



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

*Public*

Dennis P. Whalen  
Executive Deputy Commissioner

August 16, 2007

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Augustin Enoch Marshall, R.P.A.  
2888 South Beck Drive  
Tuscon, Arizona 85730

Joseph F. Ruchala, Esq.  
230 Hilton Avenue – Suite 201  
Hempstead, New York 11550

Leni Sabina Klaimitz, Esq.  
NYS Department of Health  
Bureau of Professional Medical Conduct  
90 Church Street – 4<sup>th</sup> Floor  
New York, New York 10007

**RE: In the Matter of Augustin Enoch Marshall, R.P.A.**

Dear Parties:

Enclosed please find the Determination and Order (No. 07-54) 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.

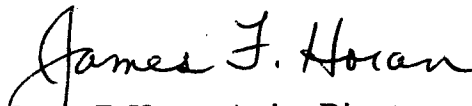
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

  
James F. Horan, Acting Director  
Bureau of Adjudication

JFH:cah

Enclosure

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

In the Matter of

Augustin Enoch Marshall, R.P.A. (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. 07-54

COPY

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

For the Department of Health (Petitioner):  
For the Respondent:

Leni S. Klaimitz, Esq.  
Joseph F. Ruchala, Esq.

After a hearing below, a BPMC Committee found that the Respondent-Physician Assistant engaged in conduct that evidences moral unfitness in the practice of medicine, by engaging in unwanted and unsolicited physical contact with a coworker and a student. The Committee voted to suspend the Respondent license to practice as a Physician Assistant (License), to require that the Respondent complete a training course and to require that the Respondent obtain professional certification. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2007), the Petitioner requests administrative review over the Committee's Determination. After reviewing the record below, the ARB votes to overturn the Committee and to revoke the Respondent's License.

Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent committed professional misconduct as defined in New York Education Law (EL) §§ 6530(20) (McKinney Supp. 2007) by engaging in conduct that evidences moral unfitness. The charges alleged that the

Respondent engaged in unwanted and unsolicited physical contact with a co-worker in 1999 and with a physician assistant student in 2004.

After a hearing on the charges, the Committee determined that the Respondent placed his hand on the breast of Coworker A while the Coworker was making entries in a patient's chart. The Committee found that the Coworker confronted the Respondent and he removed his hand. The Committee found further that Student B considered the Respondent a mentor. The Committee determined that the Respondent placed his hand on the breast of Student B and kissed the Student on the lips. The Committee found that the Student pushed the Respondent away. The Committee also found that the Student did not give the Respondent permission to engage in the conduct and that the Student had given no indication that such conduct would be welcome.

The Committee sustained the charges that the Respondent's actions toward the Coworker and the Student evidenced moral unfitness in the practice of medicine. In reaching the conclusions on the charges, the Committee found that both the Coworker and the Student testified in a credible manner at the hearing on the charges. The Committee rejected the Respondent as a credible hearing witness, because the Committee found that the Respondent related differing versions about what happened at different times. The Committee found the misconduct serious, but found no evidence that any similar conduct occurred during the Respondent's fourteen-year tenure as a Physician Assistant. The Committee stated that they found no grounds for revocation, because there was no ongoing pattern of behavior and no clinical complaints in the record. The Committee voted to suspend the Respondent's License until December 31, 2009, to require that the Respondent complete a training course on preventing sexual harassment and to require that the Respondent complete the certification process of the National Committee on Certification of Physician Assistants.

### Review History and Issues

The Committee rendered their Determination on March 9, 2007. This proceeding commenced on March 26, 2007, when the ARB received the Respondent's Notice requesting a Review. The ARB conducted deliberations in the case on June 15, 2007.

In response to the Petitioner's request for review, the Respondent asks the ARB to confirm the penalty that the Committee imposed. The Respondent notes that he has not worked since the incident involving Student B in 2005 and that he must still complete a training course and then obtain certification prior to returning to practice. The Respondent argues that the Committee's Determination provides a sanction and yet permits the Respondent to return to practice after appropriate training, supervision and certification.

### ARB Authority

Under PHL §§ 230(10)(i), 230-c(1) and 230-c(4)(b), the ARB may review Determinations by Hearing Committees to determine whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law and whether the Penalty is appropriate and within the scope of penalties which PHL §230-a permits. The ARB may substitute our judgment 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 (3<sup>rd</sup> Dept. 1993); 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 (3<sup>rd</sup> Dept. 1994); and in determining credibility, Matter of Minielly v. Comm. of Health, 222 A.D.2d 750, 634 N.Y.S.2d 856 (3<sup>rd</sup> Dept. 1995). The ARB may choose to substitute our

judgment and impose a more severe sanction than the Committee on our own motion, even without one party requesting the sanction that the ARB finds appropriate, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). In determining the appropriate penalty in a case, the ARB may consider both aggravating and mitigating circumstances, as well as considering the protection of society, rehabilitation and deterrence, Matter of Brigham v. DeBuono, 228 A.D.2d 870, 644 N.Y.S.2d 413 (1996).

The statute provides no rules as to the form for briefs, but the statute limits the review to only the record below and the briefs [PHL § 230-c(4)(a)], so the ARB will consider no evidence from outside the hearing record, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3<sup>rd</sup> Dept. 1997).

A party aggrieved by an administrative decision holds no inherent right to an administrative appeal from that decision, and that party may seek administrative review only pursuant to statute or agency rules, Rooney v. New York State Department of Civil Service, 124 Misc. 2d 866, 477 N.Y.S.2d 939 (Westchester Co. Sup. Ct. 1984). The provisions in PHL §230-c provide the only rules on ARB reviews.

#### Determination

The ARB has considered the record and the review submissions by the parties. We vote to overturn the Committee and to revoke the Respondent's License.

The ARB disagrees with the Committee and we hold that the Respondent's conduct toward his Coworker and the Student did constitute a pattern of behavior and that such conduct warrants license revocation. Anyone should know they should not take advantage of a professional license and use their position to engage in unwanted physical contact with a coworker or a person under your supervision. After the events with the Coworker, the

Respondent should have known, without further certification or training, that he could not make unwanted contact or advances ever again in a professional setting. Student B trusted the Respondent as a mentor. The Respondent betrayed that trust and demonstrated that he remains at risk to commit such misconduct in the future if he receives another chance. The Committee found the Respondent lacked credibility due to conflicting versions the Respondent provided concerning the events at issue here. The ARB can see no reason, therefore, that the Committee felt they could trust the Respondent in the future. The ARB also sees no reason why training or certification will correct the Respondent's pattern of abusive behavior. The ARB concludes that the Respondent will remain at risk to repeat his behavior as long as he holds a License.

#### ORDER

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

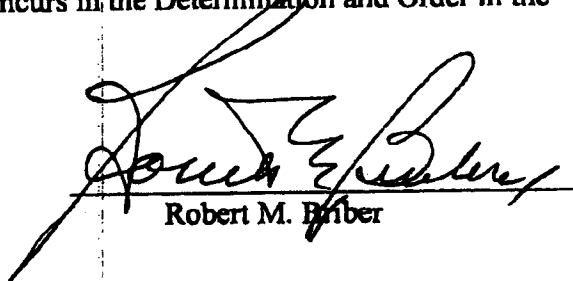
1. The ARB affirms the Committee's Determination that the Respondent engaged in conduct that evidenced moral unfitness and that such conduct amounted to professional misconduct under EL § 6530(20).
2. The ARB overturns the Committee's Determination to suspend the Respondent's License and to order the Respondent to complete a training course and achieve certification.
3. The ARB revokes the Respondent's License.

Robert M. Briber  
Thea Graves Pellman  
Datta G. Wagle, M.D.  
Stanley L. Grossman, M.D.  
Therese G. Lynch, M.D.

In the Matter of Augustin Enoch Marshall, R.P.A.

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

Dated August 14, 2007



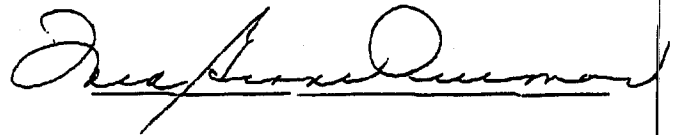
Robert M. Briber



In the Matter of Augustin Enoch Marshall. R.P.A.

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

Dated: Aug 14, 2007



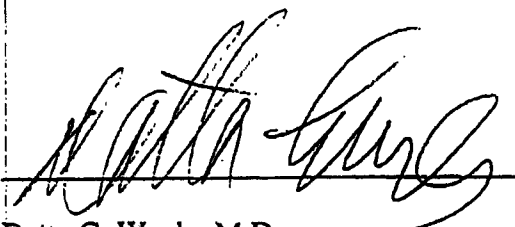
Thea Graves Pellman

In the Matter of Augustin Enoch Marshall, R.P.A.

Datta G. Wagle, M.D., an ARB Member concurs in the Determination and Order in the

Matter of Mr. Marshall.

Dated: 8/14, 2007

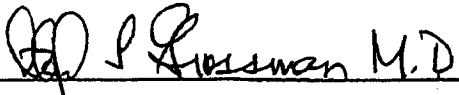


Datta G. Wagle, M.D.

In the Matter of Augustin Enoch Marshall, R.P.A.

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

Dated: August 14, 2007

  
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Stanley L Grossman, M.D.

In the Matter of Augustin Enoch Marshall, R.P.A.

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

Dated: 8/13, 2007  
August 13

Therese G. Lynch M.D.

Therese G. Lynch, M.D.