

**NEW YORK**  
state department of  
**HEALTH**

Public

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

Sue Kelly  
Executive Deputy Commissioner

June 3, 2013

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

David Granoff, D.O.  
REDACTED

Jude B. Mulvey, Esq.  
NYS Department of Health  
ESP-Corning Tower-Room 2512  
Albany, New York 12237-0032

Timothy J. Fennell, Esq.  
Amdursky, Pelky, Fennell & Wallen, P.C.  
26 East Oneida Street  
Oswego, New York 13126

**RE: In the Matter of David Granoff, D.O.**

Dear Parties:

Enclosed please find the Determination and Order (No. 13-160) 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.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), (McKinney Supp. 2013) and §230-c subdivisions 1 through 5, (McKinney Supp. 2013), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the Respondent or the Department may seek a review of a committee determination.

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

COPY

-----X  
IN THE MATTER : DETERMINATION  
: :  
OF : AND  
: :  
DAVID GRANOFF, D.O. : ORDER  
-----X

BPMC #13-160

A Notice of Hearing and Statement of Charges, both dated January 16, 2013 were served upon DAVID GRANOFF, D.O., Respondent. TREVOR A. LITCHMORE, M.D., Chairperson, JOSE M. DAVID, M.D. and IRVING S. CAPLAN, 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. CHRISTINE C. TRASKOS, ESQ., ADMINISTRATIVE LAW JUDGE, served as the Administrative Officer.

The Department of Health ("the Department") appeared by JAMES DERING, General Counsel, by JUDE B. MULVEY, ESQ., of Counsel. The Respondent appeared by AMDURSKY, PELKY, FENNELL & WALLEN, P.C., TIMOTHY J. FENNELL, ESQ. of Counsel. 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.

PROCEDURAL HISTORY

Pre-Hearing Conference: February 26 2013  
Hearing Date: March 6, 2013  
Witnesses for Petitioner: Annette Palk  
Ruth Hart, M.D.  
Janet Robens  
Witnesses for Respondent: Michael Nupuf, M.D.  
David Granoff, D.O.  
Submission of briefs: April 22, 2013  
Deliberation Held: May 2, 2013

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 [hereinafter "P.H.L."]).

This case was brought by the New York State Department of Health, Office of Professional Medical Conduct (hereinafter "Petitioner" or "Department") pursuant to §230 of the P.H.L. David Granoff, D.O. ("Respondent") is charged with One (1) specification of professional misconduct, as defined in §6530 of the Education Law of the State of New York ("Education Law"). Respondent is charged with practicing the profession of medicine while his license is suspended

or inactive. A copy of the Notice of Hearing and Statement of Charges is attached to this Determination and Order as Appendix I. The Respondent filed a timely Answer and denies the factual allegations and specification of misconduct contained in the Statement of Charges.

#### FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Unless otherwise noted, all findings and conclusions set forth below are the unanimous determinations of the Hearing Committee. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence. Numbers below in parentheses refer to exhibits (denoted by the prefix "Ex.") or transcript page numbers ("T."). These citations refer to evidence found persuasive by the Hearing Committee in arriving at a particular finding. Having heard testimony and considered documentary evidence presented by the Petitioner and Respondent, the Hearing Committee hereby makes the following findings of fact:

1. Respondent was authorized to practice medicine in New York State on January 10, 2003, by the issuance of license number 230819 by the New York State Education Department. (Dept. Ex.3)
2. Respondent was convicted of Driving Under the Influence of Alcohol ("DUI") in Pennsylvania in January 2007. (T.165)
3. Following this conviction, Respondent temporarily surrendered

his license to practice medicine to the New York State Board of Professional Medical Conduct ("BPMC") on January 10, 2008, admitting that he was "presently incapacitated for the active practice of medicine due to alcohol abuse." (Dept. Ex.6)

4. Respondent approached Dr. Michael Nupuf, an internist in private practice, for assistance to complete the community service requirement resulting from the Pennsylvania DUI conviction. (T.118,169) Dr. Nupuf agreed to set up a community service project.

5. On March 27, 2009, Dr. Nupuf sent a letter regarding the completion of the community service project. (Dept. Ex. 7; T. 119) Sometime thereafter, Respondent's Pennsylvania DUI conviction was expunged. (Dept. Ex. 7; T. 119; Dept. Ex. 13)

6. Respondent subsequently sought restoration of his New York medical license. A Modification and Restoration Proceeding was held before a Hearing Committee at the Syracuse regional office on July 6, 2011. (Dept. Ex. 4)

7. The Restoration Hearing Committee issued a decision dated October 25, 2011. The Committee denied the request for restoration and further stated that suspension of the Respondent Licensee's medical license shall not be stayed at this time. The Restoration Hearing Committee determined that Respondent did not present sufficient documentation and testimony evidence to show that he is no

longer incapacitated for the active practice of medicine and that he is clinically competent to resume the active practice of medicine.

8. The Restoration Hearing Committee also raised concerns about the conflicting testimony given by the Respondent Licensee and Dr. Michael Nupuf regarding the Respondent Licensee's activities at Oswego Hospital in 2009. Dr. Nupuf's letter, dated March 27, 2009, (Dept. Ex. 7) stated that the Respondent Licensee had conducted 30 examinations of patients and made recommendations regarding further testing or evaluations. Dr. Nupuf confirmed this information at the Restoration proceeding. The Respondent Licensee, however, testified that his role was merely observational and that he did not have any actual contact with the patients. The Restoration Hearing Committee requested that this discrepancy be investigated by the Office of Professional Medical Conduct ("OPMC") because in 2009 the Respondent's temporary surrender of his license was in effect. (Dept. Ex. 5)

9. On February 23, 2012, Michael Nupuf, M.D. was interviewed by OPMC. He was questioned about the March 27, 2009 letter as well as his testimony at Respondent's Restoration hearing. (Dept. Ex. 10)

#### CONCLUSIONS OF LAW

Respondent is charged with one specification alleging professional misconduct within the meaning of Education Law §6530. The rationale for the Committee's conclusions regarding the

specification of misconduct is set forth below.

At the outset of the deliberations, the Hearing Committee made a determination as to the credibility of all witnesses presented by the parties. The Committee must determine the credibility of the witnesses in weighing each witness's testimony. First, the Hearing Committee must consider whether the testimony is supported or contradicted by other independent objective evidence. When the evidence is conflicting and presents a clear-cut issue as to the veracity of the opposing witnesses, it is for the Hearing Committee to pass on the credibility of the witnesses and base its inference on what it accepts as the truth. Where a witness's credibility is at issue, the Committee may properly credit one portion of the witness's testimony and, at the same time reject another. The Hearing Committee also understood that they had the option of completely rejecting the testimony of a witness where they found that the witness testified falsely on a material issue.

With regard to the testimony presented, the Hearing Committee evaluated all witnesses for possible bias or motive. The witnesses were also assessed according to their training, experience, credential and demeanor.

The Department offered the testimony of Annette Palk, Supervising Professional Medical Conduct Investigator. Ms. Palk works in the physician monitoring program and also attended Respondent's

2011 Restoration hearing. The Department also offered the testimony of Janet Robens, another OPMC investigator, who interviewed Dr. Nupuf after the Restoration hearing. The Hearing Committee found both witnesses to be credible, however, their testimony was not helpful in resolving the Charge against Respondent.

The Department also offered the testimony via SKYPE of Ruth Hart, M.D., FAAFP, FACEP, who is board certified in family and emergency medicine. Dr. Hart is presently an associate professor at SUNY Upstate Medical University and Medical Coordinator for the Office of Professional Medical Conduct (OPMC) in Syracuse, New York. Dr. Hart was asked three different hypothetical questions concerning the definition of the practice of medicine. The Hearing Committee found Dr. Hart to have extensive teaching and emergency room experience. However, a majority of the Hearing Committee found that Dr. Hart's testimony failed to clearly establish a useful definition for the practice of medicine as it applies to this case. It is noted that on cross examination Dr. Hart engaged in repeated verbal fencing with Respondent's counsel over the meaning of "patient". (T. 39-41) As a result, a majority of the Hearing Committee gave Dr. Hart's testimony little weight to support the charge against Respondent. The other member of the Hearing Committee dissented in this finding.

Respondent offered the testimony of Michael Nupuf, M.D. Dr. Nupuf is board certified in internal medicine. He presently has

courtesy privileges at Oswego Hospital and is a Clinical Associate Professor at Upstate Medical University. Although Dr. Nupuf was deemed an accomplished and experienced physician, a majority of the Hearing Committee disqualified Dr. Nupuf as a credible witness because of the inconsistencies between his statements at the Restoration hearing and his testimony before this Committee. The dissenting member found Dr. Nupuf's testimony credible because he believed that Dr. Nupuf voluntarily came in to clear up the record about the community service project that he created on behalf of the Respondent.

Respondent also took the stand on his own behalf. The Hearing Committee unanimously disqualifies Respondent for his inconsistent statements. Respondent told the Restoration Committee that it was an observational community service project and that he watched Dr. Nupuf with his rounds. (Ex. 4, p. 84) Respondent told this Hearing Committee that he misspoke at the Restoration. Respondent testified that he did not make any rounds with Dr. Nupuf. Respondent said that he had no contact with any of the patients and held only "dialogue-like discussions" with Dr. Nupuf. (T. 178-179). The Hearing Committee notes that Respondent assigned blame to Dr. Nupuf when he stated that he is not responsible for what Dr. Nupuf wrote and not responsible for what Dr. Nupuf implied. (T. 179) As a result, Respondent's testimony was deemed not credible.

**Factual Allegations**

Based upon the Findings of Fact and Conclusions set forth above, the Hearing Committee makes the following determinations regarding the factual allegations contained in the Statement of Charges:

Paragraph A and A.1	Sustained
Paragraph B	Not Sustained (vote 2 to 1)
Paragraph C	Sustained

**DISCUSSION**

While the testimony of Respondent and his witness were disqualified for their inconsistencies, a majority of the Hearing Committee finds that the testimony of the three Department witnesses failed to carry the burden of proof to sustain the Charge of misconduct. The majority finds that there is insufficient proof in the record to establish that Respondent actively treated patients while his license was surrendered in 2009. We find that there is insufficient proof to establish by a preponderance of the evidence that Respondent touched, treated, made medical notations or consulted with Dr. Nupuf about 30 medical patients. The majority further notes that no witnesses were produced that placed Respondent and Dr. Nupuf working together in Oswego Hospital, a small community facility.

At a minimum, Respondent and Dr. Nupuf admitted to having

"dialogue-like discussions" about general medical issues outside of the hospital. The majority notes that it is quite common for internists to nourish their knowledge of specialty issues by asking questions of a colleague. Even Dr. Hart conceded that a lunchtime conversation by two physicians about the practice of medicine absent a specific patient and symptoms would not constitute the practice of medicine (T. 51-52, 55) As a result, the majority of the Hearing Committee does not sustain the First Specification.

#### DETERMINATION AS TO PENALTY

After a full and complete review of all of the evidence presented and pursuant to the Findings of Fact, Conclusions of Law and Discussion set forth above, the Hearing Committee by majority vote, has determined that the specification of misconduct shall be dismissed.

The Charge is not sustained by the majority because the evidence in the record fell short of the Department's burden of proof. Respondent should not take this as an exoneration of his actions. Respondent's muddled testimony before this Hearing Committee raised many concerns. Respondent demonstrated an inability to accept responsibility for the confusion surrounding the community service project and he blamed Dr. Nupuf for the consequences.

The Hearing Committee reiterates that Respondent's license

to practice medicine is not restored as a result of this proceeding. The suspension of his license remains in full force in effect. Respondent, however, is not precluded from seeking license restoration and a stay of his suspension at some future date.

ORDER

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

1. The First Specification of professional misconduct, as set forth in the Statement of Charges is NOT SUSTAINED; and
2. No further penalty is assessed against Respondent's license to practice medicine in the State of New York other than the EXISTING TEMPORARY SURRENDER AND SUSPENSION; and
3. This Determination and Order shall be effective on personal service on Respondent or seven (7) days after the date of mailing of a copy to Respondent by certified mail or as provided by P.H.L. Section 230(10)(h).

DATED: Schenectady, New York  
2013

REDACTED

TREVOR A. LITCHMORE, M.D. (CHAIR)

JOSE M. DAVID, M.D.  
IRVING S. CAPLAN

TO: David Granoff, D.O.  
REDACTED

Jude B. Mulvey, Esq.  
Associate Counsel  
New York State Department of Health  
Bureau of Professional Medical Conduct  
Empire State Plaza  
Corning Tower, Room 2512  
Albany, New York 12237-0032

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Amdursky, Pelky, Fennell & Wallen, P.C.  
26 East Oneida Street  
Oswego, New York 13126

# APPENDIX I

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

IN THE MATTER  
OF  
DAVID GRANOFF, D.O.

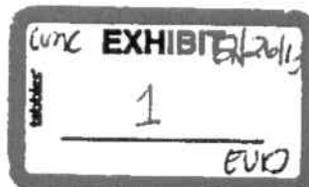
NOTICE  
OF  
HEARING

TO: David Granoff, D.O.  
REDACTED

PLEASE TAKE NOTICE:

A hearing will be held pursuant to the provisions of N.Y. Pub. Health Law §230 and N.Y. State Admin. Proc. Act §§301-307 and 401. The hearing will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct on March 5, 2013, at 10:00 a.m., at the Offices of the New York State Department of Health, Riverview Center, 150 Broadway, Suite 510, Albany, New York 12204-2719 and at such other adjourned dates, times and places as the committee may direct.

At the hearing, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the hearing will be made and the witnesses at the hearing will be sworn and examined. You shall appear in person at the hearing and may be represented by counsel who shall be an attorney admitted to practice in New York state. You have the right to produce witnesses and evidence on your behalf, to issue or have subpoenas issued on your behalf in order to require the production of witnesses and documents, and you may cross-examine witnesses and examine evidence produced against you. A summary of the Department of Health Hearing Rules is enclosed.



YOU ARE HEREBY ADVISED THAT THE ATTACHED CHARGES WILL BE MADE PUBLIC FIVE BUSINESS DAYS AFTER THEY ARE SERVED.

Department attorney: Initial here Jam

The hearing will proceed whether or not you appear at the hearing. Please note that requests for adjournments must be made in writing and by telephone to the New York State Department of Health, Division of Legal Affairs, Bureau of Adjudication, Riverview Center, 150 Broadway - Suite 510, Albany, NY 12204-2719, ATTENTION: HON. JAMES HORAN, ACTING DIRECTOR, BUREAU OF ADJUDICATION, (henceforth "Bureau of Adjudication"), (Telephone: (518-402-0748), upon notice to the attorney for the Department of Health whose name appears below, and at least five days prior to the scheduled hearing date. Adjournment requests are not routinely granted as scheduled dates are considered dates certain. Claims of court engagement will require detailed Affidavits of Actual Engagement. Claims of illness will require medical documentation.

Pursuant to the provisions of N.Y. Pub. Health Law §230(10)(c), you shall file a written answer to each of the charges and allegations in the Statement of Charges not less than ten days prior to the date of the hearing. Any charge or allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such answer. The answer shall be filed with the Bureau of Adjudication, at the address indicated above, and a copy shall be forwarded to the attorney for the Department of Health whose name appears below. Pursuant to §301(5) of the State Administrative Procedure Act, the Department, upon reasonable notice, will provide at no charge a qualified interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person. Pursuant to the terms of N.Y. State Admin. Proc. Act §401 and 10 N.Y.C.R.R. §51.8(b), the Petitioner

hereby demands disclosure of the evidence that the Respondent intends to introduce at the hearing, including the names of witnesses, a list of and copies of documentary evidence and a description of physical or other evidence which cannot be photocopied.

At the conclusion of the hearing, the committee shall make findings of fact, conclusions concerning the charges sustained or dismissed, and in the event any of the charges are sustained, a determination of the penalty to be imposed or appropriate action to be taken. Such determination may be reviewed by the Administrative Review Board for Professional Medical Conduct.

THESE PROCEEDINGS MAY RESULT IN A DETERMINATION THAT YOUR LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE BE REVOKED OR SUSPENDED, AND/OR THAT YOU BE FINED OR SUBJECT TO OTHER SANCTIONS SET OUT IN NEW YORK PUBLIC HEALTH LAW §§230-a. YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATE Jan. 16, 2013

Albany, NY

REDACTED

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

Inquiries should be directed to:  
Associate Counsel  
Bureau of Professional Medical Conduct

IN THE MATTER  
OF  
DAVID GRANOFF, D.O.

STATEMENT  
OF  
CHARGES

DAVID GRANOFF, D.O., the Respondent, was authorized to practice medicine in New York State on or about December 19, 2003, by the issuance of license number 230819 by the New York State Education Department.

**FACTUAL ALLEGATIONS**

- A. Respondent temporarily surrendered his license to practice medicine to the New York State Board for Professional Medical Conduct ("BPMC") on or about January 10, 2008 due to his incapacitation for the active practice of medicine from alcohol abuse. Respondent specifically acknowledged the following:
1. I understand that unless and until my license is restored to me, my licensure status is "inactive" and I am not authorized to practice medicine. I further understand that if I practice medicine anywhere while my license is "inactive", this shall constitute a violation of New York Education Law §6530 (12).
  - B. Respondent, sometime in the spring of 2009 while his medical license remained temporarily surrendered, practiced medicine near or in the vicinity of Oswego, New York by providing care to approximately thirty patients and/or by providing consultation services to another physician.
  - C. By written memorandum dated October 25, 2011, Respondent's request for restoration of his medical license was denied by a BPMC Committee after

receiving evidence and hearing testimony. The Committee determined, among others, that Respondent did not present sufficient documentation and testimony to show that he is no longer incapacitated for the active practice of medicine and that he is clinically competent to resume the active practice of medicine.

### SPECIFICATION OF MISCONDUCT

Respondent is charged with committing professional misconduct as defined in New York Education Law §6530(12) by practicing the profession of medicine while his license is suspended or inactive, in that Petitioner charges:

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

DATE: January 16, 2013  
Albany, New York

REDACTED

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Peter D. Van Buren  
Deputy Counsel  
Bureau of Professional Medical Conduct