



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

May 26, 1998

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Bradley C. Mohr, Esq.
NYS Department of Health
Corning Tower Room 2509
Empire State Plaza
Albany, New York 12237

Allen C. Pomerantz, M.D.
60 Westbrook Way
Manalapan, New Jersey 07726

Andrew B. Schultz, Esq.
3000 Marcus Avenue Suite 3WA
Lake Success, New York 11042

RE: In the Matter of Allen Charles Pomerantz, M.D.

Dear Mr. Mohr, Dr. Pomerantz and Mr. Schultz:

Enclosed please find the Determination and Order (No. 98-45) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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,

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 distinct 'B'.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH (Petitioner)

COPY

**In The Matter Of
Allen Charles Pomerantz, M.D. (Respondent)**

**Administrative Review
Board (ARB)
Determination and
Order 98 - 45**

**Proceeding to review a Determination by a Hearing Committee (Committee)
from Board for Professional Medical Conduct (BPMC)**

**Before Board Members : Briber, Stewart, Sinnott, Price & Shapiro.
Administrative Law Judge James F. Horan served as the Board's Administrative Officer**

**For the Respondent: Andrew B. Schultz, Esq.
For the Petitioner: Bradley C. Mohr, Esq.**

After a hearing into charges that the Respondent engaged in illegal fee-splitting with a non-physician, a BPMC Committee sustained the charge and revoked the Respondent's New York Medical License (License). In this proceeding pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney Supp. 1998), the Respondent asks the ARB to overturn the Committee's penalty, as too harsh, and to substitute probation. After considering the hearing record and the parties' briefs, the ARB sustains the Committee's penalty, although we find the Committee erred in their discussion about the facts that supported that penalty. The ARB finds that the record supports revocation as the appropriate penalty here, because the Respondent used his medical License to engage in a long running and illegal scheme, that resulted in over Six Hundred Thousand Dollars (\$600,000.00) in overpayment by the Medical Assistance Program (Medicaid).

COMMITTEE DETERMINATION ON CHARGES

In a proceeding before the former Department of Social Services (DSS)¹, Administrative Law Judge (ALJ) Ralph Erbaio, determined that the Respondent had engaged in unacceptable practices under the Medicaid regulations at Title 18 NYCRR Parts 515 & 518, by billing Medicaid for fees that the Respondent split with a non-physician, non-Medicaid Provider [Petitioner Exhibit 6]. The ALJ found the arrangement with the non-physician an unacceptable practice, because the arrangement constituted illegal fee splitting under N. Y. Educ. Law § 6530(19) (McKinney Supp. 1998) and under the New York Education Department regulations (SED) at Title 8 NYCRR § 29.1(b)(4). That statute

¹ The New York Legislature dissolved DSS in 1997 and transferred its functions to other agencies (1997 Laws of New York , Chap. 436).

and the SED regulation define fee splitting to mean any arrangement in which a physician's payment for space, facilities, equipment or personnel services constitutes a percentage from or depends upon the physician's income or receipts. This fee splitting prohibition arose from concerns that such arrangements might threaten medical service quality and professionalism, Psychoanalytic Center, Inc. v. Burns, 46 N.Y.2d 237 (1979). The ALJ found that all Medicaid payments that the Respondent received resulting from the fee splitting arrangement constituted overpayment under Title 18 NYCRR § 518.1 and found that the fee splitting arrangement constituted abuse against the Medicaid Program under Title 18 NYCRR §515.1(b)(1). As a penalty, the ALJ recommended that the Respondent make restitution amounting to Six Hundred Seventy-Two Thousand Eight Hundred Nineteen Dollars (\$672,819.00), and recommended the Respondent's exclusion from the Medicaid Program for five years. After DSS confirmed the ALJ's recommendations and after the Respondent challenged the DSS decision in court, the New York State Supreme Court Appellate Division for the First Department sustained the decision on the charges, the restitution order and the five year Medicaid exclusion, Matter of Pomerantz v. N.Y.S. Dept. of Soc. Serv., 228 A.D.2d 242, 644 N.Y.2d 24 (First Dept. 1996).

The Petitioner subsequently began this proceeding, by filing charges with BPMC alleging that the Respondent committed professional misconduct under:

- 1.) N. Y. Educ. Law § 6530(9)(c) (McKinney Supp. 1998), that defines professional misconduct to include acts that result in a guilty finding, in an adjudicatory proceeding, for violating a state or federal statute or regulation, when those acts would constitute professional misconduct; and,
- 2.) N. Y. Educ. Law § 6530(19) (McKinney Supp. 1998), that defines professional misconduct to include fee splitting.

An expedited hearing ensued pursuant to N.Y. Pub. Health Law § 230(10)(p)(McKinney Supp. 1998), before a BPMC Committee, who rendered the Determination that the ARB now reviews. In such an expedited hearing, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

After sustaining the charges against the Respondent, the Committee voted 2-1 to revoke the

Respondent's License. The majority concluded that the Respondent engaged in planned theft from the government, due to greed. The majority stated that the Respondent stole over Six Hundred Thousand Dollars (\$600,000.00) through a long term course of conduct that involved planning, decision making and prior thought. The majority rejected the Respondent's explanation that the fee splitting arrangement resulted from the Respondent's befuddlement with his administrative duties. The dissenting Committee member concluded that the Respondent's acts fell short from medical misconduct, felt that the Respondent's medical training in Grenada left him without concepts about appropriate medical business conduct and felt that the Respondent's practice in New Jersey isolated him from collegial advise that could have alerted him to his conduct's inappropriate nature. The dissenting Committee member noted that the misconduct occurred over seven years ago, that the Respondent's share in the overpayment amounted to a small sum and that the Respondent paid income tax on his share. The dissenting Committee member perceived no possibility that the Respondent would repeat his unlawful acts.

REVIEW HISTORY AND ISSUES

The Committee rendered their Determination on March 3, 1998. The Respondent then commenced this proceeding on March 16, 1998, when the ARB received the Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and the Petitioner's brief and reply brief. The record closed when the ARB received the Petitioner's reply brief on April 22, 1998.

The Respondent's brief requests that the ARB overturn the Committee's penalty, place the Respondent on probation and decrease the amount that the Respondent owes in restitution. The Respondent asserts that the harsh penalties against him would advance no public interest or patient interest. The brief notes that the record contained no factual basis for the Committee majority to conclude that the Respondent engaged in planned theft and stole funds from the government. The Respondent also argues that DSS failed to consider certain factors when assessing their penalty against the Respondent and that DSS imposed less severe penalties in other cases that involved more

serious violations.

In reply to the Respondent's brief, the Petitioner argues that the ARB may only review whether the Committee imposed an appropriate penalty against the Respondent's License and that the Respondent's brief actually attempts to reargue the prior findings by DSS, that the First Department has already sustained. The Petitioner urges the ARB to sustain the Committee's penalty, because the Respondent disregarded his responsibility as a physician and showed no remorse for his misconduct.

REVIEW BOARD DETERMINATION

The ARB has considered the record and the parties' briefs. All ARB members participated in the case. Mr. Briber and Dr. Stewart participated in the May 1, 1998 Deliberations by telephone. The ARB sustains the Committee's Determination that the Respondent committed misconduct, although we conclude that the Committee erred in their discussion about the exact misconduct the Respondent committed. The ARB sustains the Committee majority's Determination on the penalty, because we agree that the Respondent's long term criminal conduct deserves the most severe penalty and because we see nothing in the record to demonstrate the Respondent has any potential for rehabilitation.

The Respondent's brief concentrated improperly on challenging the DSS Determination and the DSS Restitution Order. As the Petitioner's brief pointed out, the ARB review offers no forum for the Respondent to relitigate the DSS proceeding, Matter of Singla v. N. Y. S. Dept. of Health, 229 A.D. 2d 798, 646 N.Y.S.2d 421 (Third Dept. 1996), leave den. 89 N.Y.2d 1087. The issues on this review involved the Committee's Determination that the Respondent's actions constituted professional misconduct and the Committee majority's Determination to revoke the Respondent's License for that misconduct. The ARB has no authority to decrease the amount the Respondent must pay pursuant to the DSS Order.

The ARB agrees with the Respondent that the record in this proceeding provided no basis for the Committee's majority to conclude that the Respondent engaged in planned theft and stole funds from the government. The charges alleged and the record in this proceeding demonstrated that the Respondent engaged in illegal fee splitting, rather than theft. Although the ARB may impose no

penalty against a Respondent for conduct outside the Statement of Charges, Matter of Dhabuwala v. State Bd. for Prof. Med. Cond., 225 A.D.2d 209, 651 N.Y.S.2d 249 (Third Dept. 1996), we see no reason to annul or remand the Committee's Determination due to their error. The ARB may substitute our judgement for the Committee's judgement in imposing a penalty, Matter of Bogdan v. Med. Cond. Bd., 195A.D.2d 940, 606 N.Y.S.2d 381 (Third Dept. 1993), or in sustaining or dismissing charges, Matter of Spartalis v. State Bd. for Prof. Med. Cond., 205 A.D.2d 940, 613 N.Y.S.2d 759 (Third Dept. 1994). The authority to substitute our judgement includes a situation in which we correct a mistake by the Committee, by using evidence from the record as the basis for our judgement, Matter of Brigham v. DeBuono, 228 A.D.2d 870, 644 N.Y.S.2d 413 (1996). The record in this proceeding provides ample evidence to demonstrate that the Respondent engaged in illegal conduct and to justify the Determination to revoke the Respondent's License.

The ARB sustains the charges that the Respondent committed professional misconduct under N.Y. Educ. Law §§ 6530(9)(c) & 6530(19) (McKinney Supp. 1998). After an adjudicatory hearing, DSS found the Respondent guilty for violating a state statute and regulation. The Respondent's conduct that resulted in the finding, illegal fee splitting, constitutes professional misconduct.

In reaching our Determination on the penalty in this case, we agree with the Committee majority's conclusion that the Respondent showed no remorse for his illegal conduct [Committee Determination page 5]. The Respondent blamed his partner in the scheme for his misdeeds and he insisted throughout the hearing that he had engaged in no illegal conduct. The Respondent also admitted at the hearing that he has failed to pay anything toward the restitution penalty that DSS assessed against him [Hearing Transcript page 32], even though the First Department sustained that penalty two years ago, Matter of Pomerantz v. N.Y.S. Dept. of Soc. Serv., (supra). Further, the ARB agrees with the Committee that the Respondent acted in a premeditated manner over a long time period and that the Respondent's conduct goes to the very heart of medical practice. We find no basis in the record for the dissenting Committee member's conclusion that the Respondent poses no danger for repeating his unlawful acts or that the Respondent's conduct resulted from poor training or unfamiliarity with medical business practice.

We reject the Respondent's contention that no public interest or patient interest would justify

a harsh penalty for the Respondent's conduct [Respondent's Brief page 16]. As we noted already, the fee splitting prohibition arose from concerns that such arrangements might threaten medical service quality and professionalism, Psychoanalytic Center, Inc. v. Burns, (supra). As the ALJ Report in the DSS proceeding noted, the Respondent allowed a non-physician entrepreneur to control the Respondent's practice, creating an environment in which the Respondent had no way to assure the quality of the provided medical services and in which the non-physician's concern with maximizing profits created a real possibility for and a justifiable concern about generating unnecessary medical services [Petitioner Exhibit 6, page 6].

We also reject the Respondent's contention that probation would offer an acceptable alternative as a penalty. The Respondent's refusal to attempt even token payment on the DSS restitution penalty and his refusal to show remorse make the Respondent appear as a poor candidate for complying with the terms that probation would require. In addition, the Committee found the Respondent's conduct intentional and rejected his explanation that his conduct resulted from ignorance or befuddlement. Although probation that includes retraining or continuing education can correct a misconduct pattern that results from ignorance, the ARB has concluded previously that neither retraining nor continuing education can correct misconduct that results from a lack of integrity, see Matter of Bezar v. DeBuono, __ A.D.2d __, 659 N.Y.S.2d 547(1997).

The Respondent used his License to participate in illegal activity. The Respondent surrendered his medical practice to a non-physician and disregarded his responsibility, to patients and to the Medicaid program, to assure that the patients received quality medical services. The Respondent's participation in that long term, illegal scheme resulted in hundreds of thousands of dollars in overpayment by the Medicaid Program, from funds that the government established to provide care for the most needy in society. The Respondent enabled the non-physician partner to obtain the overpayment. The Respondent violated the trust that society places in the medical profession. The record in this proceeding shows no credible mitigating circumstances and no likelihood for rehabilitation. The ARB concludes that License revocation presents the only appropriate penalty for the Respondent's misconduct.

ORDER

NOW, based upon this Determination, the Review Board renders the following **ORDER**:

1. The ARB **SUSTAINS** the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB **SUSTAINS** the Committee's Determination revoking the Respondent's License to practice medicine in New York State.

Robert M. Briber

Sumner Shapiro

Winston S. Price, M.D.

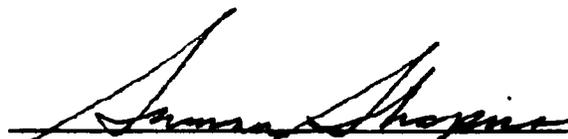
Edward C. Sinnott, M.D.

William A. Stewart, M.D.

In The Matter Of Allen Charles Pomerantz, M.D.

Sumner Shapiro, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Pomerantz.

DATED: May 20, 1998



Sumner Shapiro

In The Matter Of Allen Charles Pomerantz, M.D.

Edward C. Sinnott, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Pomerantz.

Dated : May 20, 1998

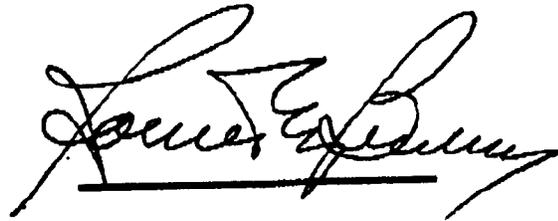


Edward C. Sinnott, M.D.

In The Matter Of Allen Charles Pomerantz, M.D.

**Robert M. Briber, a member of the Administrative Review Board for Professional Medical
Conduct, concurs in the Determination and Order in the Matter of Dr. Pomerantz.**

Dated : 5/21/ 1998

A handwritten signature in black ink, appearing to read "Robert M. Briber", written over a horizontal line. The signature is stylized and cursive.

Robert M. Briber

In The Matter Of Allen Charles Pomerantz, M.D.

William A. Stewart, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Pomerantz.

Dated 20 May, 1998

William A. Stewart

William A. Stewart, M.D.