

THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, N.Y. 12234

OFFICE OF PROFESSIONAL DISCIPLINE
ONE PARK AVENUE, NEW YORK, NEW YORK 10016-5802

Harold L. Mandelbaum, Physician
20 Shore Road Lane
Brooklyn, New York 11209

December 18, 1992

Re: License No. 076770

Dear Dr. Mandelbaum:

Enclosed please find Commissioner's Order No. 12935. This Order goes into effect five (5) days after the date of this letter.

If the penalty imposed by the Order in your case is a revocation or a surrender of your license, you must deliver your license and registration to this Department within ten (10) days after the date of this letter. Your penalty goes into effect five (5) days after the date of this letter even if you fail to meet the time requirement of delivering your license and registration to this Department. In the event you are also served with this Order by personal service, the effective date of the Order is the date of personal service.

If the penalty imposed by the Order in your case is a revocation or a surrender of your license, you may, pursuant to Rule 24.7 (b) of the Rules of the Board of Regents, a copy of which is attached, apply for restoration of your license after one year has elapsed from the effective date of the Order and the penalty; but said application is not granted automatically.

Very truly yours,

DANIEL J. KELLEHER
Director of Investigations

By:

GUSTAVE MARTINE
Supervisor

DJK/GM/er

CERTIFIED MAIL - RRR

cc: Bruce A. Jackson & Maureen McLeod
Jackson, Krez & Consumano
220 East 42nd Street
New York, New York 10017

RECEIVED

JAN 7 1993

**OFFICE OF PROFESSIONAL
MEDICAL CONDUCT**

**REPORT OF THE
REGENTS REVIEW COMMITTEE**

HAROLD L. MANDELBAUM

CALENDAR NO. 12935



The University of the State of New York

IN THE MATTER

of the

Disciplinary Proceeding

against

HAROLD L. MANDELBAUM

No. 12935

who is currently licensed to practice
as a physician in the State of New York.

REPORT OF THE REGENTS REVIEW COMMITTEE

HAROLD L. MANDELBAUM, hereinafter referred to as respondent, was licensed to practice as a physician in the State of New York by the New York State Education Department.

This disciplinary proceeding was properly commenced and in four sessions from March 28, 1991 through May 9, 1991, including conferences for legal determinations, a hearing was held before a hearing committee of the State Board for Professional Medical Conduct. The hearing committee on these dates consisted of Dr. Erwin Lear, Chairman, Dr. Steven M. Lapidus, and Ms. Carolyn C. Snipe.

At the conclusion of the hearing dates, by letter dated June 19, 1991, the Administrative Officer, Michael P. McDermott, advised the parties that on June 18, 1991, the date scheduled for deliberations, he became aware that Dr. Lear had gone outside of

HAROLD L. MANDELBAUM (12935)

the hearing record and obtained certain information about respondent relating to an area of inquiry that had been disallowed on cross-examination at the hearing on May 9, 1991. The parties were further advised that after a discussion with the Administrative Officer, Dr. Lear had voluntarily recused himself from any further involvement in this matter. Further, the parties were notified that the other hearing committee members were advised that Dr. Lear had recused himself and had both indicated that they were able to render a fair decision based solely on the record. The parties were advised that two options were available: 1) to proceed and have a new hearing committee member appointed and proceed with deliberations after the new member read and considered evidence and transcripts of the prior proceeding or 2) order a new hearing before a new hearing committee. Comments were solicited of the parties and, by letter dated June 25, 1991, petitioner contended that there was no basis for ordering a new hearing and that Public Health Law §230(10)(f) provided for this situation and recommended that the first option be followed. Respondent, by letter dated July 10, 1991, stated the intention to accept the latter option.

By letter dated July 12, 1991, the Administrative Officer directed the Office of Professional Medical Conduct to establish a new hearing panel to hear the matter de novo, having concluded that, given the nature of the charges and the fact that the decision would be based on the perceived credibility of witnesses, it was essential that each panel member have had the opportunity to

HAROLD L. MANDELBAUM (12935)

hear the testimony and observe the witnesses. A copy of this letter is attached hereto made a part hereof, and marked as Exhibit "A".

By letter dated July 17, 1991 (resent September 11, 1991), petitioner requested of Lorna S. McBarnette, Executive Deputy Commissioner of the New York State Health Department, that she or her designee reverse the order of the Administrative Officer and order that a substitute hearing committee member be appointed pursuant to Public Health Law §230(10)(f) and that the hearing committee proceed to deliberate and render a decision in this matter. Therein it was stated that this appeal was presented pursuant to the authority granted the Commissioner in Public Health Law §230(10)(i) and affirmed in Doe v. Axelrod, 71 N.Y.2d 483, 527 N.Y.S.2d 368. A copy of this letter is attached hereto, made a part hereof, and marked as Exhibit "B".

By order dated September 23, 1991, Lorna S. McBarnette reversed the Administrative Officer's Order and ordered the Board for Professional Medical Conduct to appoint a committee member as a substitute for Dr. Lear, ordered the substitute member to fully familiarize himself or herself with the record, and ordered the hearing committee to proceed with its deliberations on the case. A copy of this Order is attached hereto, made a part hereof, and marked as Exhibit "C".

Pursuant to the September 23, 1991 Order, Dr. Melvin H. Worth, Jr. was appointed as a new hearing committee member and

HAROLD L. MANDELBAUM (12935)

deliberations were held on November 12, 1991 with Dr. Lapidus appointed as chairman.

The hearing committee rendered a report of its findings, conclusions, and recommendation, a copy of which, including the statement of charges and excluding the appendix of the patient name, is annexed hereto, made a part hereof, and marked as Exhibit "D".

The hearing committee unanimously concluded that respondent was guilty of the specification of the charge (unprofessional conduct), involving the allegation that respondent had engaged in conduct which evidenced moral unfitness and recommended that respondent's license to practice medicine be revoked. It further recommended that should respondent seek reinstatement, his application should be accompanied by a complete psychiatric evaluation.

Lloyd F. Novick, M.D., in place and in stead of the Executive Deputy Commissioner of Health, recommended to the Board of Regents that the findings of fact and conclusions of the hearing committee be accepted in full, and that the recommendation of the Committee also be accepted. A copy of the recommendation is annexed hereto, made a part hereof, and marked as Exhibit "E".

On May 27, 1992 respondent appeared before us in person and was represented by his attorneys, Bruce A. Jackson, Esq. and Maureen McLeod, Esq. Sylvia P. Finkelstein, Esq., represented the Department of Health.

HAROLD L. MANDELBAUM (12935)

Petitioner's written recommendation as to the measure of discipline to be imposed, should respondent be found guilty, was revocation.

Respondent's written recommendation as to the measure of discipline to be imposed, should respondent be found guilty, was one year of suspension, stayed; one year of probation on condition that respondent continue psychiatric consultations and practice medicine under periodic supervision, only conducting examinations of female patients in the presence of a chaperone.

We have considered the record as transferred by the Commissioner of Health in this matter, as well as respondent's brief to the Regents Review Committee and petitioner's letter of May 21, 1992.

Public Health Law §230(10) sets forth the procedure to be followed in disciplining licensed physicians and provides in part*, as follows:

(f) Conduct of hearing. The evidence in support of the charges shall be presented by an attorney. The licensee shall have the rights required to be stated in the notice of hearing (subparagraph (c) of this subdivision). The committee shall not be bound by the rules of evidence, but its conclusion shall be based on a preponderance of the evidence. A hearing which has been initiated shall not be discontinued because of the death or incapacity to serve of one member of the hearing committee. In the event of a member's death or incapacity to serve on the committee, a member shall be appointed

*Substantial sections are set forth herein in order to accurately represent the sequence of review mandated by the statute.

immediately by the chairman of the board. The member shall affirm in writing that he has read and considered evidence and transcripts of the prior proceedings.

(g) Results of hearing. Within thirty days of the conclusion of the hearing the committee shall make (1) findings of fact, (2) conclusions concerning the charges sustained or dismissed, (3) and in the event any of the charges have been sustained a recommendation of the penalty or sanction to be imposed. For the committee to make a conclusion sustaining a charge, two members of the committee must vote for such a determination. The licensee shall be given a copy of the findings, conclusions and recommendations.

(h) Disposition of results. The transcript of the hearing together with exhibits, if any, and the findings, conclusions, and recommendation of the committee shall then be transmitted to the commissioner. The licensee shall be given a copy of the findings, conclusions and recommendation.

(i) Commissioner, recommendation. Within thirty days after the matter is submitted to him, the commissioner shall consider the transcript, exhibits and other evidence, if any, the findings, conclusions and recommendation of the committee and shall make his recommendation as to the committee's findings, conclusions and recommendation. Within five days of the making of his recommendation the commissioner shall transfer the entire record of the proceeding to the board of regents for final decision and order. The licensee shall be given a copy of the commissioner's recommendation.

In disagreement with petitioner, we do not view §230(10)(i) as providing authority for the Commissioner's September 23, 1991 order reversing the Administrative Officer's ruling of July 12, 1991. In our unanimous opinion, §230(10)(i) provides for the Commissioner to review rulings of the Administrative Officer only after the transmittal of the record, including the findings, conclusions, and recommendation of the committee, by the hearing committee. Nowhere does this section authorize the Commissioner to review a ruling prior to the issuance of the hearing committee report at the

HAROLD L. MANDELBAUM (12935)

request of a party. See, Charles Haverer Kite, Cal. No. 11682.

Nor do we view Doe v. Axelrod, 71 N.Y.2d 483, 527 N.Y.S.2d 363 as authority for the Commissioner's actions herein. In Doe v. Axelrod, the Court of Appeals reversed an order of the Appellate Division and dismissed a petition seeking to vacate an order of the Commissioner of Health. The order of the Commissioner of Health under review had reversed a ruling of an Administrative Officer made at a disciplinary hearing and directed the hearing committee to reconvene and complete the hearing. However, unlike in this matter, the Commissioner's order therein was issued after the hearing committee had transferred its report to the Commissioner in accordance with §230(10)(h), in which the hearing committee recommended that the Commissioner take whatever legal steps were necessary to permit a full determination on the merits. Thus, the Court explicitly stated that "the matter properly came to the Commissioner in a manner consistent with the orderly review process established in Public Health Law §230." 71 N.Y.2d 483, at 489. Thus, petitioner's reliance on this case, is illplaced.

Further, we note that the Commissioner's interests in the ruling at issue in Doe v. Axelrod involved the confidentiality of complaints under §230(11)(a) which the Court of Appeals subsequently characterized, in a sequel case, as "directly affecting" the Commissioner's role. Thus, the Court distinguished such situation from that in Axelrod v. Ambach, 126 A.D.2d 288, in which the Appellate Court had held that the Commissioner of

HAROLD L. MANDELBAUM (12935)

Health's role in medical misconduct proceedings is limited to holding hearings and submitting recommendations, to the Commissioner of Education and the Board of Regents and that he had no standing to challenge a determination of the Commissioner of Education to remand a matter. Axelrod v. Ambach, 78 N.Y.2d 112, 571 N.Y.S.2d 902.

Nor do we view Public Health Law §230(10)(f) as prohibiting the ruling of the Administrative Officer herein. Assuming, without deciding, that the voluntary recusal of a hearing committee member falls within the purview of "incapacity" as used therein, we see no prohibition in §230(10)(f) against an Administrative Officer choosing, in the exercise of discretion, not merely to replace one hearing committee member (which is allowed by §230(10)(f) if the procedural safeguards therein are followed), but to replace the entire committee. In the absence of an explicitly stated prohibition in this regard, we are disinclined to interpret the statute in such a way as to so limit the Administrative Officer's discretion in weighing due process considerations.

Further, in our unanimous opinion, the ruling of the Administrative Officer to replace the entire hearing committee and refer this matter for a hearing de novo was an appropriate ruling to remedy the circumstances herein. We note that the purpose of this ruling was to assure that, given the nature of the charge, the credibility of witnesses was determined by a committee consisting of members who had actually observed the witnesses.

HAROLD L. MANDELBAUM (12935)

In light of the foregoing, in our unanimous opinion, this matter should be remanded for a hearing before a new hearing committee.

We unanimously recommend that the determination of the Board of Regents be as follows:

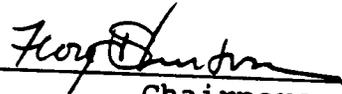
1. The findings of fact, conclusions and recommendation of the hearing committee, and the Commissioner of Health's recommendation as to those findings, conclusions and recommendation not be accepted; and
2. The matter be remanded to a new hearing committee for a hearing de novo, said hearing to be held and processed on a de novo basis in accordance with the provisions of Public Health Law §230.

Respectfully submitted,

FLOYD S. LINTON

THEODORE M. BLACK, SR.

NANCY A. RUCKER


Chairperson

Dated: 9.16.92

VOTE AND ORDER

HAROLD L. MANDELBAUM

CALENDAR NO. 12935



The University of the State of New York

IN THE MATTER

OF

HAROLD L. MANDELBAUM
(Physician)

DUPLICATE
ORIGINAL
VOTE AND ORDER
NO. 12935

Upon the report of the Regents Review Committee, a copy of which is made a part hereof, the record herein, under Calendar No. 12935, and in accordance with the provisions of Title VIII of the Education Law, it was

VOTED (December 18, 1992): That, in the matter of HAROLD L. MANDELBAUM, respondent, the recommendation of the Regents Review Committee not be accepted and that:

1. The findings of fact, conclusions and, as hereafter indicated, the recommendation of the hearing committee, and the Commissioner of Health's recommendation as to those findings, conclusions and, as hereafter indicated, recommendation be accepted; and
2. Respondent's license to practice as a physician in the State of New York be revoked upon the specification charged of which respondent was found guilty, except that the recommended condition upon any future reinstatement (restoration) application not be accepted, without prejudice to any conditions or requirements which may be applicable at the time of any proceeding for the restoration of respondent's license.

The record reveals that one member of the hearing committee, after three hearing days but prior to deliberation, improperly obtained information about the respondent by going outside of the record.

HAROLD L. MANDELBAUM (12935)

Upon disclosing this information to the Administrative Officer, this member recused himself. Deliberations were adjourned, and a new member was eventually appointed. The fully constituted committee found respondent guilty of the specification charged by the vote 3-0.

Although the Regents Review Committee recommended that the matter be remanded to a new hearing committee for a hearing de novo, there is a statutory mechanism in place to address the issue raised in this case. Public Health Law §230(10)(f) provides that "A hearing which has been initiated shall not be discontinued because of the death or incapacity to serve of one member of the hearing committee. In the event of a member's death or incapacity to serve on the committee, a member shall be appointed immediately" (emphasis supplied). Respondent's rights are protected as long as the new member has reviewed the transcripts and the evidence previously introduced. See Matter of Laverne v. Sobol, 149 AD2d 758 (3rd Dept. 1989).

Respondent has presented no facts that would warrant departing from the statutory procedure. There is nothing in the record to suggest that the recused committee member shared the information he obtained with the two other members of the hearing committee, or that the two remaining members were in any way biased. The record does indicate that pursuant to Public Health Law §230(10)(f) the newly appointed member read and considered the evidence and the transcripts of the proceeding. In addition, Public Health Law §230(10)(g) provides that in order to sustain a charge two members must vote for the determination. Although the Regents Review Committee was concerned that this matter involves the credibility of the witnesses and the opportunity to view the witnesses, the legislature by establishing the statutory replacement mechanism has already answered that issue. Respondent has not presented any authority that compels the commencement of a de novo hearing in the context of these facts.

In any event, determining the credibility of witnesses is

HAROLD L. MANDELBAUM (12935)

exclusively within the province of the Board of Regents. See, e.g., Matter of Andreski v. Commissioner of Education, 159 AD2d 824 (3rd Dept 1990). In accordance with the hearing committee, and for the reasons set forth in the hearing committee report, it is found that respondent's testimony is not credible. Respondent explained the event differently at different times. His description of the event at the hearing is implausible. On the other hand, it is found that Patient A's testimony is credible. Patient A's testimony remained consistent throughout the proceeding. Respondent's remaining arguments must also be rejected. Respondent contends he was deprived of the right to cross-examination because a witness respondent subpoenaed failed to appear. Nothing in the record, however, indicates that respondent took any steps to enforce the subpoena. With respect to the exhibits submitted by respondent as attachments to his brief, those exhibits were reviewed as part of the record. Respondent's other arguments are without merit;

and that Deputy Commissioner Henry A. Fernandez be empowered to execute, for and on behalf of the Board of Regents, all orders necessary to carry out the terms of this vote;

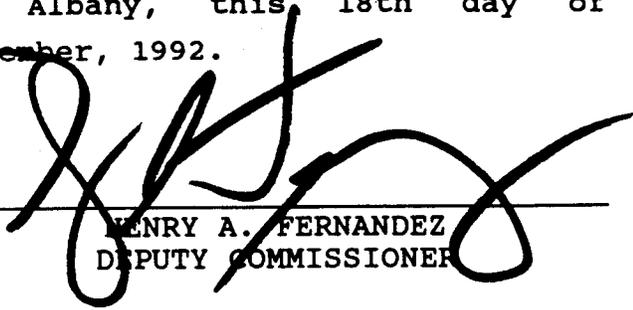
and it is

ORDERED: That, pursuant to the above vote of the Board of Regents, said vote and the provisions thereof are hereby adopted and **SO ORDERED**, and it is further

ORDERED that this order shall take effect as of the date of the personal service of this order upon the respondent or five days after mailing by certified mail.

HAROLD L. MANDELBAUM (12935)

IN WITNESS WHEREOF, I, Henry A. Fernandez, Deputy Commissioner, for and on behalf of the State Education Department and the Board of Regents, do hereunto set my hand, at the City of Albany, this 18th day of December, 1992.



HENRY A. FERNANDEZ
DEPUTY COMMISSIONER