refusal, revocation or suspension of an application for a license or the surrender of the license would, if committed in New York state, constitute professional misconduct under the laws of New York state (namely N.Y. Educ. Law §6530(2) - practicing the profession fraudulently; and §6530(21) - willfully filing a false report) as alleged in the facts of the following:

2. Paragraph A.

DATED: October 30, 1997
New York, New York



ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct

APPENDIX II

TERMS AND CONDITIONS OF PROBATION

1. Respondent shall conduct himself in all ways in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his profession.

2. Respondent shall submit written notification to the New York State Department of Health addressed to the Director, Office of Professional Medical Conduct (OPMC), Hedley Park Place, 433 River Street, Troy, New York 12180; said notice is to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.

3. Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of Respondent's compliance with the terms of this Order. Respondent shall personally meet with a person designated by the Director of OPMC as requested by the Director.

4. The period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. 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. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled on Respondent's return to practice in New York State.

5. Respondent's professional performance may be reviewed by the Director of OPMC. This review may include, but shall not be limited to, a review of office records, patient records and/or hospital charts, interviews with or periodic visits with Respondent and his staff at practice locations or OPMC offices.

6. Respondent shall maintain legible and complete medical records which accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations regarding controlled substances.

7. Respondent shall comply with all terms, conditions, restrictions, limitations and penalties to which he is subject pursuant to the Order and shall assume and bear all costs related to compliance. On receipt of evidence of noncompliance with, or any violation of these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding and/or any such other proceeding against Respondent as may be authorized pursuant to the law.