



# STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

Richard F. Daines, M.D.  
Commissioner

*Public*

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Chief of Staff

June 24, 2009

## CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Miklos Toth, M.D.  
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Lake Success, New York 11042

Ann Gayle, Esq.  
NYS Department of Health  
90 Church Street - 4<sup>th</sup> Floor  
New York, New York 10007

### **RE: In the Matter of Miklos Toth, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 09-10) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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.

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,

Redacted Signature

James F. Horan, Acting Director  
Bureau of Adjudication

JFH:cah

Enclosure

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

In the Matter of

Miklos Toth, M.D. (Respondent)

A proceeding to review a Determination by a  
Committee (Committee) from the Board for  
Professional Medical Conduct (BPMC)

Administrative Review Board (ARB)

Determination and Order No. 09-10

COPY

Before ARB Members Lynch, Pellman, Wagle, Wilson and Milone  
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): Ann Gayle, Esq.  
For the Respondent: Ralph A. Erbaio, Esq.

Following a hearing below, a BPMC Committee found that the Respondent committed professional misconduct by deliberately and deceitfully withholding information on applications for licensure and professional privileges. The Committee placed the Respondent on probation for four years and ordered that the Respondent practice with a monitor for one year. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2009), the parties ask the ARB to nullify or modify the Committee's Determination. After reviewing the hearing record and the parties' review submissions, the ARB affirms the Committee's Determination that the Respondent practiced fraudulently and that the Respondent withheld information from a hospital in an application for professional privileges. The ARB overturns the Committee's Determination to impose probation and a practice monitor. The ARB votes to revoke the Respondent's license to practice medicine in New York State.

### Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent violated New York Education Law (EL) §§ 6530(2), 6530(14), 6530(20) & 6530(31) (McKinney 2009) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- failing to comply with requirements for providing information pursuant to PHL § 2805-k,
- engaging in conduct in the practice of medicine that evidences moral unfitness, and,
- willfully harassing, abusing or intimidating a patient.

The moral unfitness and patient harassment charges alleged improper conduct while the Respondent treated one person, Patient A. The record refers to the Patient by initials to protect patient privacy. The other charges involved answers that the Respondent provided on applications to the Division of Professional Licensing at the New York State Education Department (SED Application) and Lenox Hill Hospital (Lenox Hill Applications). Following the hearing, the Committee rendered the Determination now on review.

The Factual Allegations relating to Patient A alleged that, during the course of treatment, the Respondent acted inappropriately toward the Patient by making inappropriate comments to her and by engaging in inappropriate behavior, which included, but was not limited to, kissing the Patient and having the Patient sit on the Respondent's lap. The Committee dismissed those Allegations and the Specifications charging moral unfitness and patient harassment. The Committee found that the main evidence to support those Allegations and Specifications came from the Patient's testimony that the Respondent kissed the Patient inappropriately over a period of several months and had the Patient sit on the Respondent's lap to look into a microscope. The Committee found the Patient lacked credibility as a witness for a number of reasons, including implausibility and improbability. The Respondent denied the Patient's accusations.

The Committee sustained the Specifications that charged the Respondent with practicing fraudulently due to answers the Respondent gave on the Applications to SED and Lenox Hill.

The Committee also sustained the Specifications that charged that the Respondent's answers on the Lenox Hill Applications amounted to failure to provide information mandated under PHL § 2805-k. The Committee found that New York Hospital suspended the Respondent's privileges summarily in 2002, in part because the Respondent removed specimens from patients during surgery without written consent. The Committee found that the Respondent knew about that suspension in April 2003 when the Respondent applied for medical staff re-appointment at Lenox Hill for 2004-2005 and denied that any health care facility or hospital had ever suspended the Respondent's privileges. The Committee found further that the Respondent knew about the New York Hospital suspension in May 2005 when the Respondent applied for re-appointment at Lenox Hill for 2006-2007 and denied that any hospital or health care facility had ever suspended the Respondent's privileges. The Respondent also denied any restriction on hospital privileges in a 2003 application to SED. In addition, the Committee found that the Respondent's 2005 application to Lenox Hill failed to list New York Hospital as a prior employer.

The Committee voted against revoking the Respondent's License, even though the Committee found the Respondent dishonest in reporting about his suspension from New York Hospital. The Committee expressed concern about the Respondent's office practice, including proper consents and chaperones. The Committee voted to require that the Respondent practice with a monitor for one year and to practice under probation for four years.

#### Review History and Issues

The Committee rendered their Determination on January 15, 2009. This proceeding commenced on January 29, 2009, when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and reply brief and the Respondent's brief and reply brief. The record closed when the ARB received the Petitioner's reply brief on March 16, 2009.

The Petitioner asks that the ARB overturn the Committee's Determination on witness credibility between Patient A and the Respondent. The Petitioner argues that the Committee erred in crediting the Respondent's denial of any improper conduct. The Petitioner alleges error because the Committee found the Respondent gave intentionally deceitful answers in the SED Application and in the Lenox Hill Applications. The Petitioner also faulted the Committee for failing to take into account Patient A's fragility and vulnerability when assessing the Patient's credibility. The Petitioner requests that the ARB substitute its judgment for the Committee's on credibility, that the ARB credit the testimony by Patient A and find that the Respondent willfully abused Patient A and that the Respondent engaged in conduct that evidenced moral unfitness in the practice of medicine. The Petitioner also requests that the ARB impose a more severe sanction than the Committee. The Petitioner argues that the fraudulent applications in this case warrant revocation, even without any change in the findings relating to Patient A. The Petitioner contends that probation provides no remedy against a physician who commits fraud. The Petitioner contends further that revocation provides the proper remedy for the Respondent's conduct toward Patient A.

The Respondent conceded that he violated PHL § 2805-k by failing to list New York Hospital as a prior employer on the Respondent's 2005 Lenox Hill Application. The Respondent asserted that the omission was a mistake, but he denied any intent to deceive. The Respondent challenged the findings that he practiced fraudulently and the Committee's Determination that the Respondent should practice with an on-site monitor. The Respondent conceded that he failed to list the New York Hospital suspension on his Applications to SED and Lenox Hill. The Respondent argued that he failed to list the suspension because he never received word that the suspension was final and because the Chairman of the OB-GYN Department at Lenox Hill

advised the Respondent that he could omit any mention about a non-final suspension from the Lenox Hill Applications. The Respondent argued that the Petitioner failed to prove that the Respondent omitted information about the suspension with intent to deceive. The Respondent argued further that if the ARB dismisses the fraud findings, only the findings on the 2805-k violation would remain. The Respondent argued that the 2805-k violation fails to warrant a penalty of any kind. The Respondent argues in the alternative, that if the ARB affirms the fraud findings, that those findings would warrant only a penalty of four years on probation. The Respondent argued that no need exists for the one-year on-site monitoring which the Committee imposed. The Respondent contended that the Committee ordered on-site monitoring due to a mistaken conclusion that problems existed in his office concerning consents and chaperones. The Respondent argued that no charge against the Respondent alleged misconduct due to any problem with consents and chaperones. The Respondent called it inappropriate to impose a penalty for uncharged conduct.

#### ARB Authority

Under PHL §§ 230(10)(i), 230-c(1) and 230-c(4)(b), the ARB may review Determinations by Hearing Committees to determine whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law and whether the Penalty is appropriate and within the scope of penalties which PHL §230-a permits. The ARB may substitute our judgment for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 A.D.2d 86, 606 N.Y.S.2d 381 (3<sup>rd</sup> Dept. 1993); in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 NYS

2d 759 (3<sup>rd</sup> Dept. 1994); and in determining credibility, Matter of Minielly v. Comm. of Health, 222 A.D.2d 750, 634 N.Y.S.2d 856 (3<sup>rd</sup> Dept. 1995). The ARB may choose to substitute our judgment and impose a more severe sanction than the Committee on our own motion, even without one party requesting the sanction that the ARB finds appropriate, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). In determining the appropriate penalty in a case, the ARB may consider both aggravating and mitigating circumstances, as well as considering the protection of society, rehabilitation and deterrence, Matter of Brigham v. DeBuono, 228 A.D.2d 870, 644 N.Y.S.2d 413 (1996).

The statute provides no rules as to the form for briefs, but the statute limits the review to only the record below and the briefs [PHL § 230-c(4)(a)], so the ARB will consider no evidence from outside the hearing record, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3<sup>rd</sup> Dept. 1997).

A party aggrieved by an administrative decision holds no inherent right to an administrative appeal from that decision, and that party may seek administrative review only pursuant to statute or agency rules, Rooney v. New York State Department of Civil Service, 124 Misc. 2d 866, 477 N.Y.S.2d 939 (Westchester Co. Sup. Ct. 1984). The provisions in PHL §230-c provide the only rules on ARB reviews.

#### Determination

The ARB has considered the record and the parties' briefs. The ARB affirms the Committee's Determination that the Respondent violated PHL § 2805-k. The Respondent conceded that the violation occurred due to his failure to list New York Hospital as a prior employer on the 2005 Lenox Hill Application. The ARB affirms the Committee's Determination

that the Respondent practiced fraudulently. The ARB denies the request to sustain additional charges. The ARB overturns the Committee's Determination to place the Respondent on probation. The ARB votes 5-0 to revoke the Respondent's License.

The Respondent concedes that he failed to list the New York Hospital suspension on the SED or Lenox Hill Applications, but the Respondent denies any intent to deceive. In order to sustain a charge that a licensee practiced medicine fraudulently, a hearing committee must find that (1) a licensee made a false representation, whether by words, conduct or by concealing that which the licensee should have disclosed, (2) the licensee knew the representation was false, and (3) the licensee intended to mislead through the false representation, Sherman v. Board of Regents, 24 A.D.2d 315, 266 N.Y.S.2d 39 (Third Dept. 1966), aff'd, 19 N.Y.2d 679, 278 N.Y.S.2d 870 (1967). A committee may infer the licensee's knowledge and intent properly from facts that such committee finds, but the committee must state specifically the inferences it draws regarding knowledge and intent, Choudhry v. Sobol, 170 A.D.2d 893, 566 N.Y.S.2d 723 (Third Dept. 1991). A committee may reject a licensee's explanation for erroneous reports (such as resulting from inadvertence or carelessness) and draw the inference that the licensee intended or was aware of the misrepresentation, with other evidence as the basis, Matter of Brestin v. Comm. of Educ., 116 A.D.2d 357, 501 N.Y.S.2d 923 (Third Dept. 1986). Uncontroverted evidence that a physician knew the true state of facts at the time he gave false answers on credentialing and licensing applications supports the inference of guilty knowledge or intent, Saldanha v. DeBuono, 256 A.D.2d 935, 681 N.Y.S.2d 874 (3<sup>rd</sup> Dept. 1998).

The Committee rejected the Respondent's explanation concerning the failure to list the New York Hospital Suspension on the Applications. The Committee found the Respondent's testimony untruthful, self-serving and evasive. The Committee inferred that the Respondent

withheld the information that New York Hospital suspended the Respondent's privileges because the Respondent wanted to avoid providing an explanation for the reason for the suspension. New York Hospital suspended the Respondent for removing specimens from patients during surgery without obtaining written patient consent. The Committee found that the Respondent acted with intent to deceive. The ARB holds that the Committee acted within their authority in rejecting the Respondent's explanations for his conduct and the ARB defers to the Committee, as the finder of fact, in their judgment on the credibility of the Respondent's explanation.

The ARB also defers to the Committee's judgment on the credibility of Patient A and the ARB affirms the Committee's Determination to dismiss the charges that concern Patient A. The Committee found it implausible and improbable that a young woman as intelligent and as assertive as the Committee found Patient A would have allowed several months of kissing and sexual advances without the slightest protest or complaint.

The ARB overturns the Committee's Determination to place the Respondent on probation for four years and to order that the Respondent practice with a monitor for one year. The Committee stated that they imposed the practice monitor due to concerns over consent and chaperone issues in the Respondent's practice. The Petitioner's challenge to the Committee penalty pointed out that concern over chaperones would be a proper matter to address in a case in which the Committee found patient harassment, but the Committee in this case dismissed the harassment charge. The Respondent's challenge to the Committee's penalty objected to the monitor because no allegations in the Statement of Charges involved consent or chaperone issues. The Respondent found the penalty inappropriate because the penalty imposed sanctions for uncharged conduct. The charges the Committee sustained involved intentional deceit and withholding information. The ARB can find no explanation in the Committee's Determination as

to how probation and monitoring constitute an appropriate sanction for fraud and withholding information.

The ARB votes 5-0 to revoke the Respondent's License. Committing fraud in the practice of medicine, standing alone, provides sufficient grounds on which to revoke a physician's license, Matter of Glassman v. Comm. of Health of the State of N.Y., 208 A.D.2d 1060, 617 N.Y.S.2d 413 (3<sup>rd</sup> Dept. 1994); Matter of Kleinplatz v. Novello, 14 A.D.3d 946, 788 N.Y.S.2d 505 (3<sup>rd</sup> Dept. 2005). A physician must deal truthfully with patients, with other healthcare providers, with facilities, with insurers, with licensing boards and with regulators. A physician must deal truthfully with facilities and licensing bodies in the licensing and credentialing process, as those groups try to determine whether the physician can be trusted to treat patients. Licensing and credentialing bodies must rely on physicians to provide accurate and truthful information so that the licensing and credentialing systems can assure protection for patients. The Respondent withheld information deliberately from SED and Lenox Hill concerning the Respondent's suspension for failing to obtain patient consents. In doing so, the Respondent demonstrated his unfitness to practice medicine in New York State.

ORDER

NOW, with this Determination as our basis, the ARB renders the following ORDER:

1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB overturns the Committee's Determination to place the Respondent on probation.
3. The ARB revokes the Respondent's License.

Thea Graves Pellman  
Datta G. Wagle, M.D.  
Linda Prescott Wilson  
Therese G. Lynch, M.D.  
Richard D. Milone, M.D.

In the Matter of Miklos Toth, M.D.

Linda Prescott Wilson, an ARB Member concurs in the Determination and Order in the Matter of Dr. Toth.

Dated: 23 June, 2009

Redacted Signature

Linda Prescott Wilson

In the Matter of Miklos Toth, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the  
Matter of Dr. Toth.

Dated: June 22, 2009

Redacted Signature

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Thea Graves Pellman

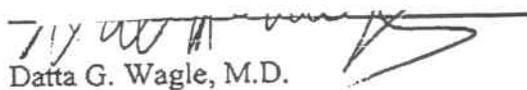
In the Matter of Miklos Toth, M.D.

Datta G. Wagle, M.D., an ARB Member concurs in the Determination and Order in the

Matter of Dr. Toth.

Dated: 6/23/ 2009

Redacted Signature

  
Datta G. Wagle, M.D.

In the Matter of Miklos Toth, M.D.

Richard D. Milone, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Toth.

Dated: June 22, 2009

Redacted Signature

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Richard D. Milone, M.D.

In the Matter of Miklos Toth, M.D.

Therese G. Lynch, M.D., an ARB Member concurs in the Determination and Order in the

Matter of Dr. Toth.

Dated: June 21, 2009

Redacted Signature

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Therese G. Lynch, M.D.