



STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Antonia C. Novello, M.D., M.P.H., Dr.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

January 28, 2002

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Diane Abeloff, Esq.
NYS Department of Health
5 Penn Plaza – 6th Floor
New York, New York 10001

T. Lawrence Tabak, Esq.
Kern, Augustine, Conroy & Schoppmann,
P.C.
420 Lakeville Road
Lake Success, New York 11042

Moshe Ostad, M.D.
62-59 108th Street
Forest Hills, New York 11375

RE: In the Matter of Moshe Ostad, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 02-42) 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.

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.

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, appearing to read "Tyrone T. Butler". The signature is written in a cursive style with a large initial 'T'.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:cah
Enclosure

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

COPY

-----X
IN THE MATTER : HEARING COMMITTEE
OF : DETERMINATION
MOSHE OSTAD, M.D. : AND ORDER
-----X

BPMC #02-42

Eleanor Kane, M.D., Chairperson, Sheldon H. Putterman, M.D. and Kenneth Kowald, duly designated members of the State Board of Professional Medical Conduct, appointed by the Commissioner of Health of the State of New York pursuant to Section 230 (1) of the Public Health Law, served as the Hearing Committee in this matter pursuant to Sections 230 (10) (e) and 230 (12) of the Public Health Law. Stephen Bermas, Esq., Administrative Law Judge, served as Administrative Officer for the Hearing Committee.

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

SUMMARY OF THE PROCEEDINGS

Notice of Hearing dated: July 31, 2001
Statement of Charges dated: July 31, 2001
Hearing Dates: October 12 and November 27, 2001
Deliberation Date: January 4, 2002
Place of Hearing: NYS Department of Health
5 Penn Plaza
New York, New York
Petitioner Appeared By: Courtney Berry, Esq.
Associate Counsel
Diane Abeloff, Esq.
Associate Counsel
Bureau of Professional Medical Conduct
NYS Department of Health
Respondent Appeared By: Kern Augustine Conroy & Schoppmann, P.C.
By T. Lawrence Tabak, Esq.

One of the Hearing Committee members, Dr. Sheldon Putterman, was not present for a portion of the hearing held on November 27, 2001, but he read and considered the transcript of proceedings of and the evidence received at such hearing date prior to the deliberations of the Hearing Committee on January 4, 2002. See Appendix A.

STATEMENT OF CHARGES

The Statement of Charges has been marked as Petitioner's Exhibit 1 and attached hereto as Appendix B.

FINDINGS OF FACT

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 cited evidence. All Findings are unanimous except as specifically indicated.

PROPOSED FINDINGS OF FACT

General Findings

1. Dr. Ostad has been a board-certified physician licensed to practice medicine in the State of New York since on or about August 1, 1972. (Ex. 1, F).
2. Dr. Ostad maintains a private practice in Queens, New York, where he practices family medicine. (Tr. 274).

Procedural Findings

3. In or about June 1999, the OPMC requested the medical record for Patient A. Dr. Ostad promptly complied with the OPMC's request and forwarded his chart for Patient A. (Ex. 3).

4. On December 8, 1999, Dr. Ostad was interviewed by the OPMC regarding his care of Patient A. (Tr. 209).

5. On or about April 6, 2000, an Investigation Committee ("IC") was convened to decide the disposition of the matter pending against Dr. Ostad regarding his care and treatment of Patient A.

6. At the April 6, 2000 IC meeting, the IC authorized the issuance of a comprehensive medical review ("CMR") of Dr. Ostad's records. Consistent therewith, the Director of the OPMC issued an order for the Comprehensive Review of Patient and/or Office Records dated April 6, 2000. (Ex. B). The basis for that order was stated to be that "evidence exists of a single incident of negligence or incompetence." (Ex. B).

7. The April 6, 2000 IC did not recommend that a disciplinary hearing be commenced or that charges be drafted against Dr. Ostad. (Tr. 191).

8. A second newly constituted IC was convened on July 20, 2000, and at that meeting recommended a second CMR be issued. (Ex. 7; Tr. 199). Consistent therewith, the director of the OPMC issued a Comprehensive Review of Patient and/or Office Records dated July 20, 2000. (Ex. 7). The basis for the order was stated to be that there was "evidence of a pattern of inappropriate medical practice".

9. The second IC convened on July 20, 2000 did not vote this matter to hearing nor did it direct the preparation of charges against Dr. Ostad. (Tr. 200).

10. Dr. Ostad took exception to the July 20, 2000 CMR order by letter dated August 16, 2000. (Ex. 8).

11. The OPMC presented this matter to a third newly constituted IC on September 28, 2000. The members of the IC recommended that charges be brought against Dr. Ostad relative to his treatment of Patient A and his alleged failure to comply with the July 20, 2000 CMR order. (Tr. 203).

12. The April 16, 2000, the July 20, 2000 and the September 28, 2000 IC's were each convened over 90 days after Respondent was interviewed on December 8, 1999.

13. Public Health Law Section 230 (10) (a) (iii) provides: "within ninety days of any interview of the licensee, an investigative committee on professional conduct of the Board of Professional Medical Conduct shall be convened." (Ex. 10).

Findings Related to Patient A

14. Patient A was a male child born on May 19, 1995. (Ex. G).

15. Patient A was a foster child under the management of the Jewish Child Care Association. (Ex. G.).

16. Dr. Ostad first treated Patient A on March 13, 1996, when he was 10 months old. (Ex. 3, p. 1; Tr. 279).

17. Dr. Ostad saw Patient A for episodic visits for specific complaints. (Tr. 281). Because his office was open at night and on the weekends, Patient A's foster mother would bring Patient A to Dr. Ostad without an appointment after work as late as 8 o'clock at night. (Tr. 280, 292).

18. Patient A was examined for his well-visits at JCCA and also received his immunizations from JCCA. (Ex. G).

19. Dr. Ostad was told by Patient A's foster mother that the child was taken to New York Hospital Medical Center at Queens (the "Hospital") for emergency-type visits and follow-up care. (Tr. 280, 303, 313).

20. During an admission at the Hospital in January 1997, a chest x-ray was ordered and physical examination was performed which revealed no significant abnormalities. (Ex. 6, p. 161; Tr. 106, 108). There was no diagnosis of asthma made by the Hospital, and the child was examined in the Hospital for almost a week by several physicians. (Tr. 110, 111).

21. During the time Dr. Ostad was treating the child episodically, Patient A was being examined by the JCCA for his well-visit check-ups. (Ex. G, p. 40-45). During those examinations, there were no noted abnormalities, and no diagnosis was made of asthma. On each of the April 13, 1996, March 27, 1997 and September 5, 1997 visits, the physician at JCCA diagnosed Patient A as "normal exam". (Ex. G, p. 40-45; Tr. 119-120).

22. During an admission to the Hospital in September 1997, a diagnosis of asthma was made for the first time. (Ex. 6, p. 10). The Hospital chart confirms that the child experienced the first episode of wheezing in September 1997. (Ex. 3, p. 40).

23. Dr. Ostad recognized the presence of asthma on October 6, 1997, which was timely. (Tr. 293). At that visit, for the first time, the child presented with wheezing, which lead to an appropriate diagnosis of asthma. (Ex. 3, p. 12; Tr. 294).

24. When the initial diagnosis was made on October 6, 1997, Dr. Ostad prescribed Albuterol syrup, which is a bronchodilator. (Ex. 3, p. 12; Tr. 295). Albuterol is a medication for asthma. (Tr. 113-114). Dr. Ostad continued the child on Albuterol throughout his course of treatment for asthma. (Ex. 3).

25. On October 18, 1997, Dr. Ostad prescribed a nebulizer for the child. (Ex. 3, p. 13). A nebulizer had previously been prescribed by the Hospital during the September 1997 admission. (Ex. 6, p. 8; Tr. 114).

26. Patient A's foster parents were appropriately trained in the use of the nebulizer. They received training at the Hospital and Patient A's foster father used a nebulizer himself for the control of his asthma. (Ex. 6, p. 47; Tr. 115,278,297,384).

27. Dr. Ostad maintained a separate medical chart for Patient A and he recorded and documented his findings at each visit. (Ex. 3). The chart maintained by Dr. Ostad accurately reflects Dr. Ostad's care and treatment of Patient A. (Tr. 131, L2 to Tr. 132, L13).

28. Dr. Ostad was not Patient A's primary care physician. (Tr. 280). The Jewish Child Care Association ("JCCA") was responsible for the management of Patient A's medical care. (Ex. 3, p. 40).

29. Patient A's foster mother continuously and repeatedly told Dr. Ostad that the child was being taken care of at the Hospital and that x-rays were being taken at the Hospital. (Tr. 32). The

Hospital chart confirms that several chest x-rays were obtained during his admissions to the Hospital. (Ex. 6, p. 11, 161).

CONCLUSIONS OF LAW

FIRST: Specifications FIRST, SECOND, THRID, FOURTH, FIFTH AND SIXTH of the Statement of Charges are violative of Public Health Law Section 230 (10) (a) (iii) and must be dismissed as set forth in Findings of Fact 3 through 13, supra.

SECOND: Respondent is found not to have engaged in professional misconduct by reason of practicing the profession of medicine with gross negligence within the meaning of N.Y. Education Law Section 6530 (4), as set forth in Findings of Fact 1,2 and 14 through 29, supra.

THIRD: Respondent is found not to have engaged in professional misconduct by reason of practicing the profession of medicine with negligence on more than one occasion within the meaning of N.Y. Education Law Section 6530 (3), as set forth in Findings of Fact 1, 2 and 14 through 29, supra.

FOURTH: Respondent is found not to have engaged in professional misconduct by reason of practicing the profession of medicine with gross incompetence within the meaning of N.Y. Education Law Section 6530 (6), as set forth in Findings of Fact 1,2 and 14 through 29, supra.

FIFTH: Respondent is found not to have engaged in professional misconduct by reason of practicing the profession of medicine with incompetence on more than one occasion within the meaning of N.Y. Education Law Section 6530 (5), as set forth in Findings of Fact 1, 2 and 14 through 29, supra.

SIXTH: Respondent is found not to have engaged in professional misconduct by failing to maintain a record for Patient A, which accurately reflects the care and treatment of Patient A within the meaning of N.Y. Education Law Section 6530 (32), as set forth in Finding of Fact 27, supra.

SEVENTH: Respondent is found not to have engaged in professional misconduct by failing to comply with an order issued pursuant to Public Health Law Section 230 (10) (a) within the meaning of N.Y. Education Law Section 6530 (15), as set forth in Findings of Fact 1 through 13, supra.

DISCUSSION

The Hearing Committee concluded that the three Investigative Committees in this matter were each invalidly convened under the provisions of Public Health Law Section 230 (10) (a) (iii). Therefore, any action purported to have been taken by any of these alleged Investigative Committees or in reliance upon any such Investigative Committee action such as the purported Comprehensive Medical Review Orders were null and void and had no legality.

Nonetheless, the Hearing Committee proceeded to consider the substance of the Specifications of Charges and concluded that the evidence did not sustain any of them.

Petitioner requested in its submissions at the end of the hearing that the Hearing Committee order the Respondent to comply with the Comprehensive Medical Review Order. Under the Hearing Committee's Findings as explained in the first paragraph of this Discussion, no such valid order exists. If Petitioner wishes to obtain a valid order by properly following the procedures set forth in Public Health Law Section 230, it has the power and authority to do so in a separate proceeding.

ORDER

The Hearing Committee determines and orders that the six Specifications of Charges be dismissed.

Dated New York, NY
24 January, 2002


Eleanor Kane, M.D.
Chairperson

Sheldon Putterman, M.D.

Kenneth Kowald

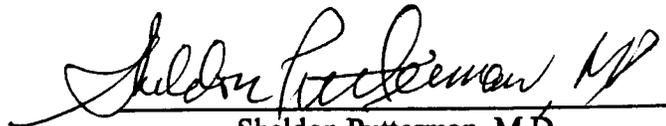
APPENDIX A

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

IN THE MATTER : AFFIRMATION
OF : OF MEMBER OF THE
MOSHE OSTAD, M.D. : HEARING COMMITTEE

SHELDON PUTTERMAN, M.D., a duly designated member of the State Board for Professional Medical Conduct and of the Hearing Committee thereof designated to hear the MATTER OF MOSHE OSTAD, M.D., hereby affirms that he was not present at a portion of the hearing session conducted on November 27, 2001. He further affirms that he has read and considered the transcript of proceedings of, and the evidence received at such hearing day prior to deliberations of the Hearing Committee on the 4th day of January, 2002.

DATED: January 17, 2002
New York, New York


Sheldon Putterman, M.D.

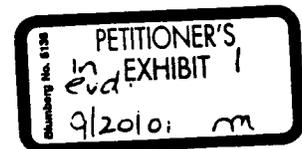
APPENDIX B

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

IN THE MATTER
OF
MOSHE OSTAD, M.D.

NOTICE
OF
HEARING

TO: Moshe Ostad, M.D.
62-59 108th Street
Forest Hills, NY 11375



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 September 20, 2001, at 10:00 a.m., at the Offices of the New York State Department of Health, 5 Penn Plaza, 6th Floor, New York, NY, 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. 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.

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, Hedley Park Place, 433 River Street, Fifth Floor South, Troy, NY 12180, ATTENTION: HON. TYRONE BUTLER, 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 (McKinney Supp. 2001) 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.

DATED: New York, New York
July 31, 2001



Roy Nemerson
Deputy Counsel
Bureau of Professional
Medical Conduct

Inquiries should be directed to: Courtney Berry
Associate Counsel
Bureau of Professional
Medical Conduct
212-268-6816

IN THE MATTER
OF
MOSHE OSTAD, M.D.

STATEMENT
OF
CHARGES

MOSHE OSTAD, M.D., the Respondent, was authorized to practice medicine in New York State on or about August 1, 1972, by the issuance of license number 113669 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. Respondent, in his office located in Forest Hills, N.Y., treated Patient A (identified in the attached appendix) approximately 47 times, from on or about March 13, 1996, until Patient A's death, on or about October 31, 1998.
1. Respondent failed to diagnose Patient A's asthma in a timely fashion.
 2. Respondent failed to prescribe appropriate medication for the treatment of Patient A's asthma.
 3. Respondent failed to adequately document Patient A's clinical condition.
 4. Respondent failed to appropriately instruct Patient A's guardian in the proper use of nebulized medications.
 5. Respondent failed to refer Patient A to a pulmonary specialist.
 6. Respondent failed to order a chest x-ray of Patient A during the entire two-and-one-half year period that he treated Patient A.
- B. On or about July 20, 2000, the Director of the Office of Professional Medical Conduct issued an order directing Respondent to comply with a

comprehensive review of his patient and/or office records. Respondent has failed to comply with the July 20th order.

SPECIFICATION OF CHARGES

FIRST SPECIFICATION

GROSS NEGLIGENCE

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(4) by practicing the profession of medicine with gross negligence on a particular occasion as alleged in the facts of the following:

1. Paragraph A and its subparagraphs.

SECOND SPECIFICATION

NEGLECT ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(3) by practicing the profession of medicine with negligence on more than one occasion as alleged in the facts of two or more of the following:

2. Paragraph A and its subparagraphs.

THIRD SPECIFICATION

GROSS INCOMPETENCE

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(6) by practicing the profession of medicine with gross incompetence as alleged in the facts of the following:

3. Paragraph A and its subparagraphs.

FOURTH SPECIFICATION
INCOMPETENCE ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(5) by practicing the profession of medicine with incompetence on more than one occasion as alleged in the facts of two or more of the following:

4. Paragraph A and its subparagraphs.

FIFTH SPECIFICATION
FAILURE TO MAINTAIN RECORDS

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(32) by failing to maintain a record for each patient which accurately reflects the care and treatment of the patient, as alleged in the facts of:

5. Paragraph A and its subparagraphs.

SIXTH SPECIFICATION
FAILURE TO COMPLY WITH AN ORDER

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(15)(McKinney Supp. 2001) by failing to comply with an order issued pursuant to Pub. Health Law §230(10)(a), as alleged in the facts of:

6. Paragraph B.

DATED: July 31, 2001
New York, New York



ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct