



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

February 6, 2003

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Conrado G. Ponio, M.D.
134-28 58th Avenue
Flushing, New York 11355

Roy Nemerson, Esq.
NYS Department of Health
5 Penn Plaza, 6th Floor
New York, New York 10001

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NYS Department of Health
145 Huguenot Street-6th Floor
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Stephen R. Mahler, Esq.
Mahler, Miller, Harris & Engel, P.C.
125-10 Queens Boulevard - Suite 311
Kew Gardens, New York 11415

RE: In the Matter of Conrado G. Ponio, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 02-239) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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, 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
ADMINISTRATIVE REVIEW BOARD FOR PROFESSIONAL MEDICAL CONDUCT**

COPY

In the Matter of

Conrado G. Ponio, M.D. (Respondent)

Administrative Review Board (ARB)

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

Determination and Order No. 02-239

**Before ARB Members Grossman, Lynch, Pellman, Price and Briber
Administrative Law Judge James F. Horan drafted the Determination**

**For the Department of Health (Petitioner):
For the Respondent:**

**Jean Bresler, Esq.
Stephen R. Mahler, Esq.**

After a hearing below, a BPMC Committee determined that the Respondent committed professional misconduct in performing examinations on six women. The Committee voted to suspend the Respondent's License to practice medicine in New York State (License) and to place the Respondent on probation after the suspension ends. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney 2002), both parties ask the ARB to nullify or modify the Committee's Determination. After reviewing the hearing record and the review submissions from the parties, we affirm Committee's determination that the Respondent engaged in inappropriate conduct with the Patients that amounted to harassment and that evidenced moral unfitness. We overturn the Committee and hold that the Respondent's conduct also amounted to fraud in practice and we overturn the Committee and vote 5-0 to revoke the Respondent's License.

Committee Determination on the Charges

The Petitioner commenced the proceeding by filing charges with BPMC alleging that the Respondent violated N. Y. Educ. Law §§ 6530(2), 6530(20) & 6530(31) (McKinney Supp. 2002) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- engaging in conduct in practice that evidences moral unfitness, and,
- willfully harassing or abusing a patient, physically or verbally.

The charges concerned the Respondent's conduct while performing pre-employment physical examinations on six women, Patients A-F. The record refers to the Patients by initials to protect patient privacy. The Respondent denied the allegations and a hearing followed before the Committee that rendered the Determination now on review.

The Committee found that the Respondent conducted physical examinations on Patients A through F, as pre-employment physicals for Lutheran Hospital in Queens, New York. The Committee determined that, in the course of those examinations, the Respondent touched the Patients' breasts or vaginas, without gloves, and/or viewed the Patients' genitals for no legitimate medical purposes. The Committee determined further that the Respondent made inappropriate, harassing and intrusive comments to the Patients. The Committee sustained the charges that the Respondent's conduct amounted to harassing and abusing the Patients and the conduct evidenced moral unfitness.

In making their findings, the Committee found the Patients credible and rejected the Respondent's assertion that the Patients conspired against the Respondent. The Committee also found the expert witnesses for the Petitioner and the Respondent credible. The Committee noted that the Respondent's expert, Dr. Stoica, supported many of the opinions of the Petitioner's expert, Dr. Brogan. The Committee found the Respondent evasive and non-credible and found the Respondent's testimony without support by common sense or the Patients' medical records.

The Committee found revocation too harsh a penalty and found the Respondent salvageable, if the Respondent realizes that his actions were wrong and improper. The Committee voted to suspend the Respondent's License for two years and to stay the last eighteen

months of the suspension. Following the actual suspension, the Committee placed the Respondent on probation for five years under the terms that appear at Appendix III to the Committee's Determination.

Review History and Issues

The Committee rendered their Determination on August 7, 2002. This proceeding commenced on August 19, 2002, 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 and response brief and the Respondent's brief. The record closed when the ARB received the response brief on September 26, 2002.

The Respondent argues that the Petitioner failed to prove the charges by substantial evidence. The Respondent argues:

- the Patients exaggerated their testimony to obtain monetary recovery against the Respondent in lawsuits the Patients have commenced,
- no one indicated that the Respondent acted in a lascivious manner,
- Lutheran Hospital and State statutes offered no guidelines for pre-employment physicals,
- three Patients presented with medical histories that warranted vaginal inspections by the Respondent,
- the procedures the Respondent performed engendered incidental touching to the breasts and no one contested the necessity or validity of those procedures, and
- the Petitioner's medical expert lacked the qualifications to testify concerning the care the Respondent provided.

The Respondent asks the ARB to dismiss all the charges.

The Petitioner asks that the ARB overrule the Committee and sustain the fraud charge. The Petitioner also asks that the ARB overrule the Committee and revoke the Respondent's License.

Determination

The ARB has considered the record and the parties' briefs. Under our authority from N.Y. Pub. Health Law § 230-c(4)(a), in reviewing a hearing committee determination, the ARB determines whether a Committee rendered an appropriate penalty and a penalty consistent with their findings and conclusions. The courts have interpreted the statute to mean that 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 (3rd Dept. 1993). The ARB may also choose to substitute our judgement and amend a Committee Determination on our own motion, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). We elect to exercise the authority to substitute our judgement in this case. We affirm the Committee's Determination that the Respondent engaged in conduct that evidenced moral unfitness and that the Respondent abused and harassed Patients A through F. We overturn the Committee and sustain the charge that the Respondent's conduct amounted to fraud in practice. We also overturn the Committee's Determination to suspend the Respondent's License and place the Respondent on probation following the suspension. We vote 5-0 to revoke the Respondent's License.

We note first that the Respondent's Brief argued that the Petitioner failed to prove the charges by substantial evidence [Respondent's Brief, page 43]. Under N.Y. Pub. Health Law §

230(10)(f), the Petitioner must prove the charges by preponderance of the evidence, rather than substantial evidence.

The Respondent challenged the Committee's Determination to credit the testimony by Patients A through F. We defer to the Committee, as the fact finder, in their judgement on witness credibility. The Committee observed the testimony by the Patients and the contrary testimony by the Respondent. They rejected the Respondent's testimony as evasive and at odds with common sense and his own medical records. The Committee acted within their authority in making their credibility determination. The Respondent also challenged the Committee's Determination to credit the expert testimony by Dr. Brogan. The Committee made specific conclusions, however, that Dr. Brogan possessed expertise and experience sufficient to know the nature of the pre-employment physical at issue in this case. They also found that the Respondent's expert, Dr. Stoica supported Dr. Brogan's testimony on several issues, such as:

- no benefit accrues from doing only an external genital exam in order to diagnose a yeast infection,
- if a physician is going to do a vaginal exam, then do a complete exam and not just a look, and,
- if a physician does a breast exam, or any exam, note the findings in the medical record [Committee Determination, page 16].

We hold that the evidence the Committee found credible provided preponderant evidence that the Respondent made contact with the Patients' breast and vaginas for no proper medical purposes and that the Respondent made harassing and abusive comments to the Patients.

The Respondent also argued that neither Lutheran Hospital nor any state statute provided standards for performing pre-employment physicals or required the Respondent to wear gloves.

The Respondent also argued that any penalty on the Respondent's mere speech would violate the Respondent's First Amendment rights. The Committee rejected those arguments and we reject the arguments as well. The Respondent's training and education provided sufficient guidelines for the Respondent to know that he acted improperly and without medical justification. The Committee also found that the Respondent's comments went beyond just extraneous or insensitive talk. The Committee noted that in Patient F's case, the Respondent indicated he would not clear the Patient for employment unless Patient F answered the Respondent's inappropriate questions.

On the fraud charges, we overturn the Committee and sustain the charges. In order to sustain a charge that a physician practiced medicine fraudulently, a hearing committee must find that (1) the physician made a false representation, whether by words, conduct or by concealing that which the licensee should have disclosed, (2) the physician knew the representation was false, and (3) the physician intended to mislead through the false representation, Sherman v. Board of Regents, 24 A.D.2d 315, 266 N.Y.S.2d 39 (3rd Dept. 1966), aff'd, 19 N.Y.2d 679, 278 N.Y.S.2d 870 (1967). A committee may reject a respondent's explanation for a misrepresentation and draw the inference that the respondent 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 (3rd Dept. 1986).

In each of these cases, the Respondent made misrepresentations to the Patients that medical justification made it necessary for the Patients to remove clothing or permit the Respondent to touch the Patients' breasts or vaginas. The Respondent knew from his training and education that no medical justification existed for his conduct and we infer that the Respondent

intended to mislead the Patients. We hold that such conduct amounted to fraud in medical practice.

Turning to the penalty, we overturn the Committee's Determination to suspend the Respondent's License and to place the Respondent on probation following the suspension. The Committee concluded that suspension and probation would make the Respondent realize that his actions were wrong and improper. The ARB finds that conclusion by the Committee inconsistent with the Committee's earlier conclusion that the Respondent should have known from his training and education that his actions were improper and without medical justification [Committee Determination, page 17]. We also note that the Respondent denied any wrongdoing and showed no remorse for his conduct. We conclude that the Respondent remains at risk to repeat his misconduct if the Respondent remains in practice. We conclude that patient protection requires that we revoke the Respondent's License.

ORDER

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

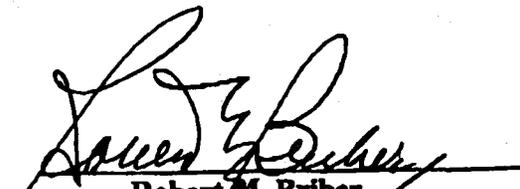
1. The ARB affirms the Committee's Determination that the Respondent committed patient abuse and evidenced moral unfitness.
2. The ARB overturns the Committee and sustains the charge that the Respondent engaged in fraud in practice.
3. The ARB overturns the Committee's Determination to suspend the Respondent's License for six months actual suspension and to place the Respondent on probation for five years following he suspension.
4. The ARB revokes the Respondent's License.

Robert M. Briber
Thea Graves Pellman
Winston S. Price, M.D.
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.

In the Matter of Conrado G. Ponio, M.D.

Robert M. Briber, an ARB Member, concurs in the Determination and Order in the Matter of Dr. Ponio.

Dated: February 1, 2003



Robert M. Briber

In the Matter of Conrado G. Ponio, M.D.

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

Dated: 12/3/03, 2003

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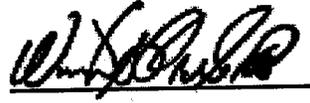
Thea Graves Pellman

In the Matter of Conrado G. Ponio, M.D.

Winston S. Price, M.D., an ARB Member concurs in the Determination and Order in the Matter of

Dr. Ponio.

Dated: Feb 3, 2003

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Winston S. Price, M.D.

In the Matter of Conrado G. Ponio, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Ponio.

Dated: February 3, 2003

A handwritten signature in black ink, appearing to read "S. L. Grossman M.D.", written over a horizontal line.

Stanley L. Grossman, M.D.

In the Matter of Conrado G. Ponio, M.D.

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

Dated: February 1, 2003

Therese G. Lynch M.D.

Therese G. Lynch, M.D.