

IN THE MATTER OF

ROBERT C. SHEPARD, M.D.,

RESPONDENT.

License Number: D 52810

*** BEFORE THE MARYLAND**

*** STATE BOARD OF PHYSICIAN**

*** QUALITY ASSURANCE**

*** BPQA Case No.: 2000-0013**

* * * * *

FINAL DECISION AND ORDER

The Board adopts the findings of fact and conclusions of law proposed by the Administrative Law Judge.¹

Dr. Shepard took four checks that were the property of the Greater Baltimore Medical Center. He altered one of them by adding his name as payee, then deposited the \$30,678 proceeds from these checks into two personal accounts. He thereafter spent some of the proceeds for personal expenses and transferred some to a personal investment account. He knew that these funds were the property of the Greater Baltimore Medical Center. He knew that none of these checks represented payment to him personally.

When the Greater Baltimore Medical Center discovered that he had taken the first two checks and demanded an accounting, he continued to hide the fact that he had taken the other two checks until the Greater Baltimore Center discovered them also.

The diverted funds were supposed to have been used to pay for ongoing treatment of and research on cancer patients.


¹ The Administrative Law Judge's separately captioned Findings of Fact and Conclusions of Law are set out in his Proposed Decision in OAH case number DHMH-BPQA-71-2001000011, which is incorporated by reference into this decision and attached as Attachment A. The Board also adopts the credibility findings made by the Administrative Law Judge on pages 11-13 of that Proposed Decision.

ORDER

The Board **REPRIMANDS** Dr. Shepard.²

The Board orders that Dr. Shepard take an ethics course.³

5/1/02
Date



Samir R. Neimat, M.D.
Chairman

NOTICE OF RIGHT TO APPEAL

Dr. Shepard has the right, pursuant to Md. Code Ann., Health Occ. § 14-408, to take a direct judicial appeal. Any appeal shall be filed within 30 days of the receipt of this Final Decision and Order and shall be made as provided for judicial review of final decisions by the Administrative Procedure Act, Md. Code Ann., State Gov't § 10-222 and Title 7, Chapter 200 of the Maryland Rules of Procedure.

² This vote was taken by an affirmative vote of a majority of the full authorized membership of the Board, as required by Md. Code Ann., Health Occ. § 14-404(a).

³ The course must be approved in advance by the Board and must be completed within one year of the date of this decision. Successful completion of the course is a condition of this disposition. If the course is not completed, the Board may, after appropriate process afforded Dr. Shepard, impose any other sanction or sanctions allowed by § 14-404(a).

EXHIBIT A

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|----------------------|---|---------------------------------|
| IN THE MATTER OF: | * | BEFORE WILLIAM C. HERZING, |
| BOARD OF PHYSICIAN | * | AN ADMINISTRATIVE LAW JUDGE |
| QUALITY ASSURANCE | * | OF THE MARYLAND OFFICE |
| v. | * | OF ADMINISTRATIVE HEARINGS |
| ROBERT SHEPARD, M.D. | * | OAH No.: DHMH-BPQA-71-200100011 |

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
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FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED DISPOSITION

STATEMENT OF THE CASE

On February 28, 2001, the Maryland State Board of Physician Quality Assurance ("Board") issued charges against Robert C. Shepard, M.D. ("Respondent") for immoral or unprofessional conduct in the practice of medicine in violation of the Medical Practice Act, Md. Code Ann., Health Occ § 14-4-4(a)(3)(2000 & Supp. 2001)("the Act").

An evidentiary hearing was held on August 29, 2001, at the Office of Administrative Hearings ("OAH"), 11101 Gilroy Road, Hunt Valley, Maryland before William C. Herzing, Administrative Law Judge ("ALJ"). Md. Code Ann., Health Occ. § 14-4-5(a). The Respondent was present and represented by Pamela Metz Kasemeyer, Esquire and David Wagner, Staff Attorney and Robert J. Gilbert, Assistant Attorney General, represented the Board.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the Rules of Procedure of the Board of Physicians Quality Assurance, and the

Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1999 & Supp. 2001); Code of Maryland Regulations ("COMAR") 10.32.02; COMAR 28.02.01.

ISSUES

The issue is whether the Respondent's deposit of checks issued to the Greater Baltimore Medical Center ("GBMC") into his personal bank accounts constitutes immoral or unprofessional conduct in the practice of medicine.

SUMMARY OF THE EVIDENCE

Exhibits

The Board submitted a binder containing sixty-one tabbed documents. The Respondent stipulated to the admissibility of certain exhibits before the hearing and several others were entered into evidence during the course of the proceedings. The Respondent submitted three exhibits, all of which were admitted into evidence. A complete Exhibit List is attached as Appendix 1.¹

Testimony

The following witnesses testified on behalf of the Board:²

Rodney W. Williams W. Williams, M.D., J.D., Chief of Medical Officer, Executive Vice President and General Counsel, GBMC;

Connie Herbold, manager at GBMC

The Respondent testified on his own behalf.

¹ The Board's exhibits will be called State's Exhibits and will be referred to by the designation S followed by the number of the exhibit and the page. Example: State Exhibit 1, page 1 will be cited as S-1, p.1. Citations to the Respondent's exhibits will follow the same format by will be referred to as R.

² References to the transcript will be designated as Tr. followed by the page number.

STIPULATIONS

The parties stipulated to the following facts:³

1. At all times relevant to the charges herein, the Respondent was and is a physician licensed to practice medicine in Maryland. The Board originally issued the Respondent a license to practice medicine in Maryland on December 1, 1997, under Maryland License Number D52810.
2. On September 9, 1997, the Greater Baltimore Medical Center, Inc. ("GBMC") and the Respondent entered into an employment agreement. Under its terms, GBMC contracted to employ Respondent as a clinical oncologist from January 1, 1998, through December 31, 2000. GBMC hired Respondent as the Principle Investigator in GBMC's Cancer Clinic responsible for directing its cancer clinical research studies ("clinical trials").
3. The clinical trials were funded by companies who paid GBMC to test its drugs on GBMC patients diagnosed with advanced stages of cancer. The participating companies were Glaxo Wellcome, Inc.; Pharmaceutical Research Associates, Inc.; Theradex Systems, Inc.; and Novartis, Inc.
4. Section VI of Respondent's employment contract, titled "Billing" explicitly provides that payments for Respondent's GBMC work belonged to GBMC:

Dr. Shepard hereby absolutely and irrevocably grants and assigns to GBMC all rights to bill and collect for any professional services he renders to any patients during the term of this Agreement. His sole compensation for these services shall be as set forth in Section IV of this Agreement, and all revenues derived from his professional activities, whether at GBMC or elsewhere, shall be the exclusive property of GBMC.
5. The physicians conducting the clinical trials entered into contracts with the pharmaceutical companies, agreeing that the pharmaceutical companies would directly pay GBMC.
6. Without using GBMC's corporate tax identification number, the Respondent opened personal bank accounts at NationsBank, account number 3919522207, and the Provident Bank of Maryland, account number 0018236176.
7. Specifically, on September 8, 1998, the Respondent signed a letter from Glaxo Wellcome, Inc. acknowledging receipt of a check for \$6000. Glaxo Wellcome, Inc. made the check payable to "GREATER BALTIMORE MEDICAL CTR." Using an automated teller machine ("ATM"), on or about September 8, 1998, the Respondent deposited the check, check No. 1491885, into his personal account at NationsBank. He endorsed the check, "For deposit only Nations Bank Acct #3919522207 Robert Shepard, M.D. G.B.M.C. Dept. 882." NationsBank posted the deposit on September 19, 1998.

³ The parties stipulated the facts set forth in Items 1, 2, 7, 9, 11, 12, 14 as stated in the Board's Allegations of Fact. The parties stipulated to Items, 3, 6, 13 and 16 with some changes in the language of the charges.

8. On October 14, 1998, using an ATM deposit, the Respondent deposited a \$4000 check from Pharmaceutical Research Associates, Inc. ("PRA"), check No. 18040, into his personal NationsBank account. PRA made the check payable to "GREATER BALTIMORE CANCER CENTER, ATTN.: JANINE THARP." Janine Tharp is a GBMC administrator. The Respondent endorsed the check: "For deposit only in #3919522207 Robert Shepard, M.D."
9. On April 14, 1999, the Respondent deposited a \$5678 check, check No. 2164469, dated October 28, 1998, from Novartis, Inc. into his Provident Bank of Maryland personal bank account. The Respondent names the account: "Robert C. Shepard, M.D., The Cancer Center at GBMC." Novartis made the check payable to "GREATER BALTIMORE MEDICAL CENTER, ATTN.: [blank]." The Respondent altered the check by handwriting "Dr. Robert Shepard" after "ATTN." He endorsed the check, "Acct. # 0018236176 For deposit only Robert Shepard, MD The Cancer Center of GBMC, Dept. 882."
10. On May 4, 1999, the Respondent deposited a \$15,000 Theradex Systems, Inc. check into his Provident Bank of Maryland account. Theradex Systems, Inc. made the check payable to "GREATER BALTIMORE MEDICAL CENTER." The Respondent endorsed the check, "Robert Shepard, MD The Cancer Center at GBMC."
11. GBMC and the Respondent entered into a Separation Agreement on June 30, 1999, in which Respondent agreed to resign from GBMC's medical staff effective July 1, 1999. GBMC and the Respondent also agreed in the Separation Agreement that the Respondent would reimburse GBMC for the money he deposited into his personal accounts. In compliance with the Separation Agreement, the Respondent reimbursed GBMC by furnishing GBMC with a check, check No. 0104, dated July 12, 1999, from his Provident Bank of Maryland account for \$30,678.

FINDINGS OF FACT

Having considered all of the evidence presented, I find the following facts by clear and convincing evidence:

1. Section III. B. 2. of Respondent's employment contract provides that Dr. Shepard shall, "Assume financial and budgetary oversight of clinical trial programs." (S-2)
2. The Respondent did not have responsibility to accept, cash or to account for checks received by GBMC from companies as payment for clinical trials. (Tr. 26, 72-72)
3. GBMC procedures for handling checks required clinical staff to open mail and give the checks to Ms. Herbold for deposit. If a check was addressed to a physician, GBMC procedures required the physician or the physician's medical secretary to give the check to Ms. Herbold for deposit. She would put GBMC's account number on the check and deposit it in the GBMC account and note the check into the GBMC database. (Tr. 70-71)

4. The Respondent asked Ms. Herbold about the accounting process for checks received for clinical trials. In the spring or summer of 1998, he asked for the name of the patients who were put on study by protocol and how much money GBMC was paid by that protocol for each patient. (Tr. 74, 93)
5. In April, 1998, the Respondent inquired of Mr. Herbold if GBMC had received two checks issued to him for the clinical trials and she advised him that they had not. (S-34; Tr. 75, 79-80)
6. In February, 1999, the Respondent wrote to Merck to advise them he had not received a grant voucher check for study #L-754-030. In May, 1999, Merck advised GBMC that the Respondent cashed the initial payment of \$10,360.00 on June 12, 1997 but the final payment of that was supposed to be sent on May 8, 1998 was not sent. Merck further advised GBMC that the check would be sent in mid May, 1999. (S-31, 35; Tr. 75, 80)
7. In April, 1999, Ms. Herbold and Nicole O'Neil, a clinical research associate, prepared an accounting of patients by protocols opening on or after January 1, 1998, so they could obtain reimbursement from the drug companies for each particular trial. Prior to that time there was no database or tracking mechanism of checks received by GBMC from companies for clinical trials. (S-42; Tr. 73, 82)
8. The Respondent and the other physicians participating in the trials had requested that Ms. Herbold create the accounting process. (Tr. 78, 83)
9. The Respondent did not inform Ms. Herbold or anyone else at GBMC that he was depositing checks into his personal accounts. (Tr. 74)
10. During creation of the accounting process, Ms. Herbold and Ms. O'Neil examined every protocol with the names of the patients who were on the protocol and looked to see if GBMC had received payment from the company who sponsored the clinical trial. Ms. Herbold examined records for all deposits of all the checks to match the company, the protocol, the patient and the money received. It was through this investigation that the four checks the Respondent deposited into his accounts were discovered. (S-42; Tr. 74-75)
11. On May 5, 1999, Dr. Williams wrote the Respondent a letter advising him he was being terminated for cause. The letter advised the Respondent that the termination was based on his deposit of two checks, payable to GBMC, in the amount of \$6,000 and \$4,000. The letter requested the Respondent reimburse GBMC \$10,000 within 7 days from the date of the letter. (S-28)
12. Dr. Williams met with the Respondent the evening of May 5, 1999. The following morning the Respondent gave Dr. Williams a check for \$20,000. (S-58; Tr. 31, 99)

13. In a letter dated, May 6, 1999, Dr. Williams sent the \$20,000 check back to the Respondent and requested he itemize any other GBMC funds deposited into his personal account. (S-30; Tr. 31)
14. In a letter to Dr. Williams, dated, May 11, 1999, the Respondent sent him two checks, one for \$10,000 and one for \$15,000 drawn on the Provident Bank account. The Respondent did not provide the requested itemization. (S-39, 58; Tr. 36)
15. On May 21, 1999, Dr. Williams requested that the Respondent provide him with a list of all checks he received and where he deposited them and a list of all disbursements made out of the accounts. The Respondent did not provide a list of checks or disbursements. (S-44; Tr. 39)
16. On June 21, 1999, Nicole O'Neil, informed Dr. Williams of a \$5,678.10 check from Novartis the Respondent deposited into his Provident Bank account on April 11, 1999. The Respondent did not tell Dr. Williams of this check prior to his notice from Ms. O'Neil. (S-51; Tr. 44)
17. On June 25, 1999, the Respondent informed Dr. Williams of the \$5,678.10 Novartis check and a check from Theradex for \$15,000.00 that he deposited into his personal bank accounts. That was the first time the Respondent told Dr. Williams of the Theradex check. (S-52; Tr. 45)
18. On June 9, 1999, Dr. Williams wrote the Respondent a letter which identified four checks totaling \$30,678.10 that the Respondent deposited into his personal accounts. He also stated he had not cashed the Respondent's check for \$15,000.00 and \$10,000.00. (S-56, 58; Tr. 46)
19. The Respondent opened the Provident Bank account in December, 1998. (S-18; Tr. 109)
20. After the Respondent deposited the check for \$5,678.19 Novartis on April 14, 1999 and the \$15,048.00 check from Theradex on May 4, 1999, the Provident Bank account balance did not fall below the total amount of those two checks until the Respondent paid GBMC \$30,678.10. (S-21)
21. On July 13, 1999, the Respondent transferred \$3,261.13 into the Provident account. The source of those funds was the Respondents personal Fidelity Investment account. (S-21; Tr. 131)
22. The NationsBank account is held jointly by the Respondent and his wife. (S-13; Tr. 132)
23. After the Respondent deposited the \$6,000 check from Glaxo into the NationsBank account on September 8, 1998, he withdrew \$15,000.00 from the account on September 28, 1998 causing the balance in the account to fall to \$3,178.03. (S-13; Tr. 136)

24. After the Respondent deposited the \$4,000.00 check from PRA into the NationsBank account on October 13, 1998, the balance was \$9,044.42. He withdrew \$6,878.10 on November 3, 1998 causing the balance to fall to \$2,514.40. (S-14, 15; Tr. 140)
25. On October 5, 1998, the Respondent withdrew \$10,000.00 from the NationsBank account and deposited it into his personal Fidelity Investment account. (Tr. 138-139)

DISCUSSION

The Practice of Medicine

The Board, in its charging document, alleged that the Respondent was guilty of violating Md. Code Ann., Health Occ. § 14-404(a)(3) which provides:

(a) *In general.*—Subject to the hearing provisions of § 14-405 of this subtitle, the Board, on the affirmative vote of a majority of its full authorized membership, may reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the licensee:

(3) Is guilty of immoral or unprofessional conduct in the practice of medicine;

The Respondent argued that his actions did not fall within the practice of medicine as defined in Md. Health Occ. Code Ann. § 14-101 or as interpreted by the Court of Appeals in *McDonnell v. Comm'n Medical Discipline*, 301 Md. 426 (1984). He contended § 14-101 limits the practice of medicine to matters pertaining to the diagnosis, care and treatment of patients. Furthermore, the Respondent argued that only three of the forty grounds for discipline delineated in § 14-404 limit the basis for discipline to actions "in the practice of medicine", which demonstrates a legislative intent to limit discipline to instances related to the diagnosis, care and treatment of patients.

In *McDonnell*, the Court of Appeals held that the legislature did not intend that any immoral conduct of a physician would be subject to sanction simply because it had a general or associative relationship to the physician in his capacity as a member of the medical profession.

Rather, it must be directly tied to the physician's conduct in the actual performance of the practice of medicine, i.e., in the diagnosis, care, or treatment of patients. *McDonnell*, 301 Md. at 436-437.

The Respondent also cited *Board of Physician Quality Assur. v. Banks*, 354 Md. 59, 729 A.2d 376, (1999). From *Banks*, he cited the language that unprofessional conduct subject to sanction under § 14-404(a)(3) must be conduct that is directly tied to the physician's conduct in the actual performance of the practice of medicine, i.e., in the diagnosis, care, or treatment of patients. The Respondent maintained that the deposit of four clinical trial checks in a personal account reflected a contractual dispute over the difficulty of four clinical trial checks in a personal account reflected a contractual dispute over the difficulty in accurately accounting for patient revenues and physician reimbursement in the clinical research program at GBMC. He further maintained that those actions never interfered with or in any manner affected his provision of patient care.

The Board pointed out that, in *Banks*, the Court of Appeals noted that a critical factor in determining whether a physician's conduct is considered in the practice of medicine is "whether the conduct occurred while the physician was performing a task integral to his or her medical practice." *Banks*, 354 Md. at 74-75. The Court acknowledged that courts have not applied an extremely technical and narrow definition of the practice of medicine, and noted that such behavior as submission of false reports and bills to an attorney, fraudulent self-prescribing of drugs, as well as sexual harassment of co-workers have been held to constitute unprofessional conduct in the practice of medicine *Id.* at pp/ 74 -75.

Here, the Respondent was Director of Oncology Clinical Trials and his duties included financial and budgetary oversight of clinical trial programs. His contract with GBMC also called for him to undertake, "other professional medical duties within the GBMC Cancer Center." (S-2) Those included being a full time clinical practitioner and Principal Investigator for cancer clinical research studies. The Respondent was the named Principal Investigator in each of the agreements with the companies from which he received the checks he deposited into his personal accounts. (S-5, 6, 7, 17) As the Principal Investigator, the Respondent performed clinical drug trials to test the efficacy of medications on cancer patients at the GBMC Cancer Center. Thus, the successful and continued operation of the clinical trials program was a necessary component of the Respondent's medical practice. The Respondent admitted depositing checks into his personal accounts, from companies who had paid GBMC to perform those clinical trials. His diversion of money from the clinical trial programs could have numerous negative consequences on patient care. The inability of GBMC to account for funds paid by the companies could influence the companies decision to utilize GBMC in further trials. A shortage of funds that should have been paid for the trials could certainly impact GBMC's financial ability to continue ongoing or future trials. The consequences of the Respondents actions therefore had a direct affect on his practice of medicine as defined in § 14-101 and as interpreted in *Banks*.

Unprofessional Conduct

The Board cited the American Medical Association, The Principles of Medical Ethics, Section 2, Annotation 1, as the basis for the charge that the Respondent's behavior was unprofessional. The Principle of Medical Ethics, Section 2 states:

Section 2

A physician shall deal honestly with patients and colleagues, and strive to expose those physicians deficient in character or competence, or who engage in fraud or deception.

See, *Dr. K. v. State Bd. of Physician Quality Assurance*, 98 Md. App. 103, 109-110, 632 A2d. 453, 456 (1993). The Board contended, "Respondent's misappropriation of hospital funds and his efforts at concealment are unprofessional and immoral under the Principles of Medical Ethics, as well as under any other standard of professionalism."⁴

The burden of proof in a physician disciplinary proceeding is on the Board by clear and convincing evidence. The purpose of the proceeding is not "to punish the offender but rather...a catharsis for the profession and a prophylactic for the public." *McDonnell*, 301 Md. at 436. Since there is a punitive aspect to the proceeding, however, "statutes authorizing sanctions against the physician should be strictly construed against the disciplinary agency." *Id.* At 436.

The Court of Appeals has reaffirmed the principal set forth in the *McDonnell* case:

It ought to be made clear...that the primary purpose of professional disciplinary proceedings is to protect the public. The punishment of an offending member of the profession is indeed a serious matter, but it is incidental to the protection of the public.

Attorney Grievance Commission v. Goldsborough, 330 Md. 342, 356-357(1992).

After consideration of the testimony and exhibits, I find that the evidence in this record supports the charge.

The Respondent contended that his actions were imprudent and unwise behavior and the result of an ongoing contractual dispute with GBMC. He stated that he believed his responsibilities included financial and budgetary oversight of the clinical trials program and he deposited the four checks into his accounts because GBMC did not have a system to account for clinical trial revenues by patient, doctor, company and protocol. He further contended that he requested, since the beginning of his employment, that such a system be established, but that he

⁴ The Board's Proposed Findings of Fact and Conclusions of Law, page 8.

became frustrated by his inability to have that accomplished. The Respondent claimed his frustration was compounded because he received a payment for a clinical trial he conducted in Massachusetts and turned the funds over to Ms. Herbold but he never received the funds or an accounting of the money. Therefore, he deposited the checks in his personal accounts until a system was in place to track all the monies received by the clinical trial program.

I am not convinced that the Respondent legitimately believed his budgetary and financial duties included receiving and depositing checks received in payment from companies for clinical trials. Ms. Herbold testified that she was solely responsible to accept, cash and to account for checks received by GBMC. She detailed GBMC procedures which required the physician or the physician's medical secretary to give the check to her for deposit. She would put GBMC's account number on the check and deposit it in the GBMC account and note the check into the GBMC database. Dr. Williams also testified that the Respondent's contractual duties did not include the operational aspects of receiving or cashing checks, which are tasks that are essentially administrative in nature.

The Respondent's claim that he was not sure if some of the checks he deposited were from work he did in Massachusetts is not convincing. Moreover, even if they were from his previous employment, the Respondent had not justifiable reason to deposit them into his personal bank accounts. The Respondent was not a named payee on any of the checks and they were issued only to GBMC. Furthermore, Section VI. of the Respondent's employment contract with GBMC explicitly provides that payments for Respondent's GBMC work belonged to GBMC and further states, "All revenues derived from his professional activities, whether at GBMC or elsewhere, shall be the exclusive property of GBMC."

The Respondent's claim that he did not know if the contracts with the companies allowed him to be issued the checks defies credibility. All of the clinical trial agreements between GBMC and the companies specifically state that payment shall be made to the institution.⁵ As the Principal Investigator, the Respondent was a signatory on each of the contracts. If, as the Respondent claimed, he was so concerned about the budgetary and financial oversight of the clinical trial programs, it would seem that he certainly would be aware that the drug companies were responsible to submit payments to GBMC. There were no administrative procedures which required the Respondent to receive and deposit the checks and the contracts with the companies as well as his employment contract with GBMC provided for payment from the companies only to GBMC. There was simply no reasonable basis on which the Respondent could have concluded that he was entitled to receive and deposit any of the checks into his personal account.

The Respondent's contention that he deposited the checks to hold until a strict accounting system was established was not demonstrated by his actions. He stated he had requested such a system from the beginning of his employment and Ms. Herbold confirmed that the Respondent asked her about the accounting process. In light of the Respondent's dealings, his inquiry about the accounting process could just as likely have been for nefarious purposes because the evidence shows the Respondent did not simply deposit and hold the funds. He testified that he created the Provident account only for the purpose of holding clinical trial revenues as well as other funds associated with his work. The Provident Bank statements support the Respondents claim that the Provident account balance did not fall below the total amount of the two GBMC checks deposited into that account. However, he did not deposit or transfer all the funds from the GBMC checks into that account and when the Respondent made a full reimbursement, he had to transfer \$3,261.13 into the account to cover the amount of the payment.

⁵ In several of the contracts, the word "INSTITUTION" is capitalized throughout the contract.

The transactions on the NationsBank account demonstrate use of the funds which conflict with the Respondent's claim that he was holding them for an accounting. The Respondent deposited checks into his personal NationsBank account on September 8, 1998 and October 14, 1998. After he deposited those checks, his NationsBank account fell below the amount deposited on several occasions. After the Respondent deposited the \$6,000 check from Glaxo on September 8, 1998, he withdrew \$15,000.00 from the account on September 28, 1998 causing the balance in the account to fall to \$3,178.03. After the Respondent deposited the \$4,000.00 check from PRA on October 14, 1998, the balance was \$9,044.42. He withdrew \$6,878.10 on November 3, 1998 causing the balance to fall to \$2,514.40. On October 5, 1998, the Respondent withdrew \$10,000.00 from the NationsBank account and deposited it into his personal Fidelity Investment account. The Respondent's assertion that he made the transfer to the Fidelity Investment account because it was tax-free, supports the Board's allegations that he used the funds from the GBMC checks deposited in the NationsBank account for his own purposes. It is inconsistent that the Respondent would seek to avoid taxes on funds which he would not have a tax liability if, as he claimed, he was only holding for GBMC.

The Respondent pointed out that the missing checks were discovered as a result of the accounting system he advocated. But, Ms. Herbold also stated the other physicians participating in the trials also requested that she create the accounting process. What I found most significant was Ms. Herbold's and Dr. Williams' testimony that the Respondent never told them, or anyone else, that he had received the checks and was holding them until they could be accounted for.

The Respondent's claim that he was holding the checks for a strict accounting is also contradicted by his inability or reluctance to account for the funds after the missing checks were discovered. The Respondent did not provide GBMC an accounting of the missing checks as

they requested and he did not reimburse the full amount of the missing funds. On May 5, 1999, Dr. Williams wrote the Respondent a lettering advising him he was being terminated because he deposited two checks (Glaxo \$6,000.00 and PRA \$4,000.00) payable to GBMC. The letter requested the Respondent reimburse GBMC \$10,000.00.⁶ The next day the Respondent gave Dr. Williams a check for \$20,000. He testified that he was reimbursing the two checks (Novartis \$5,678.00 and Theradex \$15,000.00) that GBMC did not know about. His reason for not reimbursing the missing checks GBMC had discovered was vague and evasive. Initially, he said Dr. Williams requested he hold the \$10,000.00 and give him access to all bank records. (Tr. 125) Later, the Respondent testified that when Dr. Williams returned the \$20,000.00, he (Williams) wanted the check for \$10,000.00. (Tr. 129) The Respondent stated he gave Dr. Williams the check for \$20,000.00 because he wanted to come out with everything without being asked. However, when GBMC discovered the two missing checks, the Respondent knew he had deposited over \$30,000.00 in GBMC funds but he did not advise them or offer to reimburse the full amount of all the checks at that time.

On May 6, 1999, Dr. Williams sent the \$20,000 check back to the Respondent and requested he itemize any other GBMC funds deposited into his personal account. Instead of providing the itemization, on May 11, 1999, the Respondent sent Dr. Williams two checks, one for \$10,000 and one for \$15,000. The Respondent contended he was following directions from Dr. Williams and was repaying the initial \$10,000.00 and an additional \$15,000.00. Again, his reasons for reimbursing \$15,000.00 was unexplained and he still did not offer to reimburse the full amount of the checks he deposited.

⁶ When Dr. Williams requested reimbursement of \$10,000.00, GBMC had not discovered that the Respondent had deposited checks from Novartis and Theradex.

On May 21, 1999, Dr. Williams requested the Respondent to provide him with a list of all checks he received, where he deposited them and a list of all disbursements made out of the accounts. The Respondent did not provide the requested accounting. On June 21, 1999 GBMC discovered the \$5,678.10 check from Novartis that the Respondent deposited into his Provident Bank account on April 11, 1999. The Respondent did not tell Dr. Williams of this check until June 25, 1999, when the Respondent also informed him of the check from Theradex for \$15,000.00. It was not until after Dr. Williams identified four checks totaling \$30,678.10 that the Respondent finally reimbursed GBMC on July 12, 1999.

Proposed Sanctions

The Board proposed the following sanctions:

1. That the Respondent's license be suspended for three (3) years;
2. That all but one year of the suspension be stayed;
3. That during the year suspension, the Respondent take a medical ethics course; and
4. At the conclusion of the one year suspension, the Respondent be placed on probation for three (3) years.

The Respondent contended that the proposed sanctions are far too serious in light of the fact that the charges did not result from a patient care related issue. He argued that he continues to be employed in research and suspension would render him incapable of working during the period he was suspended.

The primary objective of the Act is to protect the public from physicians who engage in the legislatively defined offensive conduct. *McDonnell*, 301 Md. at 436. I agree with the Board that the Respondent's actions were unprofessional in that he deposited money into his personal bank accounts which belonged to GBMC. When the missing funds were discovered, he was not directly forthcoming to account for the money. The Respondent clearly made serious errors for

which he is entirely responsible and which could have been avoided had he been honest and direct. His conduct was directly related to his professional responsibility to deal honestly with his employer.

While the Respondent's actions were serious, the sanctions proposed by the Board are not entirely appropriate. It is significant that this is not a matter involving the Respondent's care of patients and no one was harmed as a result of his conduct. The evidence in this record showed that the Respondent's treatment of patients and clinical performance was not in question. An inability to practice during a one-year suspension will deprive those receiving benefit from his research of his experience and expertise and risk the possibility of compromising patient treatment. In view of the fact that the Respondent's conduct involved his financial dealings with GBMC, and in lieu of a lengthy suspension from the practice of medicine, a monetary fine would be most fitting in this case. Additionally, the Respondent's lack of disciplinary history also mitigates against suspension for an extended period. Therefore, I propose the following modifications to the Board's proposed sanctions:

1. That the Respondent's license be suspended for three (3) years;
2. That all but 60 days of the suspension be stayed;
3. The Respondent shall be fined an amount of \$30,000.00;⁷

⁷ Md. Health Occ. Code Ann. § 14-405.1(2000 & Supp. 2001) allows the board to impose a fine subject to the Board's regulations. COMAR 10.32.02.06C(4) establishes the amount of fines:

.06 Imposition of Penalties.

A. The Board may impose penalties upon health care providers instead of or in addition to the sanctions provided by the Medical Practice Act, and may impose a penalty upon any individual who practices medicine without a license.

C. Penalties Imposed under Health Occupations Article, § 14-405.1, Annotated Code of Maryland.

(4) Classification of Penalties. Penalties are as follows:

(a) For a penalty instead of suspension, not less than \$50,000;

4. At the conclusion of the suspension, the Respondent be placed on probation for three (3) years; and
5. During the period of probation, that the Respondent take a medical ethics course.

CONCLUSIONS OF LAW

Based upon the preceding Findings of Fact and Discussion, I conclude that the Respondent engaged in immoral or unprofessional conduct in the practice of medicine in violation of Md. Code Ann., Health Occ. § 14-404(a)(3) and the Board may discipline the Respondent pursuant to Md. Health Occ. Code Ann., 14-404(a).

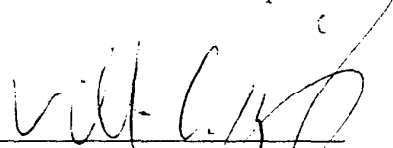
PROPOSED DISPOSITION

I **PROPOSE** that the charges issued by the Board on February 28, 2001 against Robert C. Shepard, M.D., be **UPHELD**.

I further **PROPOSE** the following sanctions be imposed:

1. That the Respondent's license be suspended for three (3) years;
2. That all but 60 days of the suspension be stayed;
3. The Respondent shall be fined an amount of \$30,000.00;
4. At the conclusion of the suspension, the Respondent be placed on probation for three (3) years;
5. During the period of probation, that the Respondent take a medical ethics course;
5. The Respondent will be responsible for all costs associated with the probation.

December 7, 2001
Date



William C. Herzing,
Administrative Law Judge

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- (b) For a penalty in addition to suspension, not less than \$10,000 and not more than \$40,000;
 - (c) For a penalty in addition to revocation, not less than \$10,000 and not more than \$50,000; and
 - (d) For a penalty in addition to a reprimand, not less than \$5,000 and not more than \$30,000.

NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party may file exceptions to this Proposed Decision with the Board of Physician Quality Assurance within fifteen (15) days of receipt of the decision, in accordance with Md. Code Ann., State Gov't' § 10-216 (2000) and COMAR 10.32.02.03F.