



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

August 7, 2002

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

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

Dear Parties:

Enclosed please find the Determination and Order (No. 02-239) 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

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

**IN THE MATTER
OF
CONRADO G. PONIO, M.D.**

**COPY
DETERMINATION
AND
ORDER
BPMC 02 - 239**

BENJAMIN WAINFELD, M.D., (Chairperson), **RALPH LUCARIELLO, M.D.**, and **SHAHLA JAVDAN** duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to §230(10) of the Public Health Law.

MARC P. ZYLBERBERG, ESQ., ADMINISTRATIVE LAW JUDGE, ("ALJ") served as the Administrative Officer.

The Department of Health appeared by **JEAN BRESLER, ESQ.**, Associate Counsel.

Respondent, **CONRADO G. PONIO, M.D.**, appeared personally and was represented by **MAHLER, MILLER, HARRIS & ENGEL, P.C.** by **STEPHEN R. MAHLER, ESQ.** of Counsel.

Evidence was received and examined, including witnesses who were sworn or affirmed. Transcripts of the proceeding were made. After consideration of the record, the Hearing Committee issues this Determination and Order pursuant to the Public Health Law and the Education Law of the State of New York.

PROCEDURAL HISTORY

Date of Notice of Hearing:	December 17, 2001
Date of Statement of Charges:	December 17, 2001
Date of Service of Notice of Hearing and Statement of Charges:	January 23, 2002
Date of Answer to Charges:	February 12, 2002
Date of Amended Statement of Charges:	February 21, 2002
Pre-Hearing Conference Held:	February 21, 2002
Hearings Held: - (First Hearing day):	February 21, 2002 March 7, 2002 April 8, 2002 April 19, 2002
Intra-Hearing Conferences Held:	February 21, 2002 March 7, 2002 April 19, 2002
Department's Proposed Findings of Fact, Conclusions of Law and Sanction:	Received June 7, 2002
Respondent's Summation Findings of Fact and Conclusions of Law:	Received June 11, 2002
Witness called by the Petitioner, Department of Health (in the order they testified):	Patient A Patient B Patient D Patient C Kathleen A. Shea, R.N. Patient F Patient E Gerard Brogan, M.D.
Witnesses called by the Respondent, Conrado G. Ponio, M.D.	Dorin Stoica, M.D. Conrado G. Ponio, M.D.
Deliberations Held: (last day of Hearing)	June 27, 2002

STATEMENT OF CASE

The State Board for Professional Medical Conduct is a duly authorized professional disciplinary agency of the State of New York (§230 et seq. of the Public Health Law of the State of New York [**"P.H.L."**]).

This case was brought by the New York State Department of Health, Bureau of Professional Medical Conduct (**"Petitioner"** or **"Department"**) pursuant to §230 of the P.H.L.

Conrado G. Ponio, M.D., (**"Respondent"**) is charged with eighteen (18) specifications of professional misconduct, as delineated in §6530 of the Education Law of the State of New York (**"Education Law"**).

Respondent is charged with professional misconduct by reason of: (1) engaging in conduct in the practice of the profession of medicine that evidences moral unfitness to practice the profession of medicine¹; and (2) willfully physically or verbally harassing or abusing a patient²; and (3) practicing the profession of medicine fraudulently³.

These Charges and Specifications of professional misconduct result from Respondent's alleged conduct towards 6 patients/employees ⁴ (**"patient"**, **"employee"** and **"potential employee"** are used interchangeably and are synonymous for the purposes of this Determination and Order).

¹ Education Law §6530(20) and the First through Sixth Specifications of the Amended Statement of Charges (Department's Exhibit #1-A).

² Education Law §6530(31) and the Seventh through Twelfth Specifications of the Amended Statement of Charges (Department's Exhibit #1-A).

³ Education Law §6530(2) and the Thirteenth through Eighteenth Specifications of the Amended Statement of Charges (Department's Exhibit #1-A).

⁴ Patients/Employees A through F are identified in the Appendix annexed to the Amended Statement of Charges (Department's Exhibit #1-A).

Respondent admits factual allegations B.1 and F.1 and denies all other factual allegations contained in the Statement of Charges (the Statement of Charges was amended by adding factual allegation B.3 which is deemed denied by Respondent; all other factual allegations are the same in the Statement of Charges as in the Amended Statement of Charges).

A copy of the Amended Statement of Charges and a copy of the Answer are attached to this Determination and Order as Appendix I and II respectively.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. These facts represent documentary evidence and testimony found persuasive by the Hearing Committee in arriving at a particular finding. Where there was conflicting evidence, the Hearing Committee considered all of the evidence presented and rejected what was not relevant, believable or credible in favor of the cited evidence. The Department, which has the burden of proof, was required to prove its case by a preponderance of the evidence. The Hearing Committee unanimously agreed on all Findings of Fact. All Findings of Fact made by the Hearing Committee were established by at least a preponderance of the evidence.

General Findings

1. Respondent was licensed to practice medicine in New York State on August 23, 1994 by the issuance of license number 196969 by the New York State Education Department (Department's Exhibits # 1-A and # 9)⁵.

⁵ Refers to exhibits in evidence submitted by the New York State Department of Health (Department's Exhibit #) or by Dr. Conrado G. Ponio (Respondent's Exhibit #).

2. The State Board for Professional Medical Conduct has obtained personal jurisdiction over Respondent (determination made by the ALJ; Respondent had no objection regarding service effected on him); (P.H.L. §230[10][d]); [P.H.T-6]⁶.

3. Gerry Brogan testified as the Department's expert. While Dr. Brogan does not perform pre-employment physical examinations as part of his current duties, he did so during his training. [T- 570]. The Hearing Committee accepted Dr. Brogan as an expert in conducting physical examinations, which are appropriate to varying situations. Dr. Brogan was licensed in 1986, board certified in emergency medicine in 1989, and is currently the vice president of emergency services at North Shore University Hospital in Plainview and Manhasset. For more than 10 years he served as a clinical assistant professor and then clinical associate professor of medicine at Stony Brook emergency department and assistant medical director at Stony Brook for clinical pathways management (Department's Exhibit # 8A); [T- 533-535].

4. During a pre-employment physical exam a physician is trying to determine one of two things: whether a condition exists that would pose a threat to patients that the employee would serve or whether a condition exists that would prevent the employee from completely discharging her responsibilities to the hospital [T- 307, 547-548].

5. Performing a gynecological exam on a pre-employment physical was not indicated for any of the four potential employees (Patients A, B, E and F) [T-565, 613, 617]. It is highly unusual that absent any signs or symptoms one would perform a vaginal exam during a pre-employment physical [T-310, 558].

⁶ Numbers in brackets refer to Hearing transcript page numbers [T-] or to Pre-Hearing transcript page numbers [P.H.T-]. The Hearing Committee did not review the Pre-Hearing or the Intra-Hearing transcripts but, when necessary, was advised of the relevant legal decisions or rulings made by the ALJ.

6. In the event the potential employee presents with a complaint of vaginal infection, such as a vaginal yeast infection, performing a complete pelvic examination would be required [T- 550, 613, 617, 716]. Doing an external genitalia exam is never adequate; a visual inspection of the external genitalia is not sufficient [T-568, 716]. After a visual inspection, a speculum exam as well as a bi manual exam would be required to check for pelvic inflammatory disease [T-550-551, 601, 716].

7. None of the four potential employees presented with any complaints of vaginal infection. A vaginal yeast infection bears no relationship whatsoever to a health care worker's pre-employment physical exam. This condition, if present, bears no relationship to a health care worker's ability to perform her job, nor does it pose a risk to her patients [T-310, 552-553, 601, 610-612, 658].

8. It is appropriate to wear examining gloves when touching a patient's vagina [T-553-554, 755].

9. If a gynecological exam is performed, it must be noted in the patient's medical records. There was no indication on the pre-employment physical exam form that any evaluation of the genitalia was expected (Department's Exhibits # 2, 3, 4, 5, 6, and 7); [T- 582].

10. A general principle of medicine is that you document what you do, both the history and physical. If you perform an exam, you document it, if it is important enough to do, it is important enough to document your findings [T-547, 582, 648-649, 729].

11. A breast examination is not part of the standard pre-employment physical [T-308 -309].

12. Appropriate procedure would require a physician to provide some draping when requiring a female patient to disrobe from the waste up [T- 621, 634].

13. In the examination room of Lutheran Hospital, where the 6 potential employees were examined, there were ^{were} no speculum ^a available and the examination table had no stirrups. Gowns and gloves were available in the table itself and in the cabinets [T-309-310, 319].

14. Kathleen Shea has been licensed as a registered nurse since 1963 and has worked at Lutheran Medical Center for 28 years in the Occupational Health Office. In that capacity, one of her jobs is assisting in the processing of pre-employment physical exams [T-295-297].

15. Personal questioning involving a potential employee's: religion, sexual activity, marriage, divorce or history of yeast infection are not relevant areas of history for pre-employment purposes [T-316-317].

PATIENT A

16. On January 10, 2000, Respondent performed a pre-employment physical on Employee A, a registered nurse, at Lutheran Hospital in Queens, New York (Department's Exhibit # 2); [T-19].

17. After checking Patient A's eyes, ears, heart and lungs, Respondent asked Patient A to lie down on the examination table and told her to pull down her pants. She pulled them down slightly to expose her abdomen and he said, "No I need you to pull it down all the way down to your knees". Patient A resisted, asked him "Why" and he responded that he had to check her for yeast infections because she had a family history of diabetes. Patient A continued to resist stating that she did not have diabetes only her father had diabetes. Respondent kept insisting that he had to look at her vagina and that she had to pull down her pants and her panties. After Patient A pulled her pants and underwear all the way down Respondent put one hand on her leg and with the other hand separated the labia, moved his fingers around and stated, "you are very clean down there". Respondent was not wearing gloves, and the physical contact lasted about one minute. Patient A then got dressed and left the room [T-21-25, 42].

Factual Allegations A, A.1., and A.2. are sustained.

PATIENT B

18. On December 28, 1999, Respondent performed a pre-employment physical examination on Patient B (Department's Exhibit # 3); [T-128].

19. Respondent asked Patient B Questions regarding Patient B's sexually history (whether she was sexually active, what form of contraception she used, did she have any sexually transmitted diseases). Respondent asked Patient B if "she ever had chlamydia?, gonorrhea? herpes?" Respondent asked Patient B if she ever had a yeast infection, an abortion, a miscarriage, or had ever been pregnant [T-131-133].

20. Patient B told Respondent that she had seen her gynecologist within the last month for an exam [T-134].

21. Respondent directed Patient B to the examination table where he had her lie down and lift up her shirt and her bra exposing her breasts. Respondent felt the top of both breasts using both hands. Respondent's "exam" was nothing like any other medical examination she had ever had [T-135, 171].

22. Respondent instructed Patient B to remove her pants and underpants down to her knees. When she asked him what he was doing, he said that he was doing an external genital inspection [T-135].

23. With Patient B's knees bent and her feet on the examination table Respondent put his hands on her knees and pulled them apart. Respondent placed his face between her knees level with her knees. He looked at her vagina while speaking about sexually transmitted diseases, yeast infections, and how she had a hormonal problem that was causing her to be obese [T-135-136].

Factual Allegations B., B.1, B.2, and B.3 are sustained.

PATIENT C

24. On June 30, 1999, Respondent performed a pre-employment physical examination on Patient C (Department's Exhibit # 4); [T-216-217].

25. Respondent told Patient C that lots of women who come from the Ukraine are very sick; that she had to remove all her clothes from the waist up. Patient C asked if she had to remove her bra and Respondent said yes [T-218, 260].

26. Patient C covered her chest with her own shirt because no gown was offered to her. No chaperone was offered at any time before or during the exam [T-218-219, 261].

27. Respondent did not check Patient C's eyes, ears, nose and throat [T-263].

28. Respondent touched both of Patient C's breasts using both of his hands. He touched her in a different way than her gynecologist examines her. She described the touch as more like grabbing her breasts. He touched both of her breasts in the same manner. He did not use a stethoscope nor was he holding one when he examined her breasts [T-219, 220-222, 245-246].

Factual Allegations C. (except for the words "head" and "neck"), C.1., C.2 (Under the guise of performing a legitimate medical examination Respondent inappropriately instructed Patient C to remove her clothes from the waist up(not all her clothes) for no legitimate medical purposes) and C.3. are sustained.

PATIENT D

29. On February 18, 1997, Respondent performed a pre-employment physical examination on Patient D (Department's Exhibit # 5); [T-193].

30. Patient D entered the examination room and Respondent discussed her medical forms with her. Respondent did not offer her a chaperone [T-195-196, 281].

31. Respondent told Patient D to remove all of her clothes so that he could conduct the examination. Patient D kept her underwear on and Respondent told her to remove her bra and she did [T-196-197, 288-289].

32. Respondent began feeling around Patient D's breast, touching a nipple and then using both hands to touch both breasts [T-198-199].

Factual Allegations D. (except the date of the physical was February 18 and not in April; and except for the word "gown"), D.1, and D.2 are sustained.

PATIENT E

33. On January 10, 2000, Respondent performed a pre-employment physical on Patient E (Department's Exhibit # 6); [T-477].

34. At the beginning of the pre-employment physical of Patient E, Respondent asked her if she was divorced and commented why would a man leave a women as pretty as Patient E [T-486].

35. Respondent asked Patient E to unhook her bra so that he could listen for an apical pulse. She did. Respondent put his hand under her shirt and bra and brushed against her breast. Patient E felt uncomfortable [T-487].

36. Respondent then questioned Patient E about whether she had ever had a urinary tract infection or a yeast infection. Patient E replied that she did not. He then told Patient E that he had to do an external vaginal examination just to check. He asked her to pull her pants and underpants down to her knees. Patient E asked Respondent repeatedly "what was that for exactly". Respondent's reply was that it would be very quick [T-488-489, 492].

37. Patient E pulled her pants and underpants down and held her legs together tight. Respondent touched her thigh and repeated that it would be quick. Then with one hand on her thigh he took the other hand and spread her labia apart. Throughout this "examination" Patient E kept asking if this was really necessary. When she felt his hands spread the Labia she jumped up and he said, "you look fine" [T- 489-491].

38. Respondent was not wearing gloves when he touched Patient E's labia [T-491].

Factual Allegations E., E.1., E.2., E.3., and E.4. are sustained.

PATIENT F

39. On January 7, 2000, Respondent performed a pre-employment physical on Patient F. (Department's Exhibit # 7); [T-407-408].

40. Respondent asked Patient F if she was single or married; when she answered she was separated, Respondent asked her why; what the problems were; if her husband was the same religion; if her husband left her because she could not have children; if her husband had abused alcohol or drugs [T-414-416].

41. When Patient F indicated that she did not want to talk about her personal issues and protested regarding Respondent's personal questions, Respondent told Patient F that he could not clear her for employment unless she answered his questions [T-414-417].

42. Respondent asked Patient F to lift up her shirt and unhook her bra completely exposing her breasts [T-417-419].

43. Respondent then asked Patient F to take her pants and under pants down to her knees. Patient F did not want to do this because she was uncomfortable and she was menstruating heavily [T- 419].

44. Patient F said, "No, I don't want to do this" Respondent kept pressuring her and Patient F kept protesting. Respondent said to her I just want to do an external. She said that "makes no sense looking at a bloody vagina - no". At which point Respondent said just show me the "mons". Patient F took her pants and underpants down to her thighs. Her pants remained down a couple of seconds, while Respondent looked at her vagina [T-419-421].

Factual Allegations F., F.1., F.2., and F.3. are sustained.

CONCLUSIONS OF LAW

The Hearing Committee makes the following conclusions, pursuant to the Findings of Fact listed above. All conclusions as to the allegations contained in the Amended Statement of Charges were by a unanimous vote of the Hearing Committee.

The Hearing Committee concludes that all of the Factual Allegations, contained in the February, 2002 Amended Statement of Charges are **SUSTAINED**⁷

Based on the above, the complete Findings of Fact and the discussion below, the Hearing Committee concludes: the FIRST through SIXTH SPECIFICATIONS (MORAL UNFITNESS) contained in the Amended Statement of Charges are **SUSTAINED**; the SEVENTH through TWELFTH SPECIFICATIONS (WILLFUL PATIENT ABUSE) contained in the Amended Statement of Charges are **SUSTAINED**.

The Hearing Committee concludes that the THIRTEENTH through EIGHTEENTH SPECIFICATIONS contained in the Amended Statement of Charges are **NOT SUSTAINED**.

The rationale for the Hearing Committee's conclusions is set forth below.

⁷ As discussed in the Findings of Fact above Factual Allegations C., C.2., and D. are also sustained except for some minor amendment in language.

DISCUSSION

Respondent is charged with Eighteen (18) specifications alleging professional misconduct within the meaning of §6530 of the Education Law. §6530 of the Education Law sets forth a number and variety of forms or types of conduct, which constitute professional misconduct. However, §6530 of the Education Law does not provide definitions or explanations of some of the types of misconduct charged in this matter.

The ALJ provided to the Hearing Committee suggested definitions of medical misconduct as alleged in this proceeding. These suggested definitions include:

Moral Unfitness

To sustain a specification of moral unfitness, the Department must show that Respondent committed acts which "evidence moral unfitness". There is a distinction between a finding that an act "evidences moral unfitness" and a finding that a particular person is morally unfit. In a proceeding before the State Board for Professional Medical Conduct, the Hearing Committee is asked to decide if certain alleged conduct is suggestive of, or would tend to prove, moral unfitness. The Hearing Committee is not called on to make an overall judgment regarding a Respondent's moral character. It is noteworthy that an otherwise moral individual can commit an act "evidencing moral unfitness" due to a lapse in judgment or other temporary aberration.

The standard for moral unfitness in the practice of medicine is twofold. First, there may be a finding that the accused has violated the public trust which is bestowed by virtue of his licensure as a physician. Physicians have privileges that are available solely due to the fact that one is a physician. The public places great trust in physicians solely based on the fact that they are physicians. For instance, physicians have access to controlled substances and billing privileges that

are available to them solely because they are physicians. Patients are asked to place themselves in potentially compromising positions with physicians, such as when they disrobe for examination or treatment. Hence, it is expected that a physician will not violate the trust the public has bestowed on him or her by virtue of his or her professional status. Second, moral unfitness can be seen as a violation of the moral standards of the medical community which the Hearing Committee, as delegated members of that community, represent.

Practicing the Profession Fraudulently

Fraudulent practice of medicine is an intentional misrepresentation or concealment of a known fact, in connection with the practice of medicine. An individual's knowledge that he is making a misrepresentation or concealing a known fact with the intention to mislead may properly be inferred from certain facts. In order to support the charge that medicine has been practiced fraudulently, the Department must prove by a preponderance of the evidence that (1) Dr. Ponio made a false representation, whether by words, conduct, or concealment of that which should have been disclosed; (2) Dr. Ponio knew that the representation was false; and (3) Dr. Ponio intended to mislead through the false representation. The opinion of the medical experts of the occurrence of or non occurrence of fraud should be disregarded in total. The Hearing Committee is the sole arbiter of whether fraud occurred and must base its determination on the credible facts (including Respondent's testimony) and not on whether others believe that fraud occurred or did not occur.

For all other terms, including "physical harassment", "abuse", and "willful", the Hearing Committee used ordinary English usage and their general understanding of those terms.

The Hearing Committee was aware of its duty to keep an open mind regarding the allegations and testimony. The Hearing Committee was made aware, by both parties, that there may

have been police activity in this matter. Such police activity has absolutely nothing to do with this proceeding. The fact or inferences that the police may have been involved does not in any way add or detract weight to a given charge or circumstance. All findings by the Hearing Committee were established on their own merits and not based or bolstered because of possible police involvement.

With regard to the testimony presented herein, including Respondent's, the Hearing Committee evaluated all the witnesses for possible bias or motive. The witnesses were also assessed according to their training, experience, credentials, demeanor, and credibility. We considered whether the testimony was supported or contradicted by other independent objective evidence. The Hearing Committee understood that as the trier of fact we may accept so much of a witnesses' testimony as is deemed true and disregard what we find and determine to be false.

The Hearing Committee found that the patients/employees who came to testify in these proceedings were generally credible, believable and sincere. Contrary to Respondent's assertions, the Hearing Committee did not believe that these 6 woman conspired against Respondent. These woman did not know each other prior to their pre-employment physicals and complained to different people at different times.

The Hearing Committee found Dr. Brogan to be forthright and non evasive in his answers during direct, cross-examination and Hearing Committee questioning. Dr. Brogan's only weakness was his lack of recent experience in pre-employment physicals. However, the Hearing Committee found Dr. Brogan's expertise and experience to be more than sufficient for the type of exam required and for the conduct that was alleged to have occurred between the 6 patients and Respondent. The Hearing Committee also found Respondent's expert, Dr. Dorin Stoica, to be credible and straightforward. Dr. Stoica's experience and weaknesses were similar to Dr. Brogan's. Although

Dr. Stoica refused to opine as to what a routine pre-employment exam would consist of, he did support many of the other opinions of Dr. Brogan (for example: no benefit to doing only external genitalia exams in order to diagnose a yeast infection; if you are going to do a gynecological exam then you do a complete exam and not just a look; if you do a breast exam or any other exam, you note your findings in the patient's medical records).

The Hearing Committee found Nurse Kathleen Shea to be professional, authoritative and knowledgeable. Having worked at Lutheran Medical Center for the past 28 years, and with Respondent for approximately four years, Nurse Shea was well qualified to opine on pre-employment physicals and the operations of the Center.

Respondent testified on his own behalf and clearly has an interest in the outcome of the case. We found the testimony presented by Respondent to be evasive, not credible and not supported by common sense or by the patient's medical records.

Factual Allegations

Respondent's touching and/or viewing of a patient's vagina in a pre-employment physical setting was done for no legitimate medical purpose. The breast "exams" performed by Respondent were done by Respondent for no legitimate medical purpose. Respondent's inappropriate comments and invasive questioning of personal facts were also done for no legitimate medical purposes. Respondent's failure to use gloves when (inappropriately) touching the vagina or labia majora of a patient was a deviation and willful physical abuse of that patient. Respondent's instructions to a patient to remove all of her clothes, including bras and panties, for no legitimate medical purposes and without offering gowns, was a deviation and is willful harassment or abuse of the patient.

Based on the Factual Allegations sustained, the Hearing Committee finds and determines that Respondent's conduct with regard to each and everyone of the 6 patients was evidence of acts of moral unfitness. Respondent made intrusive and harassing comments, and/or touched their breasts and vaginas (without gloves) and/or viewed their genitals for no legitimate medical purposes. Respondent not only violated the public trust by abusing his position as a physician to force these 6 women to disrobe for no legitimate medical purposes, but Respondent also violated the moral standards of our medical community. Respondent's conduct was especially egregious and threatening in the comments he made to Patient F where he indicated that he could not clear her for employment unless she answered his (inappropriate) questions. The questions asked or comments made by Respondent to the patients were more than just extraneous or insensitive talk. We found them to be, under the circumstances of a pre-employment examination, abusive and harassing.

Respondent claimed that no one showed him any guidelines for what should be done (or not done) on a pre-employment physical or examination. This claim was rejected by the Hearing Committee. Respondent's training and education was sufficient for him to know that his actions were improper and without medical justification or purpose. Both experts certainly knew that some of his actions were improper as did the 6 patients. There was no rationale for a physician performing a pre-employment physical examination of a nurse (or other potential employee) to conduct a visual inspection of her vagina, for yeast infection or for any other medical purposes.

None of the 6 patients indicated or believed that Respondent's actions were done for his own sexual gratification or some perceived pleasure or satisfaction. It remains unclear to the Hearing Committee what Respondent's motives were. However, these occurrences, as well as Respondent's past sexual inappropriate conduct (Department's Exhibit # 9 at page 14; [T-917-922]), indicate a serious personal problem which Respondent needs to address.

The Hearing Committee does not sustain the specifications of fraud because we believe there was insufficient evidence to show that Respondent really knew or believed his requests were false. From the facts believed by us we made no additional inferences.

DETERMINATION AS TO PENALTY

The Hearing Committee pursuant to the Findings of Fact, Conclusions of Law and Discussion set forth above unanimously determines that a penalty of TWO YEARS OF SUSPENSION (with the last eighteen months stayed) and THE FIRST SIX (6) MONTHS TO BE ACTUAL SUSPENSION PLUS FIVE (5) YEARS OF PROBATION, with a requirement that a CHAPERONE be present for all female patient contact, should be imposed on Respondent (and Respondent's license) to practice medicine in New York State.

This determination is reached after due and careful consideration of the full spectrum of penalties available pursuant to P.H.L. § 230-a., including:

(1) Censure and reprimand; (2) Suspension of the license, wholly or partially; (3) Limitations of the license; (4) Revocation of license; (5) Annulment of license or registration; (6) Limitations; (7) The imposition of monetary penalties; (8) A course of education or training; (9) Performance of public service; (10) Probation and (11) Dismissal in the interest of justice.

The Hearing Committee considered Respondent's actions and misconduct to be very serious. We reviewed and considered the possibility of revoking Respondent's license but believe that penalty to be too harsh under these specific circumstances. We believe that Respondent is salvageable in the sense that the penalty issued in this Determination and Order should make Respondent realize that his actions were wrong and improper. We believe Respondent will not make the same mistake again. No evidence was presented regarding Respondent's competence or that he was negligent in the practice of medicine.

The Hearing Committee believes that Respondent can serve the people of the State of New York if he learned his lesson. However, we do believe that if Respondent violates his terms of probation, he should have his license revoked. We are giving Respondent his last chance in New York.

Taking all of the facts, details, circumstances, and particulars in this matter into consideration, the Hearing Committee determines that the above is the appropriate action under the circumstances.

All other issues raised by both parties have been duly considered by the Hearing Committee and would not justify a change in the Findings, Conclusions or Determination contained herein.

By execution of this Determination and Order, all members of the Hearing Committee certify that they have read and considered the complete record of this proceeding.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED THAT:**

1. The **FIRST** through **TWELFTH** SPECIFICATIONS contained in the Amended Statement of Charges (Department's Exhibit # 1-A) are **SUSTAINED**; and
2. The **THIRTEENTH** through **EIGHTEENTH** SPECIFICATIONS contained in the Amended Statement of Charges (Department's Exhibit # 1-A) are **NOT SUSTAINED**; and
3. Respondent's license to practice medicine in the State of New York is **SUSPENDED FOR TWO (2) YEARS** with said **SUSPENSION** to be **STAYED** for the last eighteen months; and
4. Respondent's license to practice medicine in the State of New York is **ACTUALLY SUSPENDED FOR SIX (6) MONTHS** from the effective date of this **ORDER**; and
5. Respondent is placed on **PROBATION FOR A PERIOD OF FIVE (5) YEARS FROM THE END OF THE EFFECTIVE DATE OF HIS ACTUAL SUSPENSION** with the standard terms of probation plus the **CHAPERONE** requirement, acceptable to the Office of Professional Medical Conduct ("**OPMC**") (see attached Appendix III - which Terms and Conditions are incorporated herein); and
6. This Order shall be effective on personal service on Respondent or 7 days after the date of mailing of a copy to Respondent by certified mail or as provided by P.H.L. §230(10)(h).

DATED: New York *5*
August, 2002



BENJAMIN WAINFELD, M.D., (Chairperson)
RALPH LUCARIELLO, M.D.
SHAHLA JAVDAN

Conrado G. Ponio, M.D.
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APPENDIX I

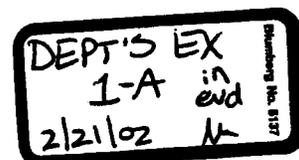
IN THE MATTER
OF
CONRADO G. PONIO, M.D.

AMENDED
STATEMENT
OF
CHARGES

CONRADO G. PONIO, M.D., the Respondent, was authorized to practice medicine in New York State on or about August 23, 1994, by the issuance of license number 196969 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. On or about January 10, 2000, Respondent performed a pre-employment physical on Employee A, a registered nurse at Lutheran Hospital in Queens New York.
1. Under the guise of performing a legitimate medical examination, Respondent touched Employee A's genitals with ungloved hands for no legitimate medical purpose.
 2. Respondent made inappropriate comments to Patient A including but not limited to "You are very clean down there" or words to that affect.
- B. On or about December 28, 1999, Respondent performed a pre-employment physical examination on Patient B.
1. Under the guise of performing a legitimate medical examination



Respondent instructed Patient B to remove her bra and pull her pants and underpants down to her knees so that he could perform a visual inspection of her genitals for no legitimate medical purpose.

2. Respondent asked Patient B questions regarding sexually transmitted diseases, yeast infections, and or abortions for no legitimate medical purpose.
3. Respondent touched Patient B's breasts for no legitimate medical purpose.

C. On or about June 30 1999, Respondent performed a pre-employment physical examination on Patient C. Respondent instructed Patient C to remove all of her clothing from the waist up and failed to offer her a gown or a chaperone. Respondent did not examine Patient C's head, eyes, neck, ears, nose throat nor did he use a stethoscope to examine her heart or lungs.

1. When Patient C asked Respondent why disrobing was necessary Respondent inappropriately stated that disrobing was necessary because she was Russian and that Russian women are often very sick, or words to that effect.
2. Under the guise of performing a legitimate medical examination Respondent inappropriately instructed Patient C to remove all her clothes for no legitimate medical purpose.
3. Under the guise of performing a legitimate medical examination Respondent touched both of patient C's breasts for no legitimate medical reason.

- D. Respondent performed a pre-employment physical on Patient D on or about April, 1997. Respondent did not offer Patient D a chaperone or a gown.
1. Under the guise of performing a legitimate medical examination Respondent instructed Patient D to remove all her clothes for no legitimate medical purpose.
 2. Respondent touched Patient D's breasts for no legitimate medical reason.
- E. On or about January 10, 2000, Respondent performed a pre-employment physical on Patient E. Respondent told Patient E to remove her pants and underpants to her knees so that he could do an external vaginal inspection.
1. Respondent made inappropriate statements to her including but not limited to "A women as pretty as you should not be divorced" and or "Your husband was a fool to leave you." or words to that effect.
 2. While Patient E lay on the examining table, Respondent, under the guise of performing a legitimate medical examination, separated the labia majora with an ungloved hand for no legitimate medical purpose.
 3. Respondent touched Patient E's breasts for no legitimate medical purpose.
 4. Under the guise of performing a legitimate medical examination Respondent instructed Patient E to remove her pants and underpants for no legitimate medical reason.
- F. Respondent performed a pre-employment on Patient F on or about January 2000.

1. Under the guise of taking an appropriate medical history, but not for a proper medical purpose, the Respondent required patient F to answer inappropriate and very personal questions regarding her marriage, separation from her husband, her husband's substance abuse and her religion. Respondent advised Patient F that he could not clear her for employment unless she answered his questions.
2. During the course of what he purported to be a proper medical examination, Respondent required Patient F to remove her shirt and bra to expose her breasts.
3. Respondent required Patient F to pull down her pants and underpants for a visual inspection of her genitals for no legitimate medical purpose.

SPECIFICATION OF CHARGES
FIRST THROUGH SIXTH SPECIFICATION
MORAL UNFITNESS

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(20)(McKinney Supp. 2002) by engaging in conduct in the practice of the profession of medicine that evidences moral unfitness to practice as alleged in the facts of the following:

1. The facts in paragraph A and its subparagraphs.
2. The facts in paragraph B and its subparagraphs.
3. The facts in paragraph C and its subparagraphs.
4. The facts in paragraph D and its subparagraphs.
5. The facts in paragraph E and its subparagraphs.

6. The facts in paragraph F and its subparagraphs.

SEVENTH THROUGH TWELFTH SPECIFICATION
WILLFUL PATIENT ABUSE

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(31)(McKinney Supp. 2002) by willfully physically or verbally harassing or abusing a patient, as alleged in the facts of:

7. The facts in Paragraph A and its subparagraphs.
8. The facts in Paragraph B and its subparagraphs.
9. The facts in Paragraph C and its subparagraphs.
10. The facts in Paragraph D and its subparagraphs.
11. The facts in Paragraph E and its subparagraphs.
12. The facts in paragraph F and its subparagraphs.

THIRTEENTH THROUGH EIGHTEENTH SPECIFICATIONS
FRAUDULENT PRACTICE

Respondent is charged with committing professional misconduct as defined by N.Y. Educ. Law §6530(2) by practicing the profession of medicine fraudulently as alleged in the facts of the following:

13. The facts in Paragraph A and its subparagraphs.
14. The facts in Paragraph B and its subparagraphs.
15. The facts in Paragraph C and its subparagraphs.
16. The facts in Paragraph D and its subparagraphs.
17. The facts in Paragraph E and its subparagraphs.
18. The facts in paragraph F and its subparagraphs.

DATED: February , 2002
New York, New York

ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct

APPENDIX II

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

-----X
IN THE MATTER
OF
CONRADO G. PONIO, M.D.

ANSWER

-----X
CONRADO G. PONIO, M.D., by his attorneys, MAHLER, MILLER, HARRIS & ENGEL, P.C., answers the "Statement of Charges" filed against him by the New York State Department of Health, Bureau of Professional Misconduct, as follows:

(A) 1. Denied
2. Denied

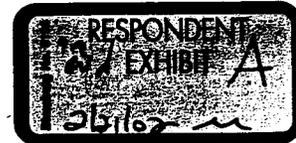
(B) 1. Admitted
2. Denied

(C) 1. Denied
2. Denied
3. Denied

(D) 1. Denied
2. Denied

(E) 1. Denied
2. Denied
3. Denied
4. Denied

(F) 1. Denied
2. Admitted
3. Denied



Dated: February 12, 2002

Very truly yours,

MAHLER, MILLER, HARRIS & ENGEL, P.C.
Attorneys for Conrado Ponio, M.D.
Office & P.O. Address
125-10 Queens Boulevard
Suite 311
Kew Gardens, New York
(718) 268-6000

APPENDIX III

APPENDIX III

Terms and Conditions of Probation for CONRADO G. PONIO, M.D.

1. Respondent shall conduct himself in all ways in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his profession. Respondent acknowledges that if he commits professional misconduct as enumerated in New York State Education Law §6530 or §6531, those acts shall be deemed to be a violation of probation and that an action may be taken against Respondent's license pursuant to New York State Public Health Law §230(19).
2. Respondent shall submit written notification to the New York State Department of Health addressed to the Director, Office of Professional Medical Conduct ("OPMC"), Hedley Park Place, 433 River Street Suite 303, Troy, New York 12180-2299; said notice is to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.
3. Respondent shall fully cooperate with and respond in a timely manner to requests from the OPMC to provide written periodic verification of Respondent's compliance with the terms of the Hearing Committee's Order including the Terms of Probation. Respondent shall personally meet with a person designated by the Director of the OPMC as requested by the Director.
4. The period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. Respondent shall notify the Director of the OPMC, in writing, if Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director again prior to any change in that status. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled on Respondent's return to practice in New York State.
5. Respondent's professional performance may be reviewed by the Director of the OPMC. This review may include, but shall not be limited to, a review of office records, patient records and/or hospital charts, interviews with or periodic visits with Respondent and his staff at practice locations or the OPMC offices.
6. Respondent shall maintain legible and complete medical records which accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations regarding controlled substances.
7. The period of probation imposed shall commence on the completion of the six (6) months of actual suspension and shall continue for a period of five (5) years thereafter.

CHAPERONE

8. Respondent shall, in the course of practicing medicine in New York State, examine and/ treat any female patient only in the presence of a chaperone. The chaperone shall be a female licensed or registered health care professional or other health care worker, shall not be a family member, personal friend, or be in a professional relationship with Respondent which could pose a conflict with the chaperone's responsibilities. The chaperone shall be proposed by Respondent and subject to the written approval of the Director of OPMC.

9. Prior to the approval of any individual as chaperone, Respondent shall cause the proposed chaperone to execute and submit to the Director of OPMC an acknowledgment of her agreement to undertake all of the responsibilities of the role of chaperone. Said acknowledgment shall be made on a form provided by and acceptable to the Director. Respondent shall provide the chaperone with a copy of this Determination and Order and all of its attachments and shall, without fail, cause the approved chaperone to:

- a. Report quarterly to OPMC regarding her chaperoning of Respondent's practice.
- b. Report within 24 hours any failure of Respondent to comply with the Determination and Order (including the Terms of Probation), including, but not limited to, any failure by Respondent to have the chaperone present when required, any sexually suggestive or otherwise inappropriate actions or comments by Respondent to any patient, and any actions of a sexual nature by Respondent in the presence of any patient.
- c. Confirm the chaperone's presence at each and every examination and treatment of a female patient by Respondent, by placing her name, title and date in the patient record for each and every visit, and by maintaining a separate log, kept in her own possession, listing the patient name and date of visit for each and every patient visit chaperoned.
- d. Provide copies of the log described in paragraph c, above, to OPMC at least quarterly and also immediately on the Director's request.

10. Respondent shall comply with all terms, conditions, restrictions, limitations and penalties to which he is subject pursuant to the Hearing Committee's Order (including these Terms of Probation) and shall assume and bear all costs related to compliance. On receipt of evidence of non-compliance with, or any violation of these terms, the Director of the OPMC and/or the Board may initiate a violation of probation proceeding and/or any such other proceeding against Respondent as may be authorized pursuant to the law.



NEW YORK STATE DEPARTMENT OF HEALTH
Office of Professional Medical Conduct
Physician Monitoring Programs
Hedley Building, 4th floor
433 River Street
Troy, NY 12180-2299
Phone: (518) 402-0845
Fax: (518) 402-0790

**GUIDELINES FOR CLOSING A MEDICAL PRACTICE FOLLOWING A
REVOCATION, SURRENDER OR SUSPENSION OF A MEDICAL LICENSE**

1. Respondent shall immediately cease and desist from engaging in the practice of medicine (in New York State) in accordance with the terms of the Order. In addition, Respondent shall refrain from providing an opinion as to professional practice or its application and from representing himself as being eligible to practice medicine.
2. Respondent shall have delivered to OPMC at Hedley Park Place, 433 River Street 4th Floor, Troy, NY 12180-2299 his original license to practice medicine in New York State and current biennial registration within five (5) days of the effective date of the Order.
3. Respondent shall within fifteen (15) days of the Order notify his patients of the cessation of his medical practice and will refer all patients to another licensed practicing physician for their continued care, as appropriate.
4. Respondent shall make arrangements for the transfer and maintenance of the medical records of his patients. Within thirty days of the effective date of the Order, Respondent shall notify OPMC of these arrangements including the appropriate and acceptable contact person's name, address, and telephone number who shall have access to these records. Original records shall be retained for at least six years after the last date of service rendered to a patient or, in the case of a minor, for at least six years after the last date of service or three years after the patient reaches the age of majority whichever time period is longer. Records shall be maintained in a safe and secure place which is reasonably accessible to former patients. The arrangements shall include provisions to ensure that the information on the record is kept confidential and made available only to authorized persons. When a patient or and/or his or her representative requests a copy of the patient's medical record or requests that the original medical record be forwarded to another health care provider, a copy of the record shall be promptly provided or forwarded at a reasonable cost to the patient (not to exceed seventy-five cents per page.) Radiographic, sonographic and like materials shall be provided at cost. A qualified person shall not be denied access to patient information solely because of their inability to pay.

5. In the event that Respondent holds a Drug Enforcement Agency (DEA) certificate, Respondent shall within fifteen (15) days advise the DEA in writing of the licensure action and shall surrender his DEA controlled substance privileges to the DEA. Respondent shall promptly surrender any unused DEA #222 U.S. Official Order Forms Schedules 1 and 2 to the DEA.
6. Respondent shall within fifteen (15) days return any unused New York State official prescription forms to the Bureau of Controlled Substances of the New York State Department of Health. Respondent shall cause all prescription pads bearing his name to be destroyed. If no other licensee is providing services at his practice location, all medications shall be properly disposed.
7. Respondent shall not share, occupy or use office space in which another licensee provides health care services. Respondent shall cause all signs to be removed within fifteen (15) days and stop all advertisements, professional listings whether in telephone directories or otherwise, professional stationery or billings by which his eligibility to practice is represented.
8. Respondent shall not charge, receive or share any fee or distribution of dividends for professional services rendered by himself or others while barred from engaging in the practice of medicine. Respondent may be compensated for the reasonable value of services lawfully rendered and disbursements incurred on a patient's behalf prior to the effective date of this Order.
9. If Respondent is a shareholder in any professional service corporation organized to engage in the practice of medicine and if his license is revoked, surrendered or suspended for a term of six months or more under the terms of this Order, Respondent shall divest himself of all financial interest in the professional services corporation in accordance with New York Business Corporation Law. Such divestiture shall occur within 90 days. If Respondent is the sole shareholder in a professional services corporation, the corporation must be dissolved or sold within ninety (90) days of the effective date of this Order.
10. Failure to comply with the above directives may result in a civil penalty or further criminal penalties as may be authorized pursuant to the law. Under Section 6512 of the Education Law it is a Class E Felony, punishable by imprisonment of up to 4 years, to practice the profession of medicine when such professional license has been suspended, revoked or annulled. Such punishment is in addition to the penalties for professional misconduct set forth in section 230 a1. of the Public Health Law, which includes fines of up to \$10,000 for each specification of charges of which the Respondent is found guilty and may include revocation of a suspended license.