

Public

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

IN THE MATTER

OF

EARL M. KABNICK, M.D.

ADMINISTRATIVE
REVIEW BOARD
DECISION AND
ORDER NUMBER
ARB 94-27

The Administrative Review Board for Professional Medical Conduct (hereinafter the "Review Board"), consisting of ROBERT M. BRIBER, MARYCLAIRE B. SHERWIN, WINSTON S. PRICE, M.D., EDWARD C. SINNOTT, M.D. and WILLIAM A. STEWART, M.D. held deliberations by telephone conference on May 31, 1994 to review the Hearing Committee on Professional Medical Conduct's (Hearing Committee) March 14, 1994 Determination finding Dr. Earl Kabnick guilty of professional misconduct. Dr. Kabnick (Respondent) requested the Review through a Notice which the Board received on April 5, 1994. James F. Horan served as Administrative Officer to the Review Board. Murray Richman, Esq. filed a brief for the Respondent on April 27, 1994. Ralph Bavaro, Esq. filed a reply brief for the Office of Professional Medical Conduct (Petitioner) on May 10, 1994.

SCOPE OF REVIEW

New York Public Health Law (PHL) §230(10)(i), §230-c(1) and §230-c(4)(b) provide that the Review Board shall review:

- whether or not a hearing committee determination and penalty are consistent with the hearing committee's findings of fact and conclusions of law; and
- whether or not the penalty is appropriate and within the scope of penalties permitted by PHL §230-a.

Public Health Law §230-c(4)(b) permits the Review Board to remand a case to the

Hearing Committee for further consideration.

Public Health Law §230-c(4)(c) provides that the Review Board's Determinations shall be based upon a majority concurrence of the Review Board

HEARING COMMITTEE DETERMINATION

The Petitioner brought this case pursuant to Public Health Law Section 230(10)(p) and Education Law Section 6530(9)(a)(i), which provide an expedited hearing in cases in which professional misconduct charges against a Respondent are based upon a prior criminal conviction in New York or another jurisdiction or upon a prior administrative adjudication which would amount to misconduct if committed in New York State. The expedited hearing determines the nature and severity of the penalty which the Hearing Committee will impose based upon the criminal conviction or prior administrative adjudication.

The Hearing Committee in this case found that the Petitioner had met its burden of proof in establishing that the Petitioner was guilty of misconduct based upon his conviction for a crime in New York State. The Committee found that the Respondent entered a guilty plea to Grand Larceny in the Third Degree, a Class D Felony, in Supreme Court for Westchester County on August 28, 1992. The Respondent's crime involved falsely billing the State of New York's Medicaid Program for Seventy Five Thousand (\$75,00.00) Dollars, for 9000 Medicaid patient sonograms, knowing that the tests were unnecessary and sometimes fictitious. The Court sentenced the Respondent to five years probation, with five hundred hours of community service, and ordered that the Respondent pay restitution.

The Hearing Committee made extensive conclusions concerning the Respondent's misconduct. The Committee concluded that the Respondent engaged in activities related to the practice of radiology with intent to defraud the State, that the Respondent knowingly abused his role as an attending radiologist and supervisor of residents by hiring and utilizing two residents for prescreening ultrasound cases that were fraudulently obtained, that the utilization was hidden and secretive and that the Respondent himself lacked the expertise necessary to supervise the residents in the activity. The Committee concluded further that the Respondent's activity constituted illegal

appropriation of the property of the State and utilized personnel and property of Queens Hospital Center to conduct activities for the Respondent's own personal gain. The Committee found the Respondent's conduct to be reprehensible. The Committee found that the Respondent admitted putting patients at risk and the Committee found that the patients could have suffered serious medical consequences. The Committee found that the Respondent was motivated by overt greed. The Committee noted that they were offended by the Respondent's breach of the public trust, as evidenced by his admission that he did not fulfill his obligations as a licensed physician.

The Committee voted to suspend the Respondent's license for two years, with one year stayed, and to fine the Respondent Ten Thousand (\$10,000.00) Dollars.

REQUESTS FOR REVIEW

The Respondent has requested a reduction in the Hearing Committee's penalty due to Dr. Kabnick's cooperation with the authorities who investigated the Medicaid Fraud scheme in which Dr. Kabnick was involved. The Respondent argues that there was no evidence in the record of an mitigation due to the Respondent's cooperative efforts with the authorities. As a second point, the Respondent argued that one of the members of the Hearing Committee should have recused herself due to prior acquaintance with Dr. Kabnick. The Respondent alleges bias on the part of the Committee member.

The Petitioner opposes any reduction in the penalty, since the Hearing Committee already heard evidence on mitigation and rendered their Determination. The Petitioner argues that there should be no review of the Hearing Committee member for bias, because the Member stated her prior acquaintance with Dr. Kabnick on the record and there was no objection by the Respondent to the Member remaining on the Hearing Committee.

REVIEW BOARD DETERMINATION

The Review Board has considered the entire record below and the briefs which counsel have submitted.

The Review Board votes to sustain the Hearing Committee's Determination that Dr. Kabnick was guilty of misconduct based upon his criminal conviction in Westchester County for Grand Larceny in the Third Degree.

The Review Board votes to overturn the Hearing Committee's penalty, because we feel that the penalty, suspending the Respondent's license for one year and fining him Ten Thousand (\$10,000.00) Dollars, is not an appropriate penalty in view of the serious nature of the Respondent's offense and it is not consistent with the extensive findings and conclusions by the Committee, concerning the Respondent's intentional and reprehensible conduct, which placed patients at risk. The Review votes unanimously to revoke the Respondent's license to practice medicine in the State of New York.

The Review Board has the authority to substitute its judgement for the Hearing Committee's judgement and to impose a greater penalty than the Hearing Committee imposed against a Respondent, Matter of Bogdan v. State Board for Professional Medical Conduct, 194 AD2d 86, 606 NYS2d 381 (Third Dept. 1993); Matter of Wapnick v. State Board for Professional Medical Conduct, No. 67874 (Third Dept. April 21, 1994). The Review Board has held in the past, and the courts have agreed, that intentionally defrauding the Medicaid program is misconduct which would justify the revocation of a physician's license, Matter of Supris v. State Board of Professional Medical Conduct, No. 68953 (Third Dept. April 14, 1994).

In this case, the Hearing Committee has found not only that the Respondent defrauded the Medicaid program, but also that he put patients at risk, that he utilized two residents and the property of Queens Hospital for his fraudulent scheme, that he was motivated by overt greed and that he violated the public trust. In spite of all those findings and the Committee's conclusion that the Respondent's conduct was reprehensible, the Committee voted to allow the Respondent to return to the practice of medicine in New York State after only a one year suspension and the payment of a fine. The Committee cited no reason why they imposed that penalty, rather than revoking the Respondent's license.

The Respondent argues that the Hearing Committee did not consider the Respondent's cooperation with authorities as a mitigating factor when imposing a sentence. The Review Board believes that the Hearing Committee must have found some mitigating factor to exist, for the Committee to determine that the Respondent's misconduct did not warrant revocation. The Westchester County Supreme Court may also have considered that cooperation in imposing a sentence

that did not include incarceration. The Review Board finds, however, that any cooperation by the Respondent was not sufficient to overcome the nature and extent of the Respondent's intentional, reprehensible and potentially dangerous misconduct. The appropriate penalty in light of the Respondent's intentional, reprehensible and potentially dangerous misconduct is revocation.

The Respondent also cites bias by one member of the Hearing Committee. We find that the Hearing Committee Member acted properly in stating her prior acquaintance with Dr. Kabnick on the record. The Respondent made no objection at that time to proceeding with that Member on the Hearing Committee and he may not claim possible bias now, merely because he is not satisfied with the Committee's penalty.

Finally, the Review Board notes that the parties limited their presentations to the Board to the question of whether or not the Hearing Committee's penalty should be reduced and the Petitioner did not request an increase in the penalty. The Review Board feels, however, that in any case before the Board, the issues are always whether the Determination and penalty are consistent with the Hearing Committee's findings and conclusions and whether the penalty is appropriate. In determining whether a penalty is consistent and appropriate, the Review Board is not limited by the recommendations of the parties or the way the parties have framed the issue.

ORDER

NOW, based upon this Determination, the Review Board issues the following

ORDER:

1. The Review Board sustains the Hearing Committee's March 14, 1994 Determination finding Dr. Earl Kabnick guilty of professional misconduct.
2. The Review Board overrules the Hearing Committee's Determination to suspend the Respondent's license for one year and fine him Ten Thousand (\$10,000.00) Dollars.
3. The Review Board revokes Dr. Earl Kabnick's license to practice medicine in the State of New York.

ROBERT M. BRIBER

MARYCLAIRE B. SHERWIN

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

WILLIAM A. STEWART, M.D.

IN THE MATTER OF EARL M. KABNICK, 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. Kabnick.

DATED: Albany, New York

June 26, 1994

Redacted Signature

ROBERT M. BRIBER

IN THE MATTER OF EARL M. KABNICK, M.D.

MARYCLAIRE B. SHERWIN, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. KABNICK.

DATED: Malone, New York

6/21, 1994

Redacted Signature

MARYCLAIRE B. SHERWIN

IN THE MATTER OF EARL M. KABNICK, M.D.

WINSTON S. PRICE, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. KABNICK.

DATED: Brooklyn, New York

_____, 1994

Redacted Signature

WINSTON S. PRICE, M.D.

IN THE MATTER OF EARL M. KABNICK, 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. KABNICK.

DATED: Roslyn, New York

June 21, 1994

Redacted Signature

EDWARD C. SINNOTT, M.D.

IN THE MATTER OF EARL M. KABNICK, 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. KABNICK.

DATED: Brooklyn, New York

21 June, 1994

Redacted Signature

WILLIAM A. STEWART, M.D.