



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
April 17, 2001 *Executive Deputy Commissioner*

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Robert Bogan, Esq.
& Paul Robert Maher, Esq.
NYS Department of Health
Hedley Building – 4th Floor
Troy, New York 12180

Barry A. Smolev, M.D.
17715 Chatsworth #201
Granada Hills, California 91344

Barry A. Smolev, M.D.
2885 Nicada Drive
Los Angeles, California 90077

Barry A. Smolev, M.D.
13719 Hawthorn Blvd.
Hawthorn, California 90250

Anthony Z. Scher, Esq.
Wood & Scher
The Harwood Building
14 Harwood Court
Scarsdale, New York 10583

RE: In the Matter of Barry A. Smolev, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 00-364) 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.

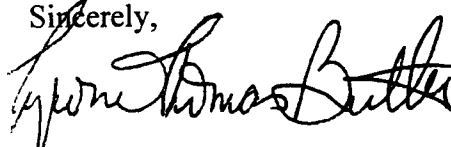
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

A handwritten signature in black ink that reads "Tyrone T. Butler". The signature is written in a cursive style with a large initial 'T'.

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

Barry A. Smolev, M.D. (Respondent)

Administrative Review Board (ARB)

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

Determination and Order No. 00-364

COPY

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

For the Department of Health (Petitioner):

Paul Robert Maher, Esq.

For the Respondent:

Anthony Z. Scher, Esq.

After a hearing below, a BPMC Committee determined that the Respondent committed professional misconduct under the New York Education Law, due to criminal convictions and administrative actions against him in other states. The Committee voted to suspend the Respondent's License to practice medicine in New York, to stay the suspension and to place the Respondent on probation for seven years. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 2001), the Petitioner asks the ARB to modify that Determination and to increase the sanction against the Respondent. After reviewing the record below and the parties' submissions, we revoke the Respondent's License, for repeated misconduct and failure to change his conduct following prior disciplinary actions.

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(9)(a)(iii), 6530(9)(b) & 6530(9)(d) (McKinney Supp. 2001) by:

- engaging in conduct in another state that results in a criminal conviction and would constitute a crime under New York Law [§ 6530(9)(a)(iii)], and,
- engaging in conduct that results in another state's guilty finding [§ 6530(9)(b)] or disciplinary action [§ 6530(9)(d)] and that would also amount to professional misconduct under New York Law.

The allegations involved criminal convictions in California and professional discipline actions against the Respondent by the medical boards in California and Arizona. The charges allege that the Respondent's conduct in Arizona, would amount to misconduct in New York under the following specifications:

- willful or grossly negligent failure to comply with laws rules or regulations, a violation under N. Y. Educ. Law § 6530(16)(McKinney Supp. 2001),
- engaging in conduct that evidences moral unfitness, a violation under N. Y. Educ. Law § 6530(20)(McKinney Supp. 2001), and,
- willfully filing a false report, a violation under N. Y. Educ. Law § 6530(21) (McKinney Supp. 2001).

The charges allege that the Respondent's conduct in California would amount to misconduct in New York, under the following specifications:

- being a habitual user of alcohol or narcotics, a violation under N. Y. Educ. Law §6530(8) (McKinney Supp. 2001),
- engaging in conduct that results in a criminal conviction, a violation under N. Y. Educ. Law § 6530(9)(a)(i)(McKinney Supp. 2001),
- engaging in conduct in another state that that results in a criminal conviction and that would constitute a crime under New York Law, a violation under N. Y. Educ. Law §6530(9)(a)(iii) (McKinney Supp. 2001),
- willful or grossly negligent failure to comply with laws rules or regulations, a violation under N. Y. Educ. Law § 6530(16)(McKinney Supp. 2001),
- engaging in conduct that evidences moral unfitness, a violation under N. Y. Educ. Law § 6530(20)(McKinney Supp. 2001),

- willfully filing a false report, a violation under N. Y. Educ. Law § 6530(21) (McKinney Supp. 2001), and,
- violating probation, a license limitation or a license condition, a violation under N. Y. Educ. Law § 6530(29) (McKinney Supp. 2001).

An expedited hearing (Direct Referral Proceeding) ensued pursuant to N.Y. Pub. Health Law §230(10)(p)(McKinney Supp. 2000), before a BPMC Committee, who rendered the Determination which the ARB now reviews. In such a Direct Referral Proceeding, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, see In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The evidence at the hearing revealed the following criminal convictions or administrative determinations against the Respondent:

- in July 1995 the Municipal Court for West Los Angeles, California found the Respondent guilty for leaving the scene of an accident, one count, a misdemeanor;
- in October 1996, The Board of Medical Examiners for the State of Arizona (Arizona Board) adopted a Consent Agreement that cancelled the Respondent's Arizona License for providing false answers on license renewals;
- in August 1998, the Los Angeles County (California) Municipal Court found the Respondent guilty for shoplifting, a misdemeanor, and sentenced the Respondent to sixty days in jail and thirty-six months on probation; and,
- on February 18, 2000, the Division of Medical Quality, Medical Board of California, California Department of Consumer Affairs (California Board) revoked the Respondent's Physician's and Surgeon's Certificate, stayed the revocation and placed the Respondent on five years probation, for the two criminal convictions, the Arizona Consent Agreement and for severe and recurrent depression, low self-esteem and chemical dependency.

The evidence also demonstrated that the New York Health Commissioner issued a summary order suspending the Respondent's License pursuant to N. Y. Pub. Health Law § 230(12)(McKinney Supp. 2001).

The Committee found the Respondent liable for disciplinary action against his license pursuant to Educ. Law §§ 6530(9)(a)(iii), 6530(9)(b) & 6530(9)(d). The Committee concluded that the conduct that resulted in the Arizona Consent Agreement would constitute misconduct in New York as failure to comply with a law, rule or regulation and willfully filing a false report. The Committee concluded that the conduct that resulted in the California disciplinary action would constitute misconduct in New York as habitual narcotic use or dependency, engaging in conduct that results in a criminal conviction and that results in a criminal conviction in another jurisdiction, failure to comply with statutes, rules or regulations, willfully making a false report and violating probation, a license restriction or a license condition. In considering a penalty for the Respondent's misconduct, the Committee considered that the Respondent:

- suffered a childhood that included deprivation and abuse,
- became chemically dependent after a three-year bout with cancer, and,
- suffers from a severe and recurrent depression.

The Committee concluded that the Respondent's physical and emotional circumstances contributed to his prior problems and substance abuse. The Committee voted to suspend the Respondent's License for seven years, to stay the suspension and to place the Respondent on probation for seven years, under the terms that appear at pages 9-13 in the Committee's Determination. The Committee's Determination made no reference to a 1996 BPMC Order [Petitioner Exhibit 6] that suspended the Respondent's License for six months and placed the Respondent on seven years probation in New York for misconduct that included federal convictions for mail fraud and preparing and presenting a false tax return.

Review History and Issues

The Committee rendered their Determination on December 28, 2000. This proceeding commenced on January 19, 2001, when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the

Petitioner's brief and the Respondent's brief. The record closed when the ARB received the Respondent's brief on February 21, 2001.

The Petitioner's brief asked that the ARB overturn the Committee and revoke the Respondent's License, or in the alternative, that the ARB impose a more severe sanction than the Committee imposed. In response, the Petitioner argues that the Committee concluded that the Respondent's conduct resulted from past abuse, his prior drug dependency and the depression. The Respondent argues that the ARB owes the Committee deference in their determination on the Respondent's credibility and the Committee's impression of the Respondent. The Respondent argues that he is capable of rehabilitation and deserves another chance at rehabilitation.

Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination on the misconduct charges. Neither party challenged those findings. We overturn the Committee on penalty and vote 5-0 to revoke the Respondent's License. Prior to the determination in this case, ARB Member Winston Price M.D. informed the ARB that Dr. Price attended college with the Respondent. Dr. Price indicated that this would in no way affect his ability to judge this case in a fair and impartial manner.

The Respondent's brief argues correctly that the ARB owes the Committee deference in the Committee's judgement on witness credibility. Witness credibility, however, plays no part in the review in this case, because no factual issues remain for resolution in this review. Instead, the Petitioner has asked the ARB to review the penalty. In reviewing penalty, 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 NYS 2d 381 (3rd Dept. 1993). We elect to exercise

that authority here, because the Committee has failed to impose an appropriate penalty for the Respondent's misconduct.

The Committee imposed a long probation, under extensive conditions, against the Respondent. A prior New York probation, that followed an actual suspension, failed to deter the Respondent from further misconduct. The Respondent has also committed further misconduct despite a prior criminal penalty that included incarceration and despite the license revocation under the Arizona Consent Agreement. We conclude that the Respondent's prior history provides a better indication than the Respondent's hearing testimony concerning the Respondent's likelihood to commit future misconduct. We also conclude that the string of prior infractions warrant revocation as a penalty.

ORDER

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

1. The ARB **AFFIRMS** the Committee Determination that the Respondent's conduct made him liable for action against his license pursuant to Education Law §§ 6530(9)(a)(iii), 6530(9)(b) & 6530(9)(d).
2. The ARB **OVERTURNS** the Committee's Determination on penalty.
3. The ARB **REVOKES** the Respondent's License.

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 Barry A. Smolev, M.D.

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

Dated: 4/5, 2001



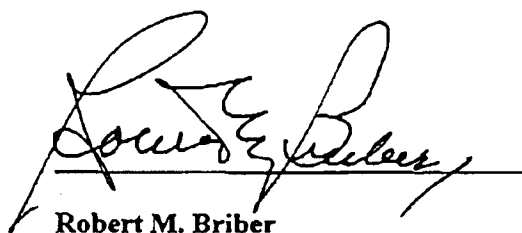
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Winston S. Price, M.D.

In the Matter of Barry A. Smolev, M.D.

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

Dated: April 10, 2001



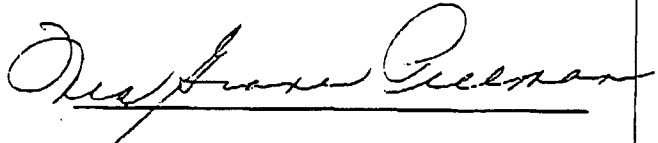
A handwritten signature in cursive script, appearing to read "Robert M. Briber", is written over a horizontal line.

Robert M. Briber

In the Matter of Barry A. Smolev, M.D.

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

Dated: 4-4, 2001

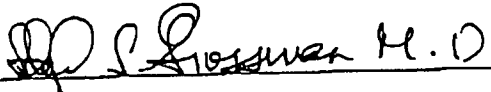


Thea Graves Pellman

In the Matter of Barry A. Smolev, M.D.

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

Dated: April 3, 2001



Stanley L Grossman, M.D.

In the Matter of Barry A. Smoley, M.D.

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

Dated: April 2, 2001

Therese G Lynch M.D.

Therese G. Lynch, M.D.



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

December 28, 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Robert Bogan, Esq.
& Paul Robert Maher, Esq.
NYS Department of Health
Hedley Building – 4th Floor
Troy, New York 12180

Barry A. Smolev
17715 Chatsworth #201
Granada Hills, California 91344

Barry A. Smolev
2885 Nicada Drive
Los Angeles, California 90077

Barry A. Smolev
13719 Hawthorn Blvd.
Hawthorn, California 90250

Anthony Z. Scher, Esq.
Wood & Scher
The Harwood Building
Scarsdale, New York 10583

RE: In the Matter of Barry A. Smolev, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 00-364) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the 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.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct."

Either the licensee or the Department may seek a review of a committee determination.

All notices of review must be served, by certified mail, upon the Administrative Review Board and the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Hedley Park Place
433 River Street, Fifth Floor
Troy, New York 12180

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tyrone T. Butler".

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:cah
Enclosure

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

COPY

IN THE MATTER
OF
BARRY A. SMOLEV, M.D.

DETERMINATION
AND
ORDER
BPMC 00-364

A Commissioner's Order, Notice of Hearing and Statement of Charges, all dated September 27, 2000, were served upon the Respondent, **BARRY A. SMOLEV, M.D.**

TERESA S. BRIGGS, M.D, Ph.D, Chairperson, **MARGERY W. SMITH, M.D.**, and **MS. D. MARISA FINN**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. **MICHAEL P. MCDERMOTT, ESQ.**, Administrative Law Judge, served as the Administrative Officer.

A hearing was held on December 14, 2000, at the Offices of the New York State Department of Health, Hedley Park Place, 433 River Street, Troy, New York. The Department appeared by **DONALD P. BERENS, JR., ESQ.**, General Counsel, by **ROBERT BOGAN, ESQ.**, and **PAUL ROBERT MAHER, ESQ.**, of Counsel. The Respondent appeared in person and was represented by **WOOD & SCHER**, The Harwood Building, Scarsdale, N.Y. 10583, by **ANTHONY Z. SCHER, ESQ.**, of Counsel.

Evidence was received and transcripts of these proceedings were made.

After consideration of the entire record, the Hearing Committee issues this Determination and Order.

STATEMENT OF CASE

This case was brought pursuant to Public Health Law Section 230(10)(p). The statute provides for an expedited hearing where a licensee is charged solely with a violation of Education Law Section 6530(9). In such case, a licensee is charged with misconduct based upon a prior criminal conviction in New York or another jurisdiction, or upon a prior administrative adjudication regarding conduct which would amount to professional misconduct, if committed in New York. The scope of an expedited hearing is limited to a determination of the nature and severity of the penalty to be imposed upon the licensee.

In the instant case, the Respondent is charged with professional misconduct pursuant to Education Law Section 6530(9)(a)(iii), (b), (d). A copy of the Commissioner's Order, Notice of Hearing and the Statement of Charges are attached to this Determination and Order as Appendix 1.

WITNESSES

For the Petitioner:

NONE

For Respondent:

Barry A. Smolev, M.D., the Respondent

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers in parentheses refer to transcript page numbers or exhibits. These citations represent evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence. All Hearing Committee findings were unanimous unless otherwise specified.

1. BARRY A. SMOLEV, M.D., the Respondent, was authorized to practice medicine in New York State on May 1, 1981, by the issuance of license number 145867 by the New York State Education Department. (Pet's Ex. 4).

2. On July 18, 1995, in the Municipal Court of West Los Angeles Judicial District, Respondent was found guilty of one count of leaving the scene of an accident that resulted in property damage, in violation of Vehicle Code Section 20002(A), a misdemeanor. (Pet's Ex. 5).

3. On October 29, 1996, the Board of Medical Examiners of the State of Arizona, by a Consent Agreement, Findings of Fact, Conclusions of Law and Order of Cancellation of License With Cause, cancelled Respondent's license to practice medicine, based on Respondent's providing false answers on license renewals. (Pet's Ex. 8).

4. On August 16, 1998, in the Municipal Court of the County of Los Angeles, Respondent was found guilty of one count of shoplifting, in violation of Penal Code Section 484(a), a misdemeanor and was sentenced to sixty (60) days jail and thirty-six (36) months probation. (Pet's Ex. 5).

5. On February 18, 2000, the Division of Medical Quality, Medical Board of California, Department of Consumer Affairs (hereinafter "California Board"), by a Decision

and Order (hereinafter "California Order"), revoked Respondent's Physician's and Surgeon's Certificate, stayed the revocation, and placed him on five (5) years probation with terms and conditions, based on his failure to comply with the terms of a California Board Decision; his conviction of one count of leaving the scene of an accident that resulted in property damage in violation of Vehicle Code Section 20002(A); his having unlawfully taken a pair of sunglasses from Lens Crafters; his conviction of one count of shoplifting a "T" shirt from Macy's Department Store in violation of Penal Code 484(a); his undergoing intensive psychotherapy for severe and recurrent depression, low self-esteem, and chemical dependency, and his providing false answers on Arizona annual license renewal. (Pet's Ex. 5).

6. By Commissioner's Order, dated September 28, 2000, Antonia C. Novello, M.D., M.P.H., Dr. P.H., Commissioner of the New York State Department of Health, after an investigation, upon the recommendation of a committee on professional medical conduct of the State Board for Professional Medical Conduct, and upon the Statement of Charges attached hereto and made a part hereof has determined that Barry A. Smolev, M.D., has been disciplined by a duly authorized professional disciplinary agency of another jurisdiction, the Division of Medical Quality, Medical Board of California, Department of Consumer Affairs, which, if committed in this state would constitute an imminent danger to the health of the people, and that it therefore appears to be prejudicial to the interests of the people to delay action until an opportunity for a hearing can be provided.

The Commissioner ORDERED, pursuant to N.Y. Public Health Law Section 230(12)(b), that effective immediately, Barry A. Smolev, M.D., Respondent, shall not practice medicine in the State of New York. This order shall remain in effect unless modified or vacated by the Commissioner of Health pursuant to N.Y. Public Health Law Section 230(12). (Pet's Ex. 1).

HEARING COMMITTEE CONCLUSIONS

The conduct resulting in the Arizona Board's discipline action against Respondent would constitute misconduct under the law of New York State, pursuant to:

- New York State Education Law §6530(16) (failure to comply with federal, state, or local laws, rules, or regulations) and/or;
- New York Education Law §6530(21) (making a false report)

The conduct resulting in the California Board's disciplinary action against Respondent would constitute misconduct under the laws of New York State, pursuant to:

- New York State Education Law §6530(8) (being a habitual abuser of alcohol or being dependent on or a habitual user of narcotics, barbiturates, amphetamines, hallucinogens, or other drugs having similar effects);
- New York State Education Law §6530(9)(a)(I) (being convicted of a crime under state law);
- New York State Education Law §6530(9)9a)(iii) (being convicted of a crime under the law of another jurisdiction which would have constituted a crime under New York law;
- New York State Education Law §6530(16) ((failure to comply with federal, state, or local laws, rules, or regulations);
- New York State Education Law §6530(21) (making a false report); and/or
- New York State Education Law §6530(29) (violating any term of probation or conditions or limitations imposed on the licensee).

VOTE OF THE HEARING COMMITTEE

SPECIFICATIONS

SPECIFICATIONS ONE AND TWO

Respondent violated New York Education Law Section 6530(9)(a)(iii) by having been convicted of committing an act constituting a crime under the law of another jurisdiction and which, if committed within this state, would have constituted a crime under New York State law.

VOTE: SUSTAINED (3-0)

SPECIFICATIONS THREE AND FOUR

Respondent violated New York Education Law Section 6530(9)(b) by having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York State, constitute professional misconduct under the laws of New York State.

VOTE: SUSTAINED (3-0)

SPECIFICATIONS FIVE AND SIX

Respondent violated New York State Education Law Section 6530(9)(d) by having had his license to practice medicine revoked or having disciplinary action taken after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation or disciplinary action would, if committed in New York State, constitute professional misconduct under the laws of New York State.

VOTE: SUSTAINED (3-0)

HEARING COMMITTEE DETERMINATION

The record in this case indicates:

- The Respondent's childhood was one of deprivation and abuse, both emotional and physical.
- He became chemically dependent after a three year bout with cancer.
- He suffers from a severe and recurrent depression and low-self esteem, a manifestation of which was a profound need to punish himself.

These physical and emotional circumstances contributed to his prior problems and to his substance abuse.

The Respondent testified on his own behalf at the instant hearing, and the Hearing Committee was very impressed by his candor and sincerity and his admissions of past mistakes.

The Respondent currently practices psychiatry in Los Angeles, California and is under a five (5) year probation imposed by the Medical Board of that state.

The Respondent testified that he plans to get married in January, 2001 and return to New York State to obtain a fellowship in child/adolescent psychiatry in an effort to get a new start in his medical career and to help children who have been neglected and abused as he had been during his own childhood.

After due consideration of the full spectrum of penalties available pursuant to statute, all of the Hearing Committee members agreed that the Respondent's misconduct warranted a significant penalty of a seven (7) year suspension, staying the suspension, and

placing the Respondent on probation for a period of seven (7) years under terms and conditions as hereinafter specified in the ORDER.

ORDER

THEREFORE: IT IS HEREBY ORDERED THAT:

1. The Respondent's license to practice medicine in New York State is hereby **SUSPENDED** for a period of seven (7) years, **SUSPENSION STAYED** and the Respondent is placed on **PROBATION** for seven (7) years under the following terms and conditions:

2. Respondent shall fully comply with all of the terms and conditions of the **DECISION AND ORDER**, File No.: DI-1990-3585, issued by the Medical Board of California on February 18, 2000, and he shall cause the Medical Board of California to submit quarterly reports to the New York State Office of Professional Conduct (OPMC) reporting on his compliance or non-compliance with that ORDER.

3. If, at some future date, the Respondent decides to return to practice in New York he must:

- Provide ninety (90) days prior notice concerning his return to the Office of Professional Medical Conduct,
- Include with the notice proof that his license remains in good standing in all states where he maintains a license.
- Respondent shall remain drug/alcohol free.

- Respondent shall remain active in self help groups such as, but not limited to, Narcotics Anonymous, Alcoholics Anonymous and Caduceus at a frequency determined by OPMC.
- Respondent shall notify all treating physicians of his/her history of alcohol/chemical dependency. Respondent shall advise OPMC of any controlled or mood-altering substance given or prescribed by treating physicians.
- Respondent shall practice only when monitored by qualified health care professionals ("sobriety monitor", "practice supervisor" and "therapist") proposed by Respondent and approved, in writing, by the Director of OPMC. Monitors shall not be family members or personal friends, or be in professional relationships which would pose a conflict with monitoring responsibilities.
- Respondent shall ensure that the monitors are familiar with Respondent's drug/alcohol dependency and with terms of this Order. Respondent shall cause the monitors to report any deviation from compliance with the terms of this Order to OPMC. Respondent shall cause the monitors to submit required reports on a timely basis.
- Respondent shall submit, at the request of a monitor, to random, unannounced observed blood, breath and/or urine screens for the presence of drugs/alcohol. This monitoring will be on a random, seven-days a week, twenty-four hours a day basis. Respondent shall report for a drug screen within four (4) hours of being contacted by the monitor. Respondent shall cause the monitor to report to OPMC within 24 hours if a

test is refused or delayed by Respondent or a test is positive for any unauthorized substance.

- Respondent shall meet with a sobriety monitor on a regular basis who will submit quarterly reports to OPMC certifying Respondent's sobriety. These reports are to include a) forensically valid results of all drug/alcohol monitoring tests to be performed at a frequency determined by OPMC for the first 12 months of the period of probation, then at a frequency to be proposed by the sobriety monitor and approved by OPMC and b) an assessment of self-help group attendance (e.g., AA/NA/Caduceus, etc.), 12 step progress, etc.
- Respondent shall practice medicine only when supervised in his/her medical practice. The practice supervisor shall be on-site at all locations, unless determined otherwise by the Director of OPMC. Respondent shall not practice medicine until a practice supervisor has been approved. Respondent shall ensure that the practice supervisor is in a position to regularly observe and assess Respondent's medical practice. Respondent shall cause the practice supervisor to report within 24 hours any suspected impairment, inappropriate behavior, questionable medical practice or possible misconduct to OPMC.
- Respondent shall cause the practice supervisor to review Respondent's practice regarding the prescribing, administering, dispensing, inventorying, and disposal of controlled substances.
- Respondent shall cause the practice supervisor to submit quarterly reports to OPMC regarding the quality of Respondent's medical practice, including the evaluation and treatment of patients, physical and mental condition,

time and attendance or any unexplained absences from work, prescribing practices, and compliance or failure to comply with any term or probation.

- Respondent shall continue in counseling or other therapy with a therapist, approved in writing by OPMC, as long as the therapist determines is necessary, or for the period of time dictated by OPMC.
- Respondent shall cause the therapist to submit a proposed treatment plan and quarterly reports to OPMC certifying whether Respondent is in compliance with the treatment plan. Respondent shall cause the therapist to report to OPMC within 24 hours if Respondent leaves treatment against medical advice, or displays any symptoms of a suspected or actual relapse.
- Respondent shall comply with any request from OPMC to obtain an independent psychiatric/chemical dependency evaluation by a health care professional proposed by the Respondent and approved, in writing, by the Director of OPMC.
- Respondent shall conduct himself/herself in all ways in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his profession. Respondent acknowledges that if he commits professional misconduct as enumerated in New York State Education Law §6530 or §6531, those acts shall be deemed to be a violation of probation and that an action may be taken against Respondent's license pursuant to New York State Public Health Law §230(19).
- Respondent shall submit written notification to the New York State Department of Health addressed to the Director, Office of Professional

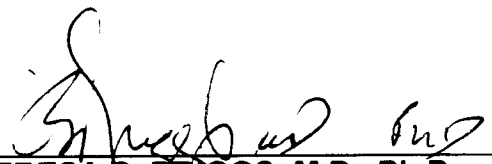
Medical Conduct (OPMC), Hedley Park Place, 433 River Street, Suite 303, Troy, New York 12180-2299; said notice is to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.

- Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of Respondent's compliance with the terms of this Order. Respondent shall personally meet with a person designated by the Director of OPMC as requested by the Director.
- The period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. However, the Respondent must fully comply with the terms and conditions specified in paragraph No. 2 of this ORDER while he continues practice in California. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director again prior to any change in that status. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon Respondent's return to practice in New York State.
- Respondent's professional performance may be reviewed by the Director of OPMC. This review may include, but shall not be limited to, a

review of office records, including billing records, patient records and/or hospital charts, interviews with or periodic visits with Respondent and his staff at practice locations or OPMC offices.

- Respondent shall maintain legible and complete medical records which accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations regarding controlled substances.
- Respondent shall comply with all terms, conditions, restrictions, limitations and penalties to which he or she is subject pursuant to the Order and shall assume and bear all costs related to compliance. Upon receipt of evidence of noncompliance with, or any violation of these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding and/or any such other proceeding against Respondent as may be authorized pursuant to the law.

DATED: Dec 24, 2000
Albany, New York


TERESA S. BRIGGS, M.D., Ph.D.
Chairperson

MARGERY W. SMITH, M.D.

MS. D. MARISA FINN

APPENDIX I

STATE OF NEW YORK
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

DEPARTMENT OF HEALTH
CONDUCT

IN THE MATTER

OF

BARRY A. SMOLEV, M.D.

COMMISSIONER'S
ORDER
AND
NOTICE OF
HEARING

TO: BARRY A. SMOLEV
2885 NICADA DR.
LOS ANGELES, CA 90077

BARRY A. SMOLEV
13719 HAWTHORN BLVD.
HAWTHORN, CA 90250

BARRY A. SMOLEV
17715 CHATSWORTH #201
GRANADA HILLS, CA 91344

The undersigned, Antonia C. Novello, M.D., M.P.H., Dr. P.H., Commissioner of the New York State Department of Health, after an investigation, upon the recommendation of a committee on professional medical conduct of the State Board for Professional Medical Conduct, and upon the Statement of Charges attached hereto and made a part hereof has determined that Barry A. Smolev, M.D., has been disciplined by a duly authorized professional disciplinary agency of another jurisdiction, the Division of Medical Quality, Medical Board of California, Department of Consumer Affairs, which, if committed in this state would constitute an imminent danger to the health of the people, and that it therefore appears to be prejudicial to the interests of the people to delay action until an opportunity for a hearing can be provided.

EXHIBIT

tabbier

It is therefore,

ORDERED, pursuant to N.Y. Public Health Law Section 230(12)(b), that effective immediately, Barry A. Smolev, M.D., Respondent, shall not practice medicine in the State of New York. This order shall remain in effect unless modified or vacated by the Commissioner of Health pursuant to N.Y. Public Health Law Section 230(12).

PLEASE TAKE NOTICE that a hearing will be held pursuant to the provisions of N.Y. Public Health Law Section 230, and N.Y. State Admin. Proc. Act Sections 301-307 and 401. The hearing will be conducted before a committee on professional conduct of the State Board of Professional Medical Conduct, on the 19th day of October, 2000 at 10:00 am in the forenoon at Hedley Park Place, 5th Floor, 433 River Street, Troy, New York and at such other adjourned dates, times, and places as the committee may direct. The Respondent may file an answer to the Statement of Charges with the below-named attorney for the Department of Health.

At the hearing, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the hearing will be made and the witnesses at the hearing will be sworn and examined. The Respondent shall appear in person at the hearing and may be represented by counsel. The Respondent has the right to produce witnesses and evidence on his behalf, to issue or have subpoenas issued on his behalf for the production of witnesses and documents,

and to cross-examine witnesses and examine evidence produced against him. Such evidence or sworn testimony shall be limited to evidence and testimony relating to the nature and severity of the penalty to be imposed upon the licensee. Where the charges are based on the conviction of state law crimes in other jurisdiction, evidence may be offered which would show that conviction would not be a crime in New York State. The Committee also may limit the number of witnesses whose testimony will be received, as well as the length of time any witness will be permitted to testify. A summary of the Department of Health Hearing Rules is enclosed. Pursuant to Section 301(5) of the State Administrative Procedure Act, the Department, upon reasonable notice, will provide at no charge, a qualified interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person.

The hearing will proceed whether or not the Respondent appears at the hearing. Scheduled hearing dates are considered dates certain and, therefore, adjournment requests are not routinely granted. Requests for adjournments must be made in writing to the Administrative Law Judge's Office, Hedley Park Place, 433 River Street, 5th Floor, Troy, New York 12180 (518-402-0751), upon notice to the attorney for the Department of Health whose name appears below, and at least five days prior to the scheduled hearing date. Claims of court engagement will require detailed affidavits of actual engagement. Claims of illness will require medical documentation.

At the conclusion of the hearing, the committee shall make findings of fact, conclusions concerning the charges sustained or dismissed, and, in the event that any of the charges are sustained, a determination of the penalty or sanction to be imposed or appropriate action to be taken. Such determination may be reviewed by the Administrative Review Board for Professional Medical Conduct.

THESE PROCEEDINGS MAY RESULT IN A
DETERMINATION THAT YOUR LICENSE TO
PRACTICE MEDICINE IN NEW YORK STATE
REVOKED OR SUSPENDED, AND/OR THAT
YOU MAY BE FINED OR SUBJECT TO OTHER
SANCTIONS SET FORTH IN NEW YORK PUBLIC
HEALTH LAW SECTION 230-A. YOU ARE
URGED TO OBTAIN AN ATTORNEY FOR THIS
MATTER.

DATED: Albany, New York

September 27, 2000



ANTONIA C. NOVELLO, M.D. M.P.H, Dr. P.H.,
Commissioner

Inquires should be addressed to:

Robert Bogan
Associate Counsel
Office of Professional Medical Conduct
433 River Street - Suite 303

Troy, New York 12180
(518) 402-0820

STATE OF NEW YORK DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER

OF

BARRY A. SMOLEV, M.D.

STATEMENT

OF

CHARGES

BARRY A. SMOLEV, M.D., the Respondent, was authorized to practice medicine in New York State on May 1, 1981, by the issuance of license number 145867 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about July 18, 1995, in the Municipal Court of West Los Angeles Judicial District, Respondent was found guilty of one count of leaving the scene of an accident that resulted in property damage, in violation of Vehicle Code Section 20002(A), a misdemeanor.

B. On or about August 16, 1998, in the Municipal Court of the County of Los Angeles, Respondent was found guilty of one count of shoplifting, in violation of Penal Code Section 484(a), a misdemeanor and was sentenced to sixty (60) days jail and thirty six (36) months probation.

C. On or about October 29, 1996, the Board of Medical Examiners of the State of Arizona, by a Consent Agreement, Findings of Fact, Conclusions of Law and Order of Cancellation of License With Cause, cancelled Respondent's license to practice medicine, based on Respondent's providing false answers on license renewals.

D. On or about February 18, 2000, the Division of Medical Quality, Medical Board of California, Department of Consumer Affairs (hereinafter "California Board"), by a Decision and Order (hereinafter "California Order"), revoked Respondent's Physician's and Surgeon's Certificate, stayed the revocation, and placed him on five (5) years

probation with terms and conditions, based on his failure to comply with the terms of a California Board Decision, his conviction of one count of leaving the scene of an accident that resulted in property damage in violation of Vehicle Code Section 20002(A), as described in Paragraph A above, his having unlawfully taking a pair of sunglasses from Lens Crafters, his conviction of one count of shoplifting a "T" shirt from Macy's Department store in violation of Penal Code 484(a), as described in Paragraph B above, his undergoing intensive psychotherapy for severe and recurrent depression, low self-esteem, and chemical dependency, and his providing false answers on Arizona annual license renewals as described in paragraph C above.

E. The conduct resulting in the Arizona Board's discipline action against Respondent would constitute misconduct under laws of New York state, pursuant to the following sections of New York law:

1. New York State Education Law section §6530(20) (moral unfitness);
2. New York State Education Law section §6530(16) (failure to comply with federal, state, or local laws, rules or regulations) and/or;
3. New York Education Law section §6530(21) (making a false report).

F. The conduct resulting in the California Board's disciplinary action against Respondent would constitute misconduct under the laws of New York state, pursuant to the following sections of New York state law:

1. New York State Education Law section §6530(8) (being a habitual abuser of alcohol or being dependent on or a habitual user of narcotics, barbiturates, amphetamines, hallucinogens, or other drugs having similar effects);
2. New York State Education Law Section 6530(9)(a)(i) (being convicted of a crime under state law);

3. New York State Education Law Section 6530 (9)(a)(iii) (being convicted of a crime under the law of another jurisdiction which would have constituted a crime under New York law;

4. New York State Education Law Section 6530 (16) (failure to comply with federal, state, or local laws, rules or regulations);

5. New York State Education Law Section 6530 (20) (moral unfitness);

6. New York State Education Law Section 6530 (21) (making a false report); and/or

7. New York State Education Law Section 6530 (29) (violating any term of probation or conditions or limitations imposed on the licensee)

SPECIFICATIONS

SPECIFICATIONS ONE AND TWO

Respondent violated New York Education Law Section 6530 (9)(a)(iii) by having been convicted of committing an act constituting a crime under the law of another jurisdiction and which, if committed within this state, would have constituted a crime under New York state law, in that Petitioner charges:

1. The facts in paragraph A; and/or
2. The facts in paragraph B.

SPECIFICATIONS THREE AND FOUR

Respondent violated New York Education Law Section 6530 (9)(b) by having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state, in that Petitioner charges:


3. The facts in Paragraphs C and E; and /or
4. The facts in Paragraphs A, B, D, and/or F

SPECIFICATIONS FIVE AND SIX

Respondent violated New York State Education Law Section 6530 (9)(d) by having had his license to practice medicine revoked or having disciplinary action taken after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation or disciplinary action would, if committed in New York state, constitute professional misconduct under the laws of New York state, in that the Petitioner charges:

5. The facts in Paragraphs C and E; and/or
6. The facts in Paragraphs A, B, C, and/or D.

DATED: 9/27, 2000


PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional Medical Conduct