



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

June 4, 2001

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Paul Rober Maher, Esq.
& Robert Bogan, Esq.
NYS Department of Health
Hedley Park Place – 4th Floor
Troy, New York 12180

Fernando N. Tibayan, M.D.
East Range Clinics, Ltd.
910 North Sixth Street
Virginia, MN 55792

RE: In the Matter of Fernando N. Tibayan, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 01-135) 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

COPY

IN THE MATTER
OF
FERNANDO N. TIBAYAN, M.D.

DETERMINATION

AND

ORDER

BPMC #01-135

A Notice of Referral Proceeding and Statement of Charges, both dated February 27, 2001, were served upon the Respondent, **Fernando N. Tibayan, M.D.** **David Harris, M.D., M.P.H.**, Chairperson, **Roger Oskvig, M.D.**, and **Ms. Jean Krym**, 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. **John Wiley, Esq.**, Administrative Law Judge, served as the Administrative Officer.

A hearing was held on May 17, 2001, at the offices of the New York State Department of Health ("the Petitioner"). The Petitioner appeared by **Donald P. Berens, Jr., Esq.**, General Counsel, by **Paul Robert Maher, Esq.**, and **Robert Bogan, Esq.**, of Counsel. The Respondent appeared in person on his own behalf.

Evidence was received and transcripts of these proceedings were made.

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

STATEMENT OF CASE

This case was brought pursuant to Public Health Law Section 230(10)(p). The statute provides for an expedited hearing when a licensee is charged solely with a violation of Education Law Section 6530(9). In such cases, a licensee is charged with

misconduct based upon a prior criminal conviction in New York State or another jurisdiction, or upon a prior administrative adjudication regarding conduct that would amount to professional misconduct, if committed in New York. The scope of an expedited hearing is limited to a determination of the nature and severity of the penalty to be imposed upon the licensee.

In the instant case, the Respondent is charged with professional misconduct pursuant to Education Law Section 6530(9)(b) and (d). A copy of the Notice of Referral Proceeding and Statement of Charges is attached to this Determination and Order as Appendix 1.

WITNESSES

For the Petitioner:

None

For the Respondent:

Fernando Tibayan, M.D.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers below in parentheses refer to exhibits, denoted by the prefix "Ex." These citations refer to evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence. All Hearing Committee findings were unanimous.

1. Fernando N. Tibayan, M.D., the Respondent, was authorized to practice medicine in New York State on January 22, 1973, by the issuance of license number 115479 by the New York State Education Department (Petitioner's Ex. 4).

2. On September 9, 2000, the Minnesota Board of Medical Practice ("the Minnesota Board"), by a Stipulation and Order ("the Minnesota Order"), placed a reprimand on the Respondent's license to practice medicine, imposed conditions and restrictions on his practice of medicine, and imposed a \$2,500.00 civil penalty. These

actions were based on findings against the Respondent of incompetence, departures from minimal standards of acceptable medical practice and inadequate medical record keeping. (Petitioner's Exhibit 5).

HEARING COMMITTEE CONCLUSIONS

The Hearing Committee concludes that the conduct of the Respondent would constitute professional misconduct under the laws of New York State pursuant to:

- New York State Education Law Section 6530(3) (negligence on more than one occasion);
- New York State Education Law Section 6530(4) (gross negligence);
- New York State Education Law Section 6530(5) (incompetence on more than one occasion);
- New York State Education Law Section 6530(20) (moral unfitness);
- New York State Education Law Section 6530(30) (abandoning a patient under and in need of immediate care);
- New York State Education Law Section 6530(31) (harassing, abusing, or intimidating a patient); and
- New York State Education Law Section 6530(32) (failure to maintain accurate records).

VOTE OF THE HEARING COMMITTEE

FIRST SPECIFICATION

"Respondent violated New York Education Law Section 6530(9)(b) by having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the conduct was based would, if committed in New York state, constitute professional misconduct under the laws of New York state..."

VOTE: Sustained (3-0)

SECOND SPECIFICATION

"Respondent violated New York Education Law Section 6530(9)(d) by having had disciplinary action taken after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the disciplinary action would, if committed in New York state, constitute professional misconduct under the laws of New York state..."

VOTE: Sustained (3-0)

HEARING COMMITTEE DETERMINATION

The record in this case indicates that the Minnesota Order was based on numerous violations of the Respondent's duties to his patients. His preoperative work-ups were inadequate in several cases, as was his postoperative care. In one case, a patient made several telephone calls to the Respondent to seek treatment for postoperative complications. The Respondent failed to see this patient and the patient died five days after surgery. The Respondent subjected a female patient to a vulgar joke about oral sex. Additionally, the Respondent's medical records were inadequate in many respects.

The number and seriousness of the acts of professional misconduct described in the Minnesota Order justify a revocation of the Respondent's New York State license to practice medicine. However, the Hearing Committee has chosen to impose a lesser penalty, suspension of the Respondent's license, because on the Respondent's efforts subsequent to the issuance of the Minnesota Order to become a better physician and a better person. The Hearing Committee was impressed with the Respondent's testimony regarding his regret for his past inadequacies and by the evidence of his efforts in medical reeducation and therapy to ensure that such problems never recur. These efforts include six weeks of inpatient care at the Sante Center for Healing for his inappropriate sexual

behavior. A Clinical Discharge Summary from the Sante Center for Healing (Respondent's Ex. A) summarizes the Respondent's diligent efforts and expresses the professional opinion that the Respondent has made significant progress.

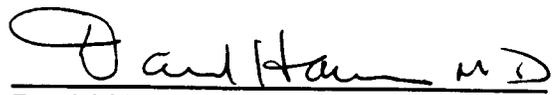
The Hearing Committee concludes that the Respondent is seriously dedicated to never repeating the misconduct described in the Minnesota Order. That misconduct was serious, however, and the Hearing Committee concludes that a suspension of the Respondent's license, under the terms described below, is necessary to protect the people of the State of New York.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Respondent's license to practice medicine is suspended.
2. The Respondent may apply to the State Board for Professional Medical Conduct to have the suspension vacated after all conditions, restrictions and limitations have been removed from his license to practice medicine in the State of Minnesota.
3. If an application to vacate the suspension is submitted, the Respondent must make a showing to the satisfaction of the State Board for Professional Medical Conduct that the health and safety of New York residents would not be compromised by vacating the suspension. If the suspension is vacated, the State Board for Professional Medical Conduct may place reasonable restrictions on the Respondent's license.
4. This Order shall be effective upon service on the Respondent by personal service or by certified or registered mail.

DATED Cold Spring Harbor, New York
May 31, 2001



**David Harris, M.D., M.P.H.
Chairperson**

**Roger Oskvig, M.D.
Jean Krym**

APPENDIX I

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

IN THE MATTER

OF

FERNANDO N. TIBAYAN, M.D.
CO-00-11-4997-A

NOTICE OF

REFERRAL

PROCEEDING

TO: FERNANDO N. TIBAYAN, M.D.
East Range Clinics Ltd.
910 North Sixth Street
Virginia, MN 55792

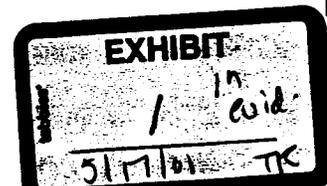
PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of N.Y. Pub. Health Law § 230(10)(p) and N.Y. State Admin. Proc. Act Sections 301-307 and 401. The proceeding will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct (Committee) on the 22nd day of March 2001, at 10:00 in the forenoon of that day at the Hedley Park Place, 5th Floor, 433 River Street, Troy, New York 12180.

At the proceeding, evidence will be received concerning the allegations set forth in the attached Statement of Charges. 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 that 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, 5th Floor, 433 River Street, Troy, New York, ATTENTION: HON.



TYRONE BUTLER, DIRECTOR, BUREAU OF ADJUDICATION, (hereinafter "Bureau of Adjudication") as well as the Department of Health attorney indicated below, on or before March 12, 2001.

Pursuant to the provisions of N.Y. Public Health Law §230(10)(p), you shall file a written answer to each of the Charges and Allegations in the Statement of Charges no later than ten days prior to the hearing. Any Charge of Allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such an 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 brief and affidavits with the Committee. Six copies of all such papers you wish to submit must be filed with the Bureau of Adjudication at the address indicated above on or before March 12, 2001, and a copy of all papers must be served on the same date on the Department of Health attorney indicated below. Pursuant to Section 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.

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: Albany, New York

February 27, 2001



PETER D. VAN BUREN

Deputy Counsel

Bureau of Professional Medical Conduct

Inquiries should be addressed to:

Robert Bogan
Associate Counsel
New York State Department of Health
Office of Professional Medical Conduct
433 River Street – Suite 303
Troy, New York 12180
(518) 402-0820

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

IN THE MATTER
OF
FERNANDO N. TIBAYAN, M.D.
CO-00-11-4997-A

STATEMENT
OF
CHARGES

FERNANDO N. TIBAYAN, M.D., the Respondent, was authorized to practice medicine in New York state on January 22, 1973, by the issuance of license number 115479 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about September 9, 2000, the Minnesota Board of Medical Practice (hereinafter "Minnesota Board"), by a Stipulation and Order (hereinafter "Minnesota Order"), Reprimanded Respondent's license to practice medicine and surgery, imposed conditions, and imposed a \$2,500 civil penalty, based on incompetence, departure from minimal standards of acceptable medical practice, and improper medical records management.

B. The conduct resulting in the Minnesota Board's disciplinary actions against Respondent would constitute misconduct under the laws of New York state, pursuant to the following sections of New York state law:

1. New York Education Law §6530(3) (negligence on more than one occasion);
2. New York Education Law §6530(4) (gross negligence);
3. New York Education Law §6530(5) (incompetence on more than one occasion);
4. New York Education Law §6530(6) (gross incompetence);
5. New York Education Law §6530(20) (moral unfitness);

6. New York Education Law §6530(30) (abandoning a patient under and in need of immediate care);

7. New York Education Law §6530(31) (harassing, abusing, or intimidating a patient); and/or

8. New York Education Law §6530(32) (failure to maintain accurate records).

SPECIFICATIONS

FIRST SPECIFICATION

Respondent violated New York Education Law §6530(9)(b) by having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state, in that Petitioner charges:

1. The facts in paragraphs A and/or B.

SECOND SPECIFICATION

Respondent violated New York Education Law §6530(9)(d) by having had disciplinary action taken after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the disciplinary action would, if committed in New York state, constitute professional misconduct under the laws of New York state, in that Petitioner charges:

2. The facts in paragraphs A and/or B.

DATED: *Feb. 27*, 2001
Albany, New York


PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional
Medical Conduct