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STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS AGAINST

LS9308301MED

MANUEL M. AQUINO, M.D.,

Respondent

FINAL DECISION AND ORDER

The parties to this proceeding for the purposes of sec. 227.53, Stats., are:

Wisconsin Department of Regulation and Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935

Manuel M. Aquino, M.D.
8024 North 76th Street
Milwaukee, WI 53223

State of Wisconsin Medical Examining Board
1400 East Washington Ave.
P.O. Box 8935
Madison, WI 53703

A hearing was conducted in the above-captioned matter on March 14 and 15, 1994. Respondent appeared in person and by Attorney James R. Gutglass. Complainant appeared by Attorney John R. Zwieg. The administrative law judge filed his Proposed Decision on August 10, 1994. Attorney Zwieg filed Complainant's Objections to Proposed Decision on August 26, 1994. Respondent filed his Notice of motion and Motion for costs on August 17, 1994. Complainant filed his Response to Motion for Costs on September 13, 1994. Respondent's response to complainant's response to the motion was filed by letter dated September 13, 1994. The parties appeared before the board on September 22, 1994, to present oral arguments on the objections, and the board considered the matter on that date.

Based upon the entire record in this matter, the Medical Examining Board makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The respondent, Manuel M. Aquino, M.D., is a physician licensed to practice medicine and surgery in the state of Wisconsin under license number 13586, which was originally granted on March 17, 1960.

2. Dr. Aquino practiced for two years as a general practitioner, and for twenty-two years as a general surgeon. He retired from general surgery in 1984, and continues to practice medicine.

3. In January of 1989, Dr. Aquino was employed as the medical director of the Milwaukee County Jail. In addition to employment four days per week in another clinic, Dr. Aquino worked at the jail five evenings per week, Monday through Friday starting at 6:30 P.M.

4. On Thursday, 1/12/89, an inmate at the Milwaukee County Jail (referred to here by his initials, "J.H.") filled out a Request for Medical Attention, stating "Bad stomach ach. Haven't ate since Monday, Chills, Headaches" [exhibit 2].

5. On Friday, 1/13/89, Dr. Aquino saw J.H. and followed his usual routine in developing a history and examining a patient with such complaints. Dr. Aquino asked J.H. questions related to his complaints, but failed to note any history on the patient's record.

6. At the time, the medical department of the Milwaukee County Jail had two blood pressure cuffs and two or three thermometers, none of which was available to Dr. Aquino as he examined J.H. Dr. Aquino did not take J.H.'s blood pressure or temperature. He did determine that J.H. was afebrile by feeling the patient's forehead.

7. Dr. Aquino examined J.H.'s ear, nose and throat and auscultated J.H.'s heart, lungs, and bowels. He heard bowel sounds in all quadrants. Dr. Aquino palpated J.H.'s abdomen and found no sign of rigidity, tenderness, muscle guarding, rebound tenderness, or abdominal masses. Dr. Aquino considered the possibility of appendicitis and decided that the symptoms did not support that diagnosis. Dr. Aquino recorded only "Poss. GE Abd - 0 - essent. benign." Dr. Aquino prescribed antidiarrheal medications, Kaopectate and Lomotil, for diarrhea reported by the patient. Dr. Aquino spent approximately ten minutes with J.H.

8. On Sunday, 1/15/89, J.H. completed another Request for Medical Attention, stating "bad stomach ache meds haven't helped can't sleep" [exhibit 2].

9. On Monday, 1/16/89, Dr. Aquino saw J.H. again and questioned him about his complaints. J.H. reported that his condition had improved. Dr. Aquino auscultated the patient's bowels and palpated his abdomen. He did not take the patient's blood pressure or temperature. Dr. Aquino again considered the possibility of appendicitis and decided that the symptoms did not support that diagnosis. Dr Aquino recorded "Improved, still sore stomach Diarrhea stop. No vomiting Abdomen benign." Dr. Aquino prescribed an antispasmodic medication, Donnatal.

10. Dr. Aquino's written notes for his two sessions with J.H. are brief to the point of being inadequate.

11. On Friday, 1/20/89, J.H. completed another Request for Medical Attention, stating "Chest pain, Stomach cramps, Stomach pains, Chills. MEDICINE NOT WORKING. need to see real Doctor. Sick 2 Weeks" [exhibit 2].

12. On Monday, 1/23/89, J.H. was seen by a nurse at the jail, who recorded "Bp 114/90, p-140 lips pale and remainder of face flushed. Skin warm & dry. T 100.2 oral Abdomen distended & tender. Bowel sounds infrequent. C/O pain with defecation." The nurse then sent J.H. to the Milwaukee County Medical Complex Emergency Room for evaluation. Surgery done that day revealed an intra-abdominal abscess secondary to a perforated appendix.

13. On 2/18/89, after 26 days of hospitalization, J.H. was discharged from the Milwaukee County Medical Complex in satisfactory condition.

14. J.H. was unavailable for the hearing in this case.

15. A civil suit was filed based on the facts in this case, which was settled without a trial. The dates of filing and dismissal are not part of the record here, but the case was active in August 1990.

16. In an unrelated case, Dr. Aquino was reprimanded by the Medical Examining Board on November 15, 1990 for failing to accurately read an electro-cardiogram tracing in 1984. He was further ordered to complete two days of continuing medical training in the area of electro-cardiograms and to discuss the importance of complete medical records with Dr. Richard Roberts. Dr. Aquino completed the CME requirement in late 1991. Dr. Roberts examined Dr. Aquino's patient assessment practice and medical record charting practice in early 1992, and found them to have been adapted to acceptable standards [exhibit 14].

17. On 7/15/91 an investigator for the Department of Regulation and Licensing, Division of Enforcement sent a letter to Dr. Aquino requesting "any and all medical records" "you may have" related to J.H. [exhibit 4].

18. On 7/18/91, Dr. Aquino responded to the request with a letter and a photocopy of the Request for Medical Attention form filled out by J.H. on 1/15/89. The photocopy of the Request for Medical Attention form sent by Dr. Aquino contained three notations which had been added by Dr. Aquino. They were the terms "Afebrile", "B.S. ⊕", and "a.c." interlineated at appropriate places in the original note.

19. Dr. Aquino made the alterations, copied the form containing the alterations and destroyed his altered copy. Dr. Aquino was aware at the time the form was sent to the Division of Enforcement that the copy he sent had been altered.

20. On 11/7/91, when queried by phone by the investigator regarding differences between the copy he sent and the jail's copy, Dr. Aquino appeared surprised and stated that he did not know why the records were different.

21. On 12/9/91, when shown copies of the two records by the investigator, Dr. Aquino stated that he had photocopied the Request for Medical Attention from the Milwaukee County Jail, that he had altered the copy by adding three items, and that the first copy had been destroyed.

22. Dr. Aquino knowingly made a false and fraudulent submission to the Division of Enforcement, an agent of the board.

CONCLUSIONS OF LAW

1. The Medical Examining Board is the legal authority responsible for issuing and controlling credentials for physicians, under sec. 448.02, Wis. Stats. The Medical Examining Board has jurisdiction over Dr. Aquino's license to practice medicine and surgery in the state of Wisconsin.

2. The Medical Examining Board has personal jurisdiction over Dr. Aquino under sec. 801.04 (2), Stats., based on his receiving notice of the proceeding, and his holding a credential issued by the board.

3. The Medical Examining Board has jurisdiction over the subject-matter of a complaint alleging unprofessional conduct, under secs. 15.08(5)(c) and 448.02, Stats.

4. Dr. Aquino's care of patient J.H. on 1/13/89 and 1/16/89 was within acceptable professional standards, and there was no violation of sec. MED 10.02(2)(h), Wis. Admin. Code, or sec. 448.02(3), Stats.

5. Dr. Aquino's conduct in providing an altered copy of a medical record to the Department constitutes a violation of sec. Med 10.02(2)(m), Code and sec. 448.02(3), Stats.

ORDER

NOW, THEREFORE, IT IS ORDERED that Counts I and II of the Complaint in this matter be, and hereby are, dismissed.

IT IS FURTHER ORDERED that based upon violation by Dr. Aquino of sec. Med 10.02(2)(m), Code, and sec. 448.02(3), Stats., Dr. Aquino be, and hereby is, reprimanded.

IT IS FURTHER ORDERED that respondent's Motion for Costs submitted on August 17, 1994, is hereby remanded to the Administrative Law Judge for a proposed order on costs as to Counts I and II. The proposed order shall be submitted to the board for its final decision and order on costs.

EXPLANATION OF VARIANCE

The board has adopted the ALJ's Findings of Fact and Conclusions of Law relating to the quality of care issue, Counts I and II of the Complaint. The board has not adopted the ALJ's findings as to the fraud issue, Count III of the Complaint, and instead finds that Dr. Aquino purposefully submitted a false and fraudulent writing to the board's agent during the course of the board's investigation.

Dr. Aquino testified at hearing, and the administrative law judge found, that Dr. Aquino had added the notations described in Finding of Fact #18, above, to refresh his memory in the event that he was deposed in a civil suit arising from his treatment of Jeffrey Hartman. Given that the alterations were inserted in such a manner as to appear to have been a part of the original record, that explanation is inherently improbable. There is more here, however, for the explanation came somewhat too late.

By letter dated July 15, 1991, Ronald A. Naef, Investigator for the Division of Enforcement in the matter, requested that Dr. Aquino make available all medical records regarding patient Jeffrey Hartman. Under cover of his letter dated July 18, 1991, Dr. Aquino sent what was described as "a summarized copy from the Milwaukee County Jail records regarding . . . Jeffrey Hartman." When Mr. Naef compared the Request for Medical Attention form dated January 15, 1989, submitted by Dr. Aquino with the same form submitted by the jail, the added notations were discovered. Mr. Naef thereafter spoke to Dr. Aquino by telephone on November 7, 1991, and asked why the two forms were different. According to the Case File Memorandum completed by Mr. Naef on or around that date, Dr. Aquino responded "I don't know why they are different." (Exhibit 4).

In a subsequent interview with Dr. Aquino on or about December 9, 1991, Dr. Aquino was asked where he had gotten the form which he mailed to Investigator Naef. According to the file memorandum describing that interview, Dr. Aquino responded that he had gone

to the jail, made a copy of the document and sent it to Mr. Naef. When shown the two documents and asked why they differed, Dr. Aquino responded (again as recorded by Mr. Naef in his Case File Memorandum) that "he added the items marked on the copy he got from the jail and then Xeroxed a copy and mailed the copy to [Mr. Naef]. He then destroyed the copy he had." Dr. Aquino reportedly explained the added notations as follows:

> Dr. Aquino said that he added "afiberile" because he recalled that he felt no temperature when he touched Mr. Hartman. That his note "abdomen benign" told him that the bowel sounds were positive so he added that also. The "a.c." was added because he had forgotten to put it down. (Exhibit 4)

When asked at hearing whether at the time he mailed the response to Mr. Naef, Dr. Aquino knew that the form he mailed had the three additional entries that did not appear in the medical record, Dr. Aquino answered "Yes." (Transcript, page 96)

It was not until Dr. Aquino's deposition in connection with this matter that he attempted to explain the alteration of the record as having been done to refresh his recollection in preparation for pending malpractice litigation. When questioned at hearing on the issue, Dr. Aquino's testimony as to his previous responses to Mr. Naef was somewhat confused; but was essentially that he did not remember what Mr. Naef had asked him or what he responded; but that in fact, the alteration was to assist him for a possible deposition in the civil litigation. In light of the compelling contrary evidence, that explanation is not credible, and the board finds that a preponderance of the evidence in this record compels the conclusion that Dr. Aquino purposefully altered the notes of his treatment of Mr. Hartman in an attempt to remedy the obvious shortcomings in his record keeping.

As set forth in the Findings of Fact, Dr. Aquino was reprimanded in 1990 for failure to accurately read an electrocardiogram tracing in 1984. Based on findings in that case relating to Dr. Aquino's record keeping, the board ordered that he "have discussions with Richard Roberts, M.D., of Madison, Wisconsin to address the importance of complete medical records and . . . complete whatever readings Dr. Roberts shall assign regarding medical records." One can understand that Dr. Aquino may have been more than a little sensitive to the issue of his medical record keeping at the time of the board's inquiry in July 1991, and anxious to obviate any further problems in that regard. But while his motivation may be understandable, even minor alterations to medical records submitted to the board in response to a board investigation is sufficiently serious to require

discipline. The board considers imposition of a reprimand in this case to adequately address the disciplinary objectives of rehabilitation and deterrence.

Dated this 7 day of Oct, 1994.

STATE OF WISCONSIN
MEDICAL EXAMINING BOARD

by _____
Clark O. Olsen, M.D.
Secretary

WRA:AQUINO.DOC

NOTICE OF APPEAL INFORMATION

Notice Of Rights For Rehearing Or Judicial Review, The Times Allowed For Each, And The Identification Of The Party To Be Named As Respondent.

Serve Petition for Rehearing or Judicial Review on:

THE STATE OF WISCONSIN MEDICAL EXAMINING BOARD.

1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708.

The Date of Mailing this Decision is:

OCTOBER 12, 1994.

1. REHEARING

Any person aggrieved by this order may file a written petition for rehearing within 20 days after service of this order, as provided in sec. 227.49 of the *Wisconsin Statutes*, a copy of which is reprinted on side two of this sheet. The 20 day period commences the day of personal service or mailing of this decision. (The date of mailing this decision is shown above.)

A petition for rehearing should name as respondent and be filed with the party identified in the box above.

A petition for rehearing is not a prerequisite for appeal or review.

2. JUDICIAL REVIEW.

Any person aggrieved by this decision may petition for judicial review as specified in sec. 227.53, *Wisconsin Statutes* a copy of which is reprinted on side two of this sheet. By law, a petition for review must be filed in circuit court and should name as the respondent the party listed in the box above. A copy of the petition for judicial review should be served upon the party listed in the box above.

A petition must be filed within 30 days after service of this decision if there is no petition for rehearing, or within 30 days after service of the order finally disposing of a petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30-day period for serving and filing a petition commences on the day after personal service or mailing of the decision by the agency, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing this decision is shown above.)

SECTIONS 227.49 AND 227.53, OF THE WISCONSIN STATUTES

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be a prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3) (e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(2) The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

(3) Rehearing will be granted only on the basis of:

(a) Some material error of law.

(b) Some material error of fact.

(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

(4) Copies of petitions for rehearing shall be served on all parties of record. Parties may file replies to the petition.

. (5) The agency may order a rehearing or enter an order with reference to the petition without a hearing, and shall dispose of the petition within 30 days after it is filed. If the agency does not enter an order disposing of the petition within the 30-day period, the petition shall be deemed to have been denied as of the expiration of the 30-day period.

(6) Upon granting a rehearing, the agency shall set the matter for further proceedings as soon as practicable. Proceedings upon rehearing shall conform as nearly may be to the proceedings in an original hearing except as the agency may otherwise direct. If in the agency's judgment, after such rehearing it appears that the original decision, order or determination is in any respect unlawful or unreasonable, the agency may reverse, change, modify or suspend the same accordingly. Any decision, order or determination made after such rehearing reversing, changing, modifying or suspending the original determination shall have the same force and effect as an original decision, order or determination.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) 1. Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. If the agency whose decision is sought to be reviewed is the tax appeals commission, the banking review board, the consumer credit review board, the credit union review board, the savings and loan review board or the savings bank review board, the petition shall be served upon both the agency whose decision is sought to be reviewed and the corresponding named respondent, as specified under par. (b) 1 to 5.

2. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency.

3. If the petitioner is a resident, the proceedings shall be held in the circuit court for county where the petitioner resides, except that if the petitioner is an agency, the proceedings shal in the circuit court for the county where the respondent resides and except as provided in ss. 77.59 (b), 182.70 (6) and 182.71 (5) (g). The proceedings shall be in the circuit court for Dane county if petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to tran the proceedings agrees, the proceedings may be held in the county designated by the parties. If more petitions for review of the same decision are filed in different counties, the circuit judge for county in which a petition for review of the decision was first filed shall determine the venue for judi review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon wh petitioner contends that the decision should be reversed or modified. The petition may be amend by leave of court, though the time for serving the same has expired. The petition shall be entitled in name of the person serving it as petitioner and the name of the agency whose decision is sought to reviewed as respondent, except that in petitions for review of decisions of the following agencies, latter agency specified shall be the named respondent:

1. The tax appeals commission, the department of revenue.

2. The banking review board or the consumer credit review board, the commissioner banking.

3. The credit union review board, the commissioner of credit unions.

4. The savings and loan review board, the commissioner of savings and loan, except if petitioner is the commissioner of savings and loan, the prevailing parties before the savings and lo review board shall be the named respondents.

5. The savings bank review board, the commissioner of savings and loan, except if petitioner is the commissioner of savings and loan, the prevailing parties before the savings ba review board shall be the named respondents.

(c) A copy of the petition shall be served personally or by certified mail or, when service timely admitted in writing, by first class mail, not later than 30 days after the institution of proceeding, upon each party who appeared before the agency in the proceeding in which the decis sought to be reviewed was made or upon the party's attorney of record. A court may not dismiss proceeding for review solely because of a failure to serve a copy of the petition upon a party or party's attorney of record unless the petitioner fails to serve a person listed as a party for purposes review in the agency's decision under s. 227.47 or the person's attorney of record.

(d) The agency (except in the case of the tax appeals commission and the banking revi board, the consumer credit review board, the credit union review board, the savings and loan revi board and the savings bank review board) and all parties to the proceeding before it, shall have t right to participate in the proceedings for review. The court may permit other interested persons intervene. Any person petitioning the court to intervene shall serve a copy of the petition on each pa who appeared before the agency and any additional parties to the judicial review at least 5 days pr to the date set for hearing on the petition.

(2) Every person served with the petition for review as provided in this section and w desires to participate in the proceedings for review thereby instituted shall serve upon the petition within 20 days after service of the petition upon such person, a notice of appearance clearly stating t person's position with reference to each material allegation in the petition and to the affirmanc vacation or modification of the order or decision under review. Such notice, other than by the nam respondent, shall also be served on the named respondent and the attorney general, and shall be fil together with proof of required service thereof, with the clerk of the reviewing court within 10 days aft such service. Service of all subsequent papers or notices in such proceeding need be made only up the petitioner and such other persons as have served and filed the notice as provided in th subsection or have been permitted to intervene in said proceeding, as parties thereto, by order of th reviewing court.

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	NOTICE OF FILING PROPOSED DECISION LS9308301MED
MANUEL M. AQUINO, M.D., RESPONDENT.	:	

TO: James R. Gutglass, Attorney
Gutglass, Erickson & Bonville, S.C.
735 North Water Street
Milwaukee, WI 53202-4267
Certified P 205 985 967

John R. Zwieg, Attorney
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708

PLEASE TAKE NOTICE that a Proposed Decision in the above-captioned matter has been filed with the Medical Examining Board by the Administrative Law Judge, John N. Schweitzer A copy of the Proposed Decision is attached hereto.

If you have objections to the Proposed Decision, you may file your objections in writing, briefly stating the reasons, authorities, and supporting arguments for each objection. Your objections and argument must be received at the office of the Medical Examining Board, Room 178, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, on or before August 26, 1994. You must also provide a copy of your objections and argument to all other parties by the same date.

You may also file a written response to any objections to the Proposed Decision. Your response must be received at the office of the Medical Examining Board no later than seven (7) days after receipt of the objections. You must also provide a copy of your response to all other parties by the same date.

The attached Proposed Decision is the Administrative Law Judge's recommendation in this case and the Order included in the Proposed Decision is not binding upon you. After reviewing the Proposed Decision, together with any objections and arguments filed, the Medical Examining Board will issue a binding Final Decision and Order.

Dated at Madison, Wisconsin this 10th day of August, 1994.

John N. Schweitzer
Administrative Law Judge

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST MANUEL M. AQUINO, M.D., RESPONDENT.	:	**PROPOSED DECISION** Case No. LS-9308301-MED (91 MED 078)

PARTIES

The parties in this matter under § 227.44, Stats., and § RL 2.037, Wis. Admin. Code, and for purposes of review under § 227.53, Stats., are:

Complainant:
Division of Enforcement
Department of Regulation and Licensing
Madison, WI 53708-8935

Respondent:
Manuel M. Aquino, M.D.
8024 North 76th Street
Milwaukee, WI 53223

Disciplinary Authority
Medical Examining Board
1400 East Washington Ave.
Madison, WI 53703

FINDINGS OF FACT

1. The respondent, Manuel M. Aquino, M.D., is a physician licensed to practice medicine and surgery in the state of Wisconsin under license number 13586, which was originally granted on March 17, 1960.

2. Dr. Aquino practiced for two years as a general practitioner, and for twenty-two years as a general surgeon. He retired from general surgery in 1984, and continues to practice medicine.

3. In January of 1989, Dr. Aquino was employed as the medical director of the Milwaukee County Jail. In addition to employment four days per week in another clinic, Dr. Aquino worked at the jail five evenings per week, Monday through Friday starting at 6:30 P.M.

4. On Thursday, 1/12/89, an inmate at the Milwaukee County Jail (referred to here by his initials, "J.H.") filled out a Request for Medical Attention, stating "Bad stomach ach. Haven't ate since Monday, Chills, Headaches" [exhibit 2].

5. On Friday, 1/13/89, Dr. Aquino saw J.H. and followed his usual routine in developing a history and examining a patient with such complaints. Dr. Aquino asked J.H. questions related to his complaints, but failed to note any history on the patient's record.

6. At the time, the medical department of the Milwaukee County Jail had two blood pressure cuffs and two or three thermometers, none of which was available to Dr. Aquino as he examined J.H. Dr. Aquino did not take J.H.'s blood pressure or temperature. He did determine that J.H. was afebrile by feeling the patient's forehead.

7. Dr. Aquino examined J.H.'s ear, nose and throat and auscultated J.H.'s heart, lungs, and bowels. He heard bowel sounds in all quadrants. Dr. Aquino palpated J.H.'s abdomen and found no sign of rigidity, tenderness, muscle guarding, rebound tenderness, or abdominal masses. Dr. Aquino considered the possibility of appendicitis and decided that the symptoms did not support that diagnosis. Dr. Aquino recorded only "Poss. GE Abd - 0 - essent. benign." Dr. Aquino prescribed antidiarrheal medications, Kaopectate and Lomotil, for diarrhea reported by the patient. Dr. Aquino spent approximately ten minutes with J.H.

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10. Dr. Aquino's written notes for his two sessions with J.H. are brief to the point of being inadequate.

11. On Friday, 1/20/89, J.H. completed another Request for Medical Attention, stating "Chest pain, Stomach cramps, Stomach pains, Chills. MEDICINE NOT WORKING. need to see real Doctor. Sick 2 Weeks" [exhibit 2].

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13. On 2/18/89, after 26 days of hospitalization, J.H. was discharged from the Milwaukee County Medical Complex in satisfactory condition.

14. J.H. was unavailable for the hearing in this case.

15. A civil suit was filed based on the facts in this case, which was settled without a trial. The dates of filing and dismissal are not part of the record here, but the case was active in August 1990.

16. In an unrelated case, Dr. Aquino was reprimanded by the Medical Examining Board on November 15, 1990 for failing to accurately read an electro-cardiogram tracing in 1984. He was further ordered to complete two days of continuing medical training in the area of electro-cardiograms and to discuss the importance of complete medical records with Dr. Richard Roberts. Dr. Aquino completed the CME requirement in late 1991. Dr. Roberts examined Dr. Aquino's patient assessment practice and medical record charting practice in early 1992, and found them to have been adapted to acceptable standards [exhibit 14].

17. On 7/15/91 an investigator for the Department of Regulation and Licensing's Division of Enforcement sent a letter to Dr. Aquino requesting "any and all medical records" "you may have" related to J.H. [exhibit 4].

18. On 7/18/91, Dr. Aquino responded to the request with a letter and a photocopy of the Request for Medical Attention form filled out by J.H. on 1/15/89 [exhibit 5]. The photocopy of the Request for Medical Attention form sent by Dr. Aquino contained three notations which had been added by Dr. Aquino. They were the terms "Afebrile", "B.S. ⊕", and "a.c." interlineated at appropriate places in the original note.

19. Dr. Aquino added the three notations to his copy of the Request for Medical Attention form in preparation for a deposition in a civil suit arising from the facts of this complaint. The notations were on the photocopy at the time he received the request from the investigator. Sometime after Dr. Aquino made the alterations, he copied the form containing the alterations and destroyed his altered copy. Dr. Aquino was not conscious of the additions at the time he photocopied the document for the board [transcript, p. 95].

20. On 11/7/91, when queried by phone by the investigator regarding differences between the copy he sent and the jail's copy, Dr. Aquino was surprised and stated that he did not know why the records were different.

20. On 12/9/91, when shown copies of the two records by the investigator, Dr. Aquino stated that he had photocopied the Request for Medical Attention from the Milwaukee County Jail, that he had altered the copy by adding three items, and that the first copy had been destroyed. Dr. Aquino did not tell the investigator that he had made the changes as reminders to himself in the civil litigation.

21. Dr. Aquino did not intend to defraud or deceive the Medical Examining Board.

CONCLUSIONS OF LAW

I. The Medical Examining Board is the legal authority responsible for issuing and controlling credentials for physicians, under sec. 448.02, Wis. Stats. The Medical Examining Board has jurisdiction over Dr. Aquino's license to practice medicine and surgery in the state of Wisconsin.

II. The Medical Examining Board has personal jurisdiction over Dr. Aquino under sec. 801.04 (2), Stats., based on his receiving notice of the proceeding, and his holding a credential issued by the board.

III. The Medical Examining Board has jurisdiction over the subject-matter of a complaint alleging unprofessional conduct, under secs. 15.08(5)(c) and 448.02, Stats.

IV. Dr. Aquino's care of patient J.H. on 1/13/89 and 1/16/89 was within acceptable professional standards, and there was no violation of sec. MED 10.02(2)(h), Wis. Admin. Code, or sec. 448.02(3), Stats.

V. Dr. Aquino's conduct in providing an altered copy of a medical record to the Department was not a violation of sec. MED 10.02(2)(m), Wis. Admin. Code or sec. 448.02(3), Stats.

ORDER

THEREFORE, IT IS ORDERED that all charges in this complaint be dismissed.

OPINION

This is a disciplinary proceeding conducted under the authority of ch. 227, Stats., and ch. RL 2, Wis. Admin. Code. The Division of Enforcement in the Department of Regulation and Licensing filed a complaint with the Medical Examining Board alleging that the respondent, Dr. Aquino, was negligent and unprofessional in his treatment of an individual (the "quality of care" issue), and that Dr. Aquino responded to a request from the Department for information about that treatment with a fraudulently altered document (the "fraud" issue). I conclude that -- although some strongly suggestive evidence supported the fraud charge -- ultimately none of the charges was sufficiently proven.

The situation which led to this proceeding, stated in more detail in the findings of fact, is that on January 13, 1989, while Dr. Aquino was employed as the medical director of the Milwaukee County Jail, he saw an inmate referred to as "J.H.", who had requested medical attention for a stomach ache, anorexia, chills and headaches. Dr. Aquino prescribed medication for diarrhea. On January 16th, Dr. Aquino saw J.H. again, who was still complaining of a stomach ache, this time along with insomnia. Dr. Aquino prescribed antispasmodic medication. Four days later, on January 20th, J.H. complained of chest pain, stomach cramps, stomach pains, and chills, but he was then not seen by a medical professional until January 23rd, when a nurse sent J.H. out of the jail to a hospital, where he was found to have an intra-abdominal abscess secondary to a perforated appendix. J.H. eventually recovered. Then on July 15, 1991 an investigator for the Department of Regulation and Licensing's Division of Enforcement requested J.H.'s medical records from Dr. Aquino, and Dr. Aquino sent back a photocopy of J.H.'s second request for medical attention form, which contained three notations which were not on the original form and which had been added by Dr. Aquino.

Quality of Care.

The most crucial issue in this case is whether Dr. Aquino questioned and examined J.H. in greater depth and detail than appears in his notes. Because J.H. could not be located and was not available to testify, the only direct testimony on Dr. Aquino's care of J.H. came from Dr. Aquino himself. From his general manner and from the consistency of his testimony with the facts in the record, I found Dr. Aquino to be a credible witness. The only challenges to his testimony came as secondary inferences from other evidence, specifically from the paucity of written notations on the medical records, from the difficult situation in which Dr. Aquino worked, and from his providing an altered record to the department.

Dr. Aquino admitted that he had no specific memory of his contact with J.H. but testified to his normal routine [transcript, pp. 38-73]. Dr. Aquino testified that when he saw J.H. on Friday, 1/13/89, he followed his usual routine in developing a history and examining a patient with such complaints. Dr. Aquino stated that although no history is noted on J.H.'s record, he did ask J.H. questions related to his complaints. Dr. Aquino admitted that he did not take J.H.'s blood pressure and he did not measure J.H.'s temperature other than to feel his forehead, but he explained that at the time, the medical department of the Milwaukee County Jail had only two blood pressure cuffs and two or three thermometers, none of which was available in the examination room. Dr. Aquino stated that he examined J.H.'s ear, nose and throat, he auscultated J.H.'s heart, lungs, and bowels, hearing bowel sounds in all quadrants, and that he palpated J.H.'s abdomen, finding no sign of rigidity, tenderness, muscle guarding, rebound tenderness, or abdominal masses. Dr. Aquino stated that he considered the possibility of appendicitis and decided that the symptoms did not support that diagnosis. Virtually none of this is evident from the written record, as Dr. Aquino recorded only "Poss. GE Abd - 0 - essent. benign." Dr. Aquino stated that although the record does not mention diarrhea, J.H. complained of it, which can be seen from the fact that Dr. Aquino prescribed Kaopectate and Lomotil.

Dr. Aquino stated that when he saw J.H. again on Monday, 1/16/89, he again questioned J.H. about his complaints, auscultated the patient's bowels, and palpated his abdomen.. He stated that he again did not take the patient's blood pressure or temperature since he was improving. Dr. Aquino testified that he again considered the possibility of appendicitis but decided that the symptoms did not support that diagnosis, and he prescribed Donnatal, an antispasmodic. Again very little of this appears in the written record, as Dr Aquino recorded only "Improved, still sore stomach Diarrhea stop. No vomiting Abdomen benign."

The above testimony by Dr. Aquino regarding his examination and care of J.H. was unchallenged by testimony or other direct evidence. As mentioned above, it was called into question by three sources of non-testimonial and inferential evidence.

The first challenge to Dr. Aquino's testimony is the weak inference that arises from the inadequacy of his records. I have found as a fact that Dr. Aquino's written notes for his two sessions with J.H. are inadequate. However, Dr. Aquino was not specifically charged with endangering the patient by failing to make notes, he was charged with endangering the patient by failing to examine him adequately. The inadequacy of his notes is consistent with the disposition of another case against Dr. Aquino in 1990. The discipline imposed there established that prior to 1990 Dr. Aquino

was deficient in his record-keeping, so rather than casting doubt on his testimony here, the earlier case actually lends a certain weak support to it.

The second challenge to Dr. Aquino's testimony is the inference that Dr. Aquino cut corners in his care of patients in the jail. The attorney for the board established that Dr. Aquino worked at the Milwaukee County Jail five evenings a week starting at 6:30 P.M., and that on four of those days he had worked nine-hour days at another clinic. The attorney also established that Dr. Aquino typically saw 25 to 30 inmates per evening in addition to performing other duties, such as reviewing 30 to 40 charts [transcript, p. 363]. Further, Dr. Aquino was paid a salary for the position, and not an hourly wage. By these facts, the inference was raised that Dr. Aquino would be inclined to take short cuts to speed up his work. This issue is at least partly related to the working conditions at the Milwaukee County Jail, which were in themselves imperfect. Besides the pressure to see a large number of patients per night, the conditions included a small area on the request form in which to write notes, and the occasional lack of basic medical diagnostic equipment such as thermometers and blood pressure cuffs [transcript, pp. 48-50, 73-79, 343]. All of these add up to only a possible inference, however, and they are not strong enough to prove that Dr. Aquino failed to examine and treat J.H. as he stated he did.

(The question of whether Dr. Aquino as Medical Director bore some responsibility for the conditions at the Milwaukee County Jail was not fully explored in this forum. He explained that he requested improvement in some of these areas but that his budget requests were frequently not funded [transcript, pp. 79, 343-344, 362]. On the one hand I tend to think that a medical professional should not be faulted for continuing to provide needed medical care even in an inadequate situation; on the other hand, the responsibility for the situation must rest somewhere, and Dr. Aquino was the Medical Director. The latter position was strongly maintained by Dr. Armond Start [transcript, p. 211]. Although the issue is thought-provoking, it need not be resolved here, since the only shortcuts I find Dr. Aquino actually took in his treatment of J.H. were his failure to take J.H.'s temperature and blood pressure, and the discussion of expert testimony below shows that these indices would not have been so determinative as to have been crucial to a proper diagnosis.)

The third challenge to Dr. Aquino's testimony arises out of the allegation that he attempted to provide false information to the department, which would lead to the reasonable inference that he was aware of the inadequacy of his examination and treatment, and attempted to cover it up. The evidence on this issue will be discussed later in this opinion under the heading of "fraud". When viewed in the most incriminating light, I agree with the complainant that the evidence strongly suggests fraud; nevertheless, considering all the facts and circumstances, and weighing Dr. Aquino's credibility, I find that the evidence is ultimately not strong enough to prove the charge. Since I find that Dr. Aquino did not intentionally attempt to provide false information to the department, no secondary inference can be drawn to prove that his care and treatment of J.H. were inadequate.

Therefore, **given all the evidence available on the issue, I find that Dr. Aquino provided care to J.H. as he testified he did.** Given that fact, the next question is whether his examination, his diagnosis, and his treatment were adequate, or whether they constituted a danger to J.H.'s health, welfare or safety or were otherwise negligent.

Expert testimony from three witnesses was provided on this issue. As commonly occurs when

expert witnesses testify for each side, the experts disagreed. Dr. Start, called as an expert by the Department, generally expressed the opinion that Dr. Aquino should have performed an exam and tests from which he would have been able to diagnose appendicitis on 1/16/89, if not on 1/13/89. Drs. Tiu and Boulanger, called as experts by Dr. Aquino, expressed their opinions that Dr. Aquino's examination was adequate under the circumstances and that his diagnosis of gastroenteritis was within normal limits of competent medical practice and perhaps even accurate. All three witnesses were well-qualified; their *curricula vitae* are included in the record [exhibits 10, 11, and 12]. On the specific issue of diagnosing appendicitis, all three were qualified, but respondent's experts' experience were at least as extensive and more recent than the complainant's expert, and I find that the Department did not meet its burden on this issue.

The expert witness called by the board was Dr. Armond Start, who was medical director of the Oklahoma state prison system from 1977 to 1983, medical director of the Texas state prison system from 1983 to 1986, half-time consulting medical director to the Wisconsin State Department of Corrections from 1988 to 1991, and consulting medical director to the Dane County Jail from 1990 to the present. Dr. Start is obviously well-qualified to comment on the setting of the Milwaukee County Jail in which Dr. Aquino's practice took place, and his comments regarding whether a physician should "tolerate that sort of mismanagement" in the jail were unsettling [transcript, p. 148; see also p. 174]. However, Dr. Start has had no clinical practice since 1977, so he is no more qualified, and perhaps a little less-qualified, than the other two experts to critique Dr. Aquino's actual diagnosis.

Further, Dr. Start's opinions on the specific issue of whether and when Dr. Aquino should have diagnosed appendicitis were not entirely rock-solid. Dr. Start lost a point in credibility and objectivity when he testified that on 1/13/89 Dr. Aquino should have sent J.H. "to the surgeon with a diagnosis of acute appendicitis". Based on all of the facts and testimony in the record, I cannot accept this. Dr. Start later qualified this answer by saying that it was not an opinion which he held to a reasonable degree of professional certainty, and there was a discussion about striking the comment from the record, but it was ultimately left in [transcript, pp. 160-164], and I feel that Dr. Start was inclined to rely too heavily on hindsight. In fact, I feel that being justifiably upset over Dr. Aquino's lack of written notes, Dr. Start probably began to form many of his opinions at a time when it appeared from the record that Dr. Aquino's examination of J.H. was totally inadequate. In fact, when he was asked to assume that Dr. Aquino had examined J.H.'s abdomen on 1/13/89 as he testified, Dr. Start agreed that that would be an adequate examination [transcript, pp. 153, 185-186], which would be in conflict with his statement above. At another point Dr. Start stated that he considered it medically probable that J.H.'s appendix had ruptured by 1/16/89 [transcript, pp. 201-206], but he also stated that on 1/16/89 a minimally competent physician could still have diagnosed gastroenteritis [transcript, pp. 174, 213]. On cross-examination, Dr. Start admitted that other doctors, including himself, have failed to diagnose appendicitis properly [transcript, pp. 182-183] and that diarrhea is not associated with appendicitis [transcript, p. 188]. At one point he stated that on the second visit, a minimally competent physician would have ordered a urinalysis and a blood count [transcript, p. 157], but on cross-examination, he admitted that if J.H. appeared better by history and observation on 1/16/89, there would have been no need to order a urinalysis or a blood count [transcript, pp. 193, 198-199]. He stated that checking the patient's temperature by hand on 1/13/89 was unprofessional, but this was sufficiently disputed by the other witnesses that I do not find it critical.

The first expert witness called by the respondent was Dr. Alfonso L. Tiu, a physician certified in internal medicine and cardiovascular disease currently practicing in the Milwaukee area. Dr. Tiu knows Dr. Aquino through a common membership in the Philippine Medical Group, but no serious suggestion of bias was raised. Dr. Tiu commented on Dr. Aquino's written notes, saying that "abd - 0 - essent. benign" is within acceptable limits as a note describing an abdominal exam, and that he sees similar notes from other physicians [transcript, p. 250]. On the same subject of written notes, he testified that not every doctor would make an entry that a patient suffered from diarrhea, but that like Dr. Aquino they might let the prescribed medications speak for themselves [transcript, p. 254].

Dr. Tiu also expressed the opinion that a physician's standard of care may depend on setting and circumstances [transcript, p. 288]. He stated that checking a patient's temperature by hand was acceptable under the conditions Dr. Aquino worked in [transcript, pp. 251-252], but more importantly, he stated that an elevated temperature may accompany gastroenteritis, so that Dr. Aquino's failure to take an accurate temperature did not severely hinder his ability to make an accurate diagnosis [transcript, p. 286]. As to Dr. Aquino's diagnosis of gastroenteritis, Dr. Tiu confirmed that diarrhea is seldom associated with appendicitis [transcript, p. 246], and he asserted that not ordering blood or urine tests on 1/16/89 was within acceptable limits of practice [transcript, p. 257]. Dr. Tiu's opinion was that Dr. Aquino was not negligent, considering the circumstances in which he had to practice [transcript, pp. 242-243], and that the case was managed properly [transcript, p. 263]. He offered three opinions which I consider reasonable possibilities: first, that the patient may not have even had appendicitis on 1/13/89 and 1/16/89; second, that the onset of appendicitis cannot be pinpointed from the record; and third, that if appendicitis was present on 1/13/89 or 1/16/89 the symptoms were "totally atypical" [transcript, p. 258].

The second expert witness called by the respondent was Dr. Wayne J. Boulanger, a retired surgeon, now chief of staff for Columbia Hospital at the Medical College of Wisconsin. With regard to Dr. Aquino's written notes, he asserted that his own are not much better. He stated that "recording absent findings is time-consuming and may well be omitted when time is scarce", and he admitted that that was his standard method of operation [transcript, p. 313]. With regard to taking the patient's temperature with his hand on 1/13/89, Dr. Boulanger stated that if J.H. did not feel noticeably warmer than normal, there was no need for Dr. Aquino to take his temperature, and Dr. Boulanger stated that he didn't think he would have bothered either [transcript, p. 316]. He stated that the hand-on-forehead technique might fail to detect a low-grade fever, but that a temperature might accompany gastroenteritis and might be absent with appendicitis [transcript, p. 315], so its diagnostic value in this situation was negligible.

As to the Dr. Aquino's diagnosis, assuming that he examined J.H. as he testified he did, Dr. Boulanger stated that it was appropriate to rule out appendicitis on 1/13/89 and 1/16/89, and Dr. Boulanger's opinion was that Dr. Aquino's care was satisfactory [transcript, p. 308]. J.H. may have had appendicitis on 1/1/6/89 or possibly even on 1/13/89, but Dr. Boulanger stated that "most of us have missed that diagnosis [of appendicitis] at times" [transcript, p. 316], and beyond that, Dr. Boulanger strongly implied that far from being negligent or incompetent, Dr. Aquino's diagnoses on 1/13/89 and 1/16/89 may have been accurate [transcript, pp. 318-319]. Dr. Boulanger placed the date on which the appendix ruptured as "at least three or four days before January 23rd", but after Dr. Aquino's exam on 1/16/89 [transcript, p. 320].

Based on all the expert testimony, I cannot conclude that taking J.H.'s temperature with a thermometer would have materially assisted Dr. Aquino in his diagnosis, or that J.H. had a diagnosable case of appendicitis on either 1/13/89 or 1/16/89. Therefore, **based on all the expert testimony, I conclude that Dr. Aquino's examination, diagnosis, and treatment did not constitute a danger to J.H.'s health, welfare or safety, nor were they negligent. Therefore, the charges against Dr. Aquino based on the quality of his care of J.H. must be dismissed.**

Fraud.

The second major issue in this case is the allegation of fraud. This is based on actions by Dr. Aquino which, I must agree, can be interpreted in such a way as to suggest that he consciously tried to mislead the Board and the Department regarding his care of J.H. When he received a request from an investigator for the Department dated 7/15/91 for "any and all medical records", and "any records you may have ..." regarding J.H., Dr. Aquino returned a photocopy [exhibit 5] of the Request for Medical Attention form which had been filled out by J.H. on 1/15/89 [exhibit 2]. The copy sent by Dr. Aquino contained three notations which were not on the original form and which were added by Dr. Aquino. They were the terms "Afebrile", "B.S. ⊕", and "a.c." inserted at appropriate places in the other handwritten notes. According to the investigator, when questioned by phone about the additions 3 1/2 months after the request, Dr. Aquino seemed "surprised" and stated "I don't know why they are different" [exhibit 8, p. 14]. A month later the investigator made an appointment with Dr. Aquino to speak about the J.H. case and visited him in his office; in that meeting, according to the investigator [exhibit 9, p.7],

> ... Dr. Aquino was asked where the 01/15/89 document was that he had sent a copy of. He did not recall the document, so I showed him the copy he had mailed me. Dr Aquino said that he didn't have that anymore. I asked Dr. Aquino where he had gotten the 01/15/89 document that he sent me. Dr. Aquino said that he had gone to the jail and made a copy of it at the jail Dr. Aquino was then shown a copy of what had been sent me by the jail and what he had sent me. I then pointed out the differences in the two 01/15/89 documents and asked Dr. Aquino if he could explain the differences.
>
> Dr. Aquino said that he added the items marked on the copy he got from the jail and then xeroxed a copy and mailed that copy to me. He then destroyed the copy he had. ... Dr. Aquino said that he added the "afiberile" because he recalled he felt no temperature when he touched Mr. Hartman. That his note "abdomen benign" told him that the bowel sounds were positive so he added that also. The "a.c." was added because he had forgotten to write it down.

(The two depositions of the investigator in this case [exhibits 7 and 8] were offered as testimony rather than as exhibits, and they must be treated as if they were incorporated into testimony, which means that they should be copied along with the transcript, even when the exhibits are not copied.) In his depositions, the investigator confirmed that Dr. Aquino did not say anything about making the changes as reminders to himself for the civil litigation. In fact, the crucial facts that are missing from the above description are when Dr. Aquino made the changes and when he destroyed the copy with the written changes. In the hearing Dr. Aquino explained when he made the changes, but nowhere in the record appears an explanation of when the copy was destroyed.

Dr. Aquino's version of the facts does not contradict the facts reported by the investigator, but it paints them in a very different light. He testified that he had been involved in a civil suit arising from the facts of this case, and that he added the three notations to his copy of the Request for Medical Attention form at that time "just to refresh my mind, just in case I get called for a deposition in that litigation". Raising even more suspicions than the written changes is the fact that sometime after he made the alterations, he copied the form containing the alterations and destroyed his altered copy. However, he did not state specifically when this occurred, he was not asked that question by the investigator, nor was he asked that question in the hearing. His version implied that whether it was before or after 7/15/91, it had nothing to do with the Department's request. He stated that the notations were on the photocopy at the time he received the request from the investigator, that he had forgotten the additions at the time he photocopied the document for the board [transcript, p. 95], and that he had no fraudulent intent in providing the record [transcript, pp. 353-358]. The request was for whatever he had in his possession, not for a complete and accurate record of his treatment of J.H.

The evidence that Dr. Aquino knowingly submitted false information to the Department and the Board is certainly suggestive:

- The additional entries are interlineated in a way that makes them look like part of the original record, with no attempt to designate them as additions (which suggests that they were a deliberate attempt to deceive);
- In the phone conversation in November of 1991 Dr. Aquino seemed surprised and told the investigator that he didn't know why the records were different (which suggests that he was caught off guard and had not yet thought of the explanation which he later relied on);
- In the office visit in December of 1991 Dr. Aquino told the investigator that he had added the entries on a copy he got from the jail, sent a copy of that to the investigator, and destroyed his own copy (which seems to be a clear admission against interest); and
- Dr. Aquino did not tell the investigator that he had made the entries to prepare for his civil suit (which also suggests that he had not yet thought of that explanation).

The evidence on the other side of the issue, that Dr. Aquino submitted the document with no ill intent, is as follows:

- Within a day or two of receiving the investigator's request, Dr. Aquino sent a copy of the 1/16/89 document only (which suggests that he really did send what was in his possession at the time, without going to the jail to look at, copy, and alter both of the originals);
- In a phone conversation in November of 1991, Dr. Aquino seemed surprised and told the investigator he didn't know why the records were different (which suggests that he was genuinely unaware that the document he sent had any changes on it);
- Dr. Aquino apparently made no attempt to alter the original documents which remained in the jail record, and which he should have known would continue to be available;
- He made only the three changes, not others which would also have been helpful to him, including similar changes on a copy of the 1/13/89 document.

The two possible explanations are:

(1) As the Department alleges, Dr. Aquino made the changes after he received the request from the investigator, which would create an unavoidable inference of conscious fraud; or

(2) As Dr. Aquino testified, he made the changes at the time of the civil case, around August of 1990, in anticipation of a deposition. If that is so, his copy of a copy may have been made at that time, the original copy may have been destroyed with no ill intent at any time between the close of the civil case and the investigator's request (or even in the 3 1/2 months after he sent his copy to the board), and he had completely forgotten making the changes at the time he sent it.

The negative inferences which can be drawn from Dr. Aquino's actions are undeniably strong. However, the documentary and inferential evidence on the issue is still fairly evenly balanced, and when I include Dr. Aquino's sworn testimony, I find that the complainant did not meet its burden of proof by a preponderance of the evidence. **Therefore, I find that Dr. Aquino did not intend to defraud or deceive the Medical Examining Board.**

Even with this finding, it cannot be claimed that the Department's allegation of fraud was "irrelevant", as Dr. Aquino's counsel argued in his Motion in Limine dated March 10, 1994. Having now found that Dr. Aquino provided a copy of the record in his possession with no intent to defraud, I agree that his act provides no useful information about the standard of care issues, and in that sense it is, as counsel argued, irrelevant. However, had the fact been different, and the allegation proven, it would have provided highly relevant information regarding Dr. Aquino's guilty knowledge. For that reason, I find that the Department was substantially justified in trying the issue, even though Dr. Aquino's explanation ultimately prevailed.

Discipline.

As I find no violations, I recommend no discipline. The one concern which remains in this case after the charges are disposed of is Dr. Aquino's inadequate note-taking. However, that concern is allayed because as mentioned in fact #15 above, since the events of this case, Dr. Aquino has completed a consultation with Dr. Richard Roberts to discuss the importance of complete medical records. The written testimony of Dr. Roberts was entered by stipulation, and he says that as of March 1992 Dr. Aquino has adapted his record-keeping practice to acceptable standards.

Dated and signed: August 10, 1994

John N. Schweitzer
Administrative Law Judge
Department of Regulation and Licensing

APPENDIX
(These sections may be omitted from the Final Decision)

PROCEDURAL HISTORY

A. This case was initiated by the filing of a complaint with the Medical Examining Board on August 30, 1993. A disciplinary proceeding (hearing) was scheduled for October 25th and 26th, 1993.

B. Dr. Aquino's answer was filed on September 14, 1993 by attorney James R. Gutglass of Gutglass, Erickson & Bonville, S.C., 735 North Water Street, Milwaukee, WI 53202-4267.

C. A prehearing conference was held on October 8, 1993 and at the parties' request, the hearing was rescheduled to March 14th, 15th and 16th, 1994.

D. Additional prehearing conferences were held on November 1, 1993; November 29, 1993; January 18, 1994; and February 22, 1994.

E. Mr. Gutglass filed a motion "in limine" on March 10, 1994 to dismiss count III of the complaint. The motion was denied as a motion in limine and the issue of count III was reserved for decision as part of the fact-finding hearing.

F. The hearing was held as rescheduled on March 14th and 15th, 1994. Dr. Aquino appeared in person and represented by Mr. Gutglass. The Medical Examining Board was represented by Attorney John R. Zwieg of the Department's Division of Enforcement. The hearing was recorded, and a transcript was prepared and delivered on April 7, 1994. The testimony and exhibits entered into evidence at the hearing form the basis for this Proposed Decision.

APPLICABLE RULES

448.02 Authority.

...

(3) INVESTIGATION; HEARING; ACTION. (a) The board shall investigate allegations of unprofessional conduct and negligence in treatment by persons holding a license, certificate or limited permit granted by the board. ....

MED 10.02 Definitions.

...

(2) The term "unprofessional conduct" is defined to mean and include but not be limited to the following, or aiding and abetting the same:

...

(h) Any practice or conduct which tends to constitute a danger to the health, welfare or safety of patient or public.

...

(m) Knowingly making any false statement, written or oral, in practicing under any license, with fraudulent intent ....