

**DOH 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

December 23, 1997

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Kathleen Wasson, Esq.
David W. Smith, Esq.
NYS Department of Health
5 Penn Plaza - Sixth Floor
New York, New York 10001

Barbara A. Ryan, Esq.
Aaronson, Rappaport, Feinstein
& Deutsh, LLP
757 3rd Avenue
New York, New York 10017

Richard Swerdlik, M.D.
Otisville Correctional Facility
P.O. Box 1000
Otisville, New York 10963

RE: In the Matter of Richard Swerdlik, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 97-305) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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 black ink that reads "Tyrone T. Butler". The signature is written in a cursive style with a large initial "T" and a long horizontal stroke at the end.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm
Enclosure

COPY

IN THE MATTER

-OF-

RICHARD SWERDLIK, M.D.

DECISION

AND

ORDER

OF THE

HEARING

COMMITTEE

BPMC ORDER

NO. 97 - 305

This matter was commenced by a Notice of Hearing and Statement of Charges, both dated July 16, 1997 which were served upon RICHARD SWERDLIK, M.D., (hereinafter referred to as "Respondent"). STANLEY GITLOW, M.D., Chairperson, STEVEN M. LAPIDUS, M.D., and MICHAEL A. GONZALEZ, RPA., 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. JONATHAN M. BRANDES, ESQ., Administrative Law Judge, served as the Administrative Officer. A hearing was held on November 10, 1997 at Five Penn Plaza, New York, New York. The State Board For Professional Medical Conduct (hereinafter referred to as "Petitioner") appeared by HENRY M. GREENBERG, ESQ., General Counsel, by KATHLEEN WASSON, ESQ., Senior Attorney and DAVID W. SMITH, ESQ., Associate Counsel, Bureau of Professional Medical Conduct. Respondent did not appear in person however he did appear by Aaronson, Rappaport, Feinstein &Deutsch, LLP, BARBARA A. RYAN, ESQ., of counsel. Evidence was received. A transcript of these proceedings was made.

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

PRELIMINARY STATEMENT

This case was brought pursuant to Public Health Law Section 230(10)(p). This statute provides for an expedited hearing where a licensee is charged solely with a violation of Section 6530(9) of the Education Law. In such cases, a licensee is charged with misconduct based upon prior professional disciplinary action or criminal conviction. The scope of this expedited hearing is limited to a determination of the nature and severity of the penalty to be imposed by this state upon the licensee based solely upon the record of the previous conviction or discipline.

In the instant case, Respondent is charged with professional misconduct pursuant to the New York State Education Law, Section 6530 (9)(a)(ii) (having been convicted of a crime under federal law). The allegations in this proceeding and the underlying events are more particularly set forth in the Notice of Referral Proceeding and Statement of Charges, a copy of which is attached to this Decision and Order as Appendix One.

FINDINGS OF FACT

The Committee adopts the factual statements set forth on page one of the Statement of Charges (Appendix One) as its findings of fact and incorporates them herein.

CONCLUSIONS
WITH REGARD TO
FACTUAL ALLEGATIONS
SPECIFICATIONS
AND
PENALTY

Petitioner herein has proven by a preponderance of the evidence that Respondent plead guilty to a crime under federal law. Therefore, the Factual Allegations and Specifications in this proceeding are sustained. The Committee now turns its attention to what penalty to impose.

Despite the best efforts of his attorney, Respondent was unable to be present at this proceeding in person. He is currently incarcerated at the federal correctional facility in Otisville, New York. However, Respondent's wife did appear in his behalf. She did not testify as a witness¹.

This Respondent does not deny that he committed a federal crime. Rather, he asks for leniency based upon the quality of his medical work and the gentility of his nature. The committee has reviewed all the documents submitted, the testimony of the character witnesses as well as the arguments of counsel. The description of Respondent as a caring, gentle, loving physician who was selected by other physicians when they needed medical services was considered by the Committee as well. The Committee was impressed that Respondent has six children and a wife to support.

The Committee expresses concern that this matter was brought while Respondent is incarcerated. It is the opinion of this Committee that this proceeding is premature in that Respondent presumably cannot practice medicine while in prison. If he can practice medicine while in prison, he would be practicing within a criminal community and thus not pose a threat to the

¹Counsel for Respondent offered a virtually limitless number of character witnesses and character affidavits. It was the ruling of the Administrative Officer that two witnesses would be allowed to testify and three affidavits would be received in evidence. The purpose of this ruling was to maintain the decorum of the proceedings. The Committee was informed that a large number of other people had a significant interest in this matter and would presumably have testified to the excellence of Respondent's character. This information was considered by the Committee during deliberations.

health of the general public. Of greater significance is the belief of the Committee that it was denied the opportunity to confer with Respondent. The Committee would have felt better prepared to render judgment had the members been able to hear Respondent's own voice as they explored Respondent's motivation for stealing in excess of 2.5 million dollars from the Medicaid program. The Committee is of the belief that by understanding Respondent's reasons for being a thief, they would be better prepared to mete out an appropriate penalty. Furthermore, a direct interview of Respondent would have permitted the Committee an opportunity to examine Respondent's future plans and penitence.

It is the opinion of this Committee that society places enormous trust in physicians. While Respondent has violated that trust, there is evidence Respondent functioned well as a clinical physician. Patients and colleagues continue to have the utmost faith in the quality of his care. The Committee takes notice that but for his lack of scruples and honesty, Respondent seems to have been a fine physician and a loving father to his children. The Committee notes that Respondent and his family will continue to suffer even at the completion of his sentence. He is a felon. He will have been absent from his children for years. Nothing in his life will ever be the same. Society has an enormous investment in this man. If, as in this case, society has reason to believe he will not steal again, it is the role of this body as representatives of society, to put him back to work, especially as in this case where the physician always did his patient care well.

Therefore, the license of Respondent to practice medicine in this state shall be suspended during the period of Respondent's incarceration. The period of suspension should serve to express the opinion of the Committee that theft cannot be countenanced. Upon fulfilling the custodial part of Respondent's sentence, he shall be allowed to resume practice in this state. This is intended to allow Respondent to practice medicine while on parole, probation or in a "half way" program prior to actual release. However, Respondent shall have a permanent limitation placed on his license. He shall be permitted solely to practice anesthesia. Since all future contingencies cannot be

foreseen, the Committee notes that Respondent, by virtue of the limitation on his license will be limited to practicing medicine in an institution where he can be watched. Furthermore, since Respondent is under an order of restitution, it is the intention of the Committee that Respondent be allowed to practice medicine in this state while still fulfilling part of his sentence.

ORDER

WHEREFORE, Based upon the preceding facts and conclusions,

It is hereby **ORDERED** that:

1. The Factual allegations in the Statement of Charges (Appendix One) are **SUSTAINED**;

Furthermore, it is hereby **ORDERED** that;

2. The Specifications of Misconduct contained within the Statement of Charges (Appendix One) are **SUSTAINED**;

Furthermore, it is hereby **ORDERED** that;

3. The license of Respondent to practice medicine in the state of New York is hereby **SUSPENDED**;

Furthermore, it is hereby **ORDERED** that;

4. The said suspension shall be lifted upon Respondent's release from incarceration;

Furthermore, it is hereby **ORDERED** that;

5. Nothing set forth in this Order shall be construed to prohibit Respondent from practicing medicine upon his release from full time incarceration; Nor should it be construed to prohibit Respondent from practicing medicine while on parole, on probation or in part-time custody;

Furthermore, it is hereby **ORDERED** that;

6. This order shall take effect **UPON RECEIPT or SEVEN (7) DAYS** after mailing of this order by Certified Mail.

Dated:
New York, New York

Dec 8 1997



STANLEY GITLOW, M.D., Chairperson

STEVEN M. LAPIDUS, M.D.,
MICHAEL A. GONZALEZ, RPA.

TO:

KATHLEEN WASSON, ESQ., Senior Attorney
DAVID W. SMITH, ESQ., Associate Counsel,
Bureau of Professional Medical Conduct
5 Penn Plaza
New York, NY 10001

BARBARA A. RYAN, ESQ.
Aaronson, Rappaport, Feinstein & Deutsch,
LLP

RICHARD SWERDLIK, M.D.
Otisville Correctional Facility
P.O. Box 8
Otisville New York 10963

APPENDIX ONE

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

IN THE MATTER
OF
RICHARD SWERDLIK, M.D.

NOTICE OF
REFERRAL
PROCEEDING

TO: Richard Swerdlik, M.D.
Otisville Correctional Facility
P.O. Box 8
Otisville, New York 10963

PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of N.Y. Pub. Health Law §§230(10)(p) (McKinney Supp. 1997) and N.Y. State Admin. Proc. Act §§301-307 and 401 (McKinney 1984 and Supp. 1997). The proceeding will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct (Committee) on September 9, 1997, at 10:00 a.m., at the offices of the New York State Department of Health, 5 Penn Plaza, Sixth Floor, New York, New York 10001.

At the proceeding, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the proceeding will be made and the witnesses at the proceeding will be sworn and examined.

You may appear in person at the proceeding and may be represented by counsel. You may produce evidence or sworn testimony on your behalf. Such evidence or sworn testimony shall be strictly limited to evidence and testimony relating to the nature and severity of the penalty to be imposed upon the licensee. Where the charges are based on the conviction of state law crimes in other jurisdictions, evidence may be offered which would show that the conviction would not be a crime in New York State. The Committee also may limit the number of

witnesses whose testimony will be received, as well as the length of time any witness will be permitted to testify.

If you intend to present sworn testimony, the number of witnesses and an estimate of the time necessary for their direct examination must be submitted to the New York State Department of Health, Division of Legal Affairs, Bureau of Adjudication, Hedley Park Place, 433 River Street, Fifth Floor South, Troy, NY 12180, ATTENTION: HON. TYRONE BUTLER, DIRECTOR, BUREAU OF ADJUDICATION (Telephone: (518-402-0748), (henceforth "Bureau of Adjudication") as well as the Department of Health attorney indicated below, no later than twenty days prior to the scheduled date of the Referral Proceeding, as indicated above.

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. You may file a written brief and affidavits with the Committee. Six copies of all papers you submit must be filed with the Bureau of Adjudication at the address indicated above, no later than fourteen days prior to the scheduled date of the Referral Proceeding, and a copy of all papers must be served on the same date on the Department of Health attorney indicated 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 (McKinney Supp. 1997) 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.

The proceeding may be held whether or not you appear. Please note that requests for adjournments must be made in writing to the Bureau of Adjudication, at the address indicated above, with a copy of the request to the attorney for the Department of Health, whose name appears below, at least five days prior to the scheduled date of the proceeding. Adjournment requests are not routinely granted. Claims of court engagement will require detailed affidavits of actual engagement. Claims of illness will require medical documentation. Failure to obtain an attorney within a reasonable period of time prior to the proceeding will not be grounds for an adjournment.

The Committee will make a written report of its findings, conclusions as to guilt, and a determination. Such determination may be reviewed by the administrative review board for professional medical conduct.

SINCE THESE PROCEEDINGS MAY RESULT IN A DETERMINATION THAT SUSPENDS OR REVOKES YOUR LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE AND/OR IMPOSES A FINE FOR EACH OFFENSE CHARGED, YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: New York, New York
July, 76 1997



ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct

Inquiries should be addressed to:

DAVID W. SMITH
Associate Counsel
NYS Department of Health
Division of Legal Affairs
5 Penn Plaza, Suite 601
New York, New York 10001
(212) 613-2617

IN THE MATTER
OF
RICHARD SWERDLIK, M.D.

STATEMENT
OF
CHARGES

RICHARD SWERDLIK, M.D., the Respondent, was authorized to practice medicine in New York State on or about July 2, 1986, by the issuance of license number 166777 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. On or about May 20, 1996, during trial in the United States District Court for the Southern District of New York, Respondent pleaded guilty to one count of conspiracy to commit mail fraud (18 U.S.C.A. §371) and nine counts of mail fraud (18 U.S.C.A. 1341) in connection with his participation in the Medicaid program. The total dollar amount by which Medicaid was defrauded was in excess of \$2.5 million.
1. Respondent was sentenced to 46 months in prison and ordered to pay in excess of \$289,000.00 in restitution.
 2. Upon his release from prison he was ordered on 3 years of supervised release and the performance of 150 hours of community service.

SPECIFICATION

SPECIFICATION

CRIMINAL CONVICTION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(9)(a)(ii)(McKinney Supp. 1997) by having been convicted of committing an act constituting a crime under federal law as alleged in the facts of the following:

1. Paragraphs A and A1-2.

DATED: July 16, 1997
New York, New York



ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct