STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

Antonia C. Novello, M.D., M.P.H. , Dr.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

PUBLIC

October 1, 2002

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

David W. Smith, Esq.
NYS Department of Health
5 Penn Plaza-6th Floor
New York, New York 10001

Ralph A. Erbaio, Esq.
Lifshutz, Polland & Hoffman, P.C.
675 Third Avenue
New York, New York 10017

David Tomback, M.D.
118-18 Union Turnpike
Kew Gardens, New York 11215

RE: In the Matter of David Tomback, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 02-169) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt **or** seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified mail or in person** to:

Office of Professional Medical Conduct
New York State Department of Health
Hedley Park Place
433 River Street-Fourth Floor
Troy, New York 12180

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,

REDACTED

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:cah
Enclosure

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

In the Matter of

David Tomback, M.D. (Respondent)

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

Administrative Review Board (ARB)

Determination and Order No. 02-169

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

For the Department of Health (Petitioner): **David W. Smith, Esq.**
For the Respondent: **Ralph A. Erbaio, Esq.**

After a hearing below, a BPMC Committee determined that the Respondent committed professional misconduct by making knowing and fraudulent misrepresentations on applications for licensure and employment (Applications). The Committee voted to suspend the Respondent's New York medical license (License) and to place the Respondent on probation after the suspension. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney 2002), both parties ask the ARB to nullify or modify that Determination as to the charges and the penalty. After reviewing the hearing record and review submissions from the parties, the ARB affirms the Committee's Determination that the Respondent made knowing and fraudulent misrepresentations on the Applications and we affirm the Determination that the conduct constituted misconduct. We overturn the Committee and sustain the additional charge that the Respondent's conduct evidenced moral unfitness in practice. As to the penalty, we overturn the Committee and vote to revoke the Respondent's License.

Committee Determination on the Charges

The Petitioner commenced the proceeding by filing charges with BPMC alleging that the Respondent violated N. Y. Educ. Law §§ 6530(1-2), 6530(14) & 6530(20) (McKinney Supp. 2002) by committing professional misconduct under the following specifications:

- obtaining a license fraudulently,
- practicing the profession fraudulently,
- engaging in conduct that evidences moral unfitness, and,
- violating N.Y. Pub. Health Law § 2805-k (1)(a) by failing to provide information about affiliations with and reasons for termination at medical facilities.

The charges related to the Respondent's Applications for state licensure or employment at medical facilities. The Petitioner also charged moral unfitness concerning an abusive e-mail message to the Respondent's former roommate. The Respondent contested the charges and a hearing followed before the Committee that rendered the Determination now on review.

The Committee found no support for the charge involving the abusive e-mail and the Petitioner has raised no challenge to that finding on review. The Committee did sustain charges that the Respondent obtained his License fraudulently by making knowing misrepresentations on licensure Applications. The Committee found that the Respondent practiced fraudulently and violated Pub. Health Law §2805-k(1)(a) by making intentionally false statements or withholding information with the intent to mislead on licensure and employment Applications. The Committee dismissed the charge that the Respondent's false statements evidenced moral unfitness. In making their Determination, the Committee found testimony by the Respondent unreliable. The Committee found the Respondent deceptive, angry, manipulative and unwilling to accept responsibility for his actions. The Committee voted to suspend the Respondent's License for two years and placed the Respondent on probation for five years following the suspension. The probation terms include a requirement that the Respondent undergo a psychiatric evaluation (Evaluation) during the probation and complete any treatment or therapy that the Evaluation would identify as necessary.

Review History and Issues

The Committee rendered their Determination on May 15, 2002. This proceeding commenced on May 20, 2002, when the ARB received the Petitioner's Notice requesting a Review. The Respondent filed a Review Notice subsequently. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and reply brief and the Respondent's brief and reply brief. The record closed when the ARB received the Respondent's reply brief on July 19, 2002.

The Petitioner argued that the Respondent's fraud and deceit evidenced mortal unfitness in medical practice and the Petitioner asked the ARB to overturn the Committee and sustain the moral unfitness charge. The Petitioner also contended that the Committee imposed an inappropriate penalty by allowing the Respondent to retain the License he achieved by deceit. The Petitioner asked that the ARB overturn the Committee and revoke the Respondent's License.

The Respondent argued that no evidence existed to support the charges that the Committee sustained. The Respondent contended that he made no answers on any application with the intent to deceive and he asked that the ARB overturn the Committee and dismiss all charges. In the alternative, the Respondent argued that the Committee imposed an overly harsh and unnecessary penalty. The Respondent's argued that the case involved no finding of moral unfitness and no findings relating to patient care. The Respondent asked that the ARB reduce the penalty to probation only.

Determination

The ARB has considered the record and the parties' briefs. In reviewing a case, the ARB may substitute our judgement for that of the Committee, in deciding upon a penalty Matter of

Bogdan v. Med. Conduct Bd. 195 A.D.2d 86, 606 N.Y.S.2d 381 (3rd Dept. 1993) and in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 NYS 2d 759 (3rd Dept. 1994). We elect to exercise that authority on this review. We affirm the Committee's Determination that the Respondent obtained his License fraudulently, practiced fraudulently and violated Pub. Health Law §2805-k(1)(a). We overturn the Committee and hold that the Respondent's conduct also evidenced moral unfitness. We also overturn the Committee and vote unanimously to revoke the Respondent's License.

The Respondent's brief argued that the evidence failed to prove knowing misstatements on the Applications. In challenging the findings by the Committee, the Respondent relied on his hearing testimony in which he denied any intent to deceive or misrepresent on the Applications. The Respondent asks in effect that we overturn the Committee's judgement that the Respondent lacked any credibility in his denials. In reviewing a Committee's judgement on credibility, the ARB defers to the Committee as the fact finder. As the fact finders who observe the testimony at the hearing, the Committee stands in the best position to make the determination on credibility. Also, in making a determination on fraud charges, a committee may reject a respondent's explanation for a misrepresentation and draw the inference that the respondent intended or was aware of the misrepresentation, with other evidence as the basis, Matter of Brestin v. Comm. of Educ., 116 A.D.2d 357, 501 N.Y.S.2d 923 (3rd Dept. 1986).

In the Committee's Determination at page 10, the Committee gave extensive reasons for rejecting the Respondent's testimony. The record also proved that the Respondent submitted a series of false Applications. The evidence the Committee found credible revealed a pattern of fraudulent conduct. That evidence provided the Committee preponderant evidence that the

Respondent obtained his License fraudulently, practiced fraudulently and violated Pub. Health Law §2805-k(1)(a).

We also conclude that the Respondent's repeated, deliberate misrepresentations also evidenced moral unfitness in practice. The Respondent's misrepresentations related directly to his medical practice and violated the profession's ethical standards. Medical practice requires integrity just as much as the profession requires skill and knowledge. In describing the Respondent's conduct, the Committee used such terms as disingenuous, deceptive and manipulative. We hold that the Committee made findings on the Respondent's conduct inconsistent with the Committee majority's Determination to dismiss the moral unfitness the charge. We overturn the Determination and we sustain the moral unfitness charge.

The Committee's majority also allowed the Respondent to retain his License, even though the Committee found that the Respondent obtained his License fraudulently. The Committee also found that the Respondent irresponsible and unwilling to accept responsibility for his actions [Committee Determination page 10]. The ARB concludes that the failure to admit or learn from mistakes or misconduct leaves the Respondent at risk to repeat that conduct. The Committee majority's sanction required the Respondent to undergo psychiatric therapy, but the Petitioner made no charges concerning psychiatric impairment and the Respondent offered no defense based on impairment. The ARB concludes that the Committee rendered a penalty inconsistent with their findings.

The ARB considered annulling the Respondent's License pursuant to Pub. Health Law § 230-a(5), because the Respondent obtained the License fraudulently. The ARB rejected annulment by a 3-2 vote. We voted 5-0 to revoke the Respondent's License. The ARB agrees with the Committee's dissenting member, who found the Respondent's conduct beyond

rehabilitation. We conclude that the pattern of fraudulent conduct demonstrates the Respondent's unfitness to retain his License.

ORDER

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

1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct by obtaining his License fraudulently, practicing fraudulently and violating Pub. Health Law §2805-k(1)(a).
2. The ARB overturns the Committee and sustains the charge that the Respondent's conduct evidenced moral unfitness.
3. The ARB overturns the Committee's Determination to suspend the Respondent's License and place the Respondent on probation.
4. The ARB revokes the Respondent's License to practice medicine in New York State.

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

In the Matter of David Tomback, M.D.

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

Dated: Sept 9, **2002**

REDACTED

Therese G. Lynch, M.D.

In the Matter of David Tomback, M.D.

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

Dated: 9/10, 2002

REDACTED

Thea Graves Pellman

In the Matter of David Tomback, M.D.

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

Dated: September 11, 2002

REDACTED

Robert M. Briber

In the Matter of David Tomback, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the Matter of Dr. Tomback.

Dated: September 15, 2002

REDACTED

Stanley L Grossman, M.D.