



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.  
*Commissioner*

**PUBLIC**

Dennis P. Whalen  
*Executive Deputy Commissioner*

October 12, 1999

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

William E. Mariano, Esq.  
William E. Mariano & Associates  
901 N. Broadway, Suite 3  
White Plains, New York 10603

Jude Brearton Mulvey, Esq  
NYS Department of Health  
Empire State Plaza  
Corning Tower – Room 2509  
Albany, New York 12237-0032

Henry Hemsley, M.D.  
6370 County Road  
Norwich, New York 13815

**RE: In the Matter of Henry Hemsley, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 99-142) 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.

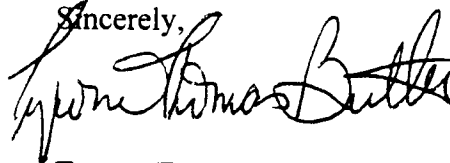
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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



Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:mla  
Enclosure

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

In the Matter of

Henry Hemsley, MD. (Respondent)

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

**COPY**

Administrative Review Board (ARB)

Determination and Order No. 99-142

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

For the Department of Health (Petitioner):

Jude Brearton Mulvey, Esq.

For the Respondent:

William E. Mariano, Esq.

After a hearing below, a BPMC Committee determined that the Respondent practiced repeatedly while under suspension and that he committed fraud in practice. The Committee voted to revoke the Respondent License to practice medicine in New York State. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 1999), the Respondent asks the ARB 1.) to consider new evidence and modify the Committee's Determination, or 2.) to overturn the revocation penalty, as overly harsh. After considering the hearing record and briefs from the parties, the ARB refuses to consider new evidence or remand for further proceedings. We affirm the Committee's Determination to revoke the Respondent's License, as an appropriate sanction for the Respondent's repeated misconduct.

**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(2), 6530(12), 6530(16), 6530(20) & 6530(24)

(McKinney Supp. 1999) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- practicing medicine with a license under suspension,
- willful failure to comply with federal, state or local law,
- engaging in conduct in practice that evidences moral unfitness, and,
- practicing the profession beyond the scope permitted by law.

The charges alleged that the Respondent provided medical care to ten patients, in violation of Orders suspending the Respondent from practice. A hearing (Hemsley II) ensued before a BPMC Committee, pursuant to N. Y. Pub. Health Law §230(10)(e)(McKinney Supp. 1999). The Committee rendered the Determination on the charges and the penalty now under review.

The record showed that the Respondent entered a December 22, 1997 Consent Agreement with BPMC (Consent Agreement), in which the Respondent admitted to a criminal conviction in Pennsylvania, for underlying conduct that would constitute a crime in New York. The Consent Agreement provided for a three-year suspension against the Respondent's License, with the suspension stayed, subject to the Respondent's compliance with probation terms. The probation terms included the requirement that the Respondent practice with a sobriety monitor. A prior BPMC Committee (Hemsley I) determined on January 19, 1999, that the Respondent violated the Consent Agreement by failing to obtain the sobriety monitor. After a probation violation proceeding pursuant to N. Y. Pub. Health Law § 230(19)(McKinney Supp. 1999), the Hemsley I Committee issued an Order suspending the Respondent from practice for thirty days, or until the Respondent obtained a sobriety monitor and received approval for the monitor from the Office for Professional Medical Conduct (OPMC). The evidence in the Hemsley II

demonstrated that the Respondent provided medical care to six persons, Patients A – F, from February 3 to April 5, 1999, during his suspension. On April 20, 1999, the Petitioner served on the Respondent the charges in the Hemsley II hearing and a Commissioner's Summary Order suspending summarily the Respondent's License. The evidence showed that the Respondent continued to practice after receiving the Commissioner's Order and that the Respondent provided medical care to Patients E, G, H, I and J, subsequent to the Commissioner's Order.

The Committee concluded that the Respondent provided medical care to Patients without advising the patients about his License's suspension. The Committee found such conduct constituted fraud in practice. The Committee found further that the Respondent's conduct constituted practicing with a suspended license, willful failure to comply with laws and practicing beyond lawful scope. The Committee voted to revoke the Respondent's License. The Committee dismissed the charge that the Respondent's conduct evidenced moral unfitness. The Committee noted that the Respondent:

- violated probation and suspension terms repeatedly,
- exhibited no contrition,
- continued to consider the sobriety monitor requirement as unacceptable,
- refused to accept BPMC's authority, and,
- refused to abide by the laws governing medical practice.

The Committee determined that such conduct and such an attitude poses a danger to the public.

### **Review History and Issues**

The Committee rendered their Determination on June 28, 1999. This proceeding commenced on July 14, 1999, when the ARB received the Respondent's Notice requesting a

Review. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and the Petitioner's brief and response brief. The record closed when the ARB received the response brief on August 23, 1999.

The Respondent raises two issues on appeal. First, he argues that the sobriety monitor requirement arose from testimony his ex-wife gave in the Pennsylvania criminal case, to the effect that the Respondent suffered a substance abuse problem. The Respondent argues that his ex-wife has now recanted that testimony. The Respondent raises that evidence for the first time before the ARB and asks that the ARB modify the Committee's Determination in reliance on that evidence. As his second issue, the Respondent argues that the Committee imposed an overly harsh penalty. He raised the following points in mitigation:

- the Respondent experienced difficulty obtaining a sobriety monitor in the rural area in which he lives,
- the Respondent provided necessary services to a limited number of patients, as the only urologist in a forty mile radius,
- the Respondent's conduct took place in February and March, months when harsh weather make travel difficult,
- the Respondent posed no risks to any patients, and,
- the Respondent now realizes, after this latest hearing, the necessity to practice with a monitor and to abide by the suspension orders.

The Respondent asks that the ARB overturn the revocation and return his License to suspension, pending approval for a monitor. The Respondent's brief appended a curriculum vitae for a physician the Respondent proposes as the monitor.

The Petitioner requests that the ARB refuse to accept any evidence from outside the Hearing record. The Petitioner argues that this case involves practice while on suspension, rather than impairment. The Petitioner's brief refuted the mitigating factors that the Respondent raised in his brief. The Petitioner contends that ample evidence from the hearing justified the Committee's Determination to revoke the Respondent's License.

### **Determination**

The ARB has considered the record and the parties' briefs. We refuse to consider any evidence from beyond the hearing record and we refuse to remand for the Committee to consider additional evidence. We affirm the Committee's Determination that the Respondent committed professional misconduct and we affirm the Committee's Determination revoking the Respondent's License.

**New Evidence:** We reject the request that we consider evidence from outside the record and then modify the Committee's Determination with that information as the basis. Under N. Y. Pub. Health Law § 230-c (McKinney Supp. 1999) the ARB may review the hearing record and the parties' brief only. By letter on July 14, 1999, our Administrative Officer, Judge Horan, instructed the parties to submit no evidence to the ARB from outside the hearing record. The Respondent disregarded that instruction.

On an offer to produce new evidence, the ARB would consider a remand to the Committee for the Committee to consider such evidence and for the opposing party to have an opportunity to challenge that evidence. The ARB sees no grounds for a remand in this case, because the Respondent proposes to introduce evidence with no probative value on the charges at issue. The Respondent proposes to offer evidence to relitigate his criminal conviction and the BPMC Consent Agreement that required the Respondent to obtain a sobriety monitor. Neither

the Committee nor the ARB can overturn the Pennsylvania criminal conviction. The Respondent should direct the new evidence to the Pennsylvania courts. Also, the Hemsley I Committee, that considered the probation violation charges, has determined already that the Respondent committed misconduct by failing to obtain a monitor.

The issue in Hemsley II involved the Respondent's practice while suspended. The evidence at hearing demonstrated that the Respondent practiced while suspended and failed to inform his patients concerning the suspension. We affirm the Committee's Determination that the Respondent practiced medicine fraudulently, practiced while under suspension, engaged in practice beyond its authorized scope and willfully failed to comply with the law.

**Penalty:** The Respondent's brief cited several mitigating factors in requesting that the ARB modify the penalty. As one mitigating factor, the Respondent argued that he experienced difficulty in obtaining a sobriety monitor in the rural area in which he lives. As we noted above, the Hemsley I Committee has already determined that the Respondent violated probation by failing to obtain a sobriety monitor. This hearing involved the practice under suspension charges.

The Respondent also argued that he provided necessary services, in an area with no other urologist within forty miles, at a time in February and March, when the weather made travel difficult. The Respondent fails, however, to cite to even one case at issue here, in which a patient required emergency care. The record also demonstrates that the Respondent continued to practice under suspension into April. We see nothing so onerous about a one-hour drive in spring weather, with a non-emergent case, that would excuse deliberate misconduct.

The Respondent argued further that he now realizes the necessity to obtain a sobriety monitor and to abide by the suspension orders. We find such argument totally lacking in credibility. The Respondent has already violated a Consent Agreement, the Hemsley I Committee's Suspension and the Commissioner's Order Suspension. The Hemsley II Committee also found the Respondent lacking in contrition for his conduct and still unwilling to accept the



need for a practice monitor. On his review brief, the Respondent continues to argue that no need exists for a sobriety monitor. The ARB concludes from this evidence that, if we allowed the Respondent to return to practice, the Respondent would continue to disregard any conditions on his License. Probation and suspension orders have failed to deter the Respondent from his misconduct. Allowing the Respondent to retain his License after his latest misconduct would only encourage him to believe that he can do as he pleases and escape any consequences for misconduct.

Although the record reveals no patient harm, BPMC and the ARB may act against a physician before any patient suffers harm. We may also discipline physicians for improper conduct with their licenses for matters other than patient care. The Respondent has ignored chances to correct his behavior and save his License. We conclude that the Committee acted appropriately when they determined that revocation provides the only penalty for the Respondent's repeated misconduct.

**ORDER**

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

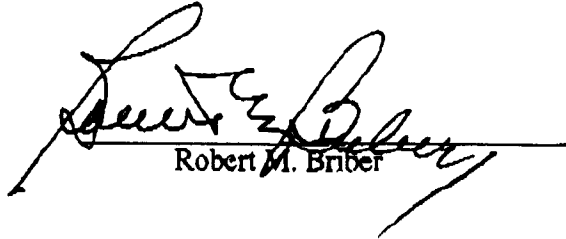
1. The ARB **AFFIRMS** the Committee's Determination to sustain charges that the Respondent committed professional misconduct.
  
2. The ARB **AFFIRMS** the Committee's Determination to revoke the Respondent's License.

**Robert M. Briber**  
**Sumner Shapiro**  
**Winston S. Price, M.D.**  
**Stanley L. Grossman, M.D.**  
**Therese G. Lynch, M.D.**

In the Matter of Henry Hemsley, M.D.

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

Dated: September 30, 1999



Robert M. Briber

**In the Matter of Henry Hemsley, M.D.**

Sumner Shapiro, an ARB Member concurs in the  
Determination and Order in the Matter of Dr. Hemsley.

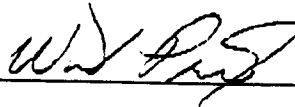
Dated: OCTOBER 5, 1999

  
\_\_\_\_\_  
Sumner Shapiro

**In the Matter of Henry Hemsley, M.D.**

**Winston S. Price, M.D.**, an ARB Member concurs in the Determination and Order in the Matter of Dr. Hemsley.

Dated: 10/2, 1999



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**Winston S. Price, M.D.**

**In the Matter of Henry Hemsley, M.D.**

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

Dated: October 4, 1999

Stanley L. Grossman M.D.

Stanley L Grossman, M.D.

**In the Matter of Henry Hemsley, M.D.**

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

Dated: Oct 2, 1999

*Therese G. Lynch M.D.*

**Therese G. Lynch, M.D.**