



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

September 7, 2004

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Sarwar Murtuza, M.B.B.S.
8237 Austin Traphill Road
Elkin, North Carolina 28621

Robert Bogan, Esq.
Paul Robert Maher, Esq.
NYS Department of Health
433 River Street-Suite 303
Troy, New York 12180

RE: In the Matter of Sarwur Murtuza, M.B.B.S.

Dear Parties:

Enclosed please find the Determination and Order (No. 04-103) 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.

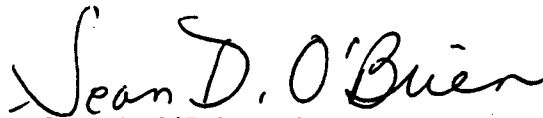
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified 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 "Sean D. O'Brien". The signature is written in a cursive style with a large initial "S".

Sean D. O'Brien, Director
Bureau of Adjudication

SDO:cah

Enclosure

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

In the Matter of

Sarwar Murtuza, M.B.B.S. (Respondent)

Administrative Review Board (ARB)

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

Remand Order No. 04-103

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:**

**Paul Robert Maher, Esq.
No Submission**

The Respondent holds a license to practice medicine in New York (License), as well as a medical license in North Carolina. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney 2004), the ARB considers whether to take action against the Respondent's License following his criminal conviction in Tennessee and his voluntary surrender of his North Carolina medical license. After a hearing before a BPMC Committee, the Committee voted to suspend the Respondent's License for one year, while the Office for Professional Medical Conduct (OPMC) conducts a proceeding to send the Respondent for a psychiatric/medical/substance abuse assessment (Evaluation). The Petitioner now seeks review from the Committee's Determination and asks the ARB to overturn the Committee and revoke the Respondent's License. After reviewing the hearing record and the Petitioner's brief, we remand this matter for the Committee to oversee the Evaluation proceeding and to render a Supplemental Determination. We annul the suspension and direct the Committee to consider again the sanction in the Supplemental Determination, after reviewing the results from the Evaluation proceeding.

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)(d) (McKinney Supp. 2004) by committing professional misconduct, because the duly authorized professional disciplinary agency from another state (North Carolina) took disciplinary action against the Respondent's medical license in that state, for, conduct that would constitute professional misconduct, if the Respondent had committed such conduct in New York. The Petitioner's Statement of Charges [Petitioner Exhibit 1] alleged that the Respondent's misconduct in North Carolina would have constituted misconduct if committed in New York under N. Y. Educ. Law §6530(8). That statute defines misconduct to include: being a habitual abuser of alcohol, or being dependent on or a habitual user of narcotics, barbiturates, amphetamines, hallucinogens, or other drugs having a similar effect. The Petitioner also alleged professional misconduct under Educ. Law § 6530(9)(a)(iii), for engaging in conduct that results in a criminal conviction in another jurisdiction (Tennessee) that would also constitute criminal conduct in New York. An expedited hearing (Direct Referral Proceeding) followed pursuant to Pub. Health Law §230(10)(p), before the BPMC Committee that rendered the Determination now on review. In the Direct Referral Proceeding, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The evidence at the Direct Referral Hearing showed that the Respondent entered a guilty plea in the General Sessions Court in Carter County Tennessee, on November 14, 2003, to Driving Under the Influence. He received eleven months and twenty-nine days incarceration, with that sentence suspended for all but two days time actually served, one year on probation and a \$350.00 fine with costs. During an investigation into that conviction by the North Carolina

Medical Board (North Carolina Board), the Respondent voluntarily surrendered his medical license in that state. The North Carolina Board reported to the National Practitioner Data Bank [45 CFR pt. 60] that the Board accepted the surrender because the Respondent was unable to practice safely due to alcohol or other substance abuse.

Following the Direct Referral Hearing, the Committee made a Determination that the Respondent's Tennessee criminal conviction made him liable for disciplinary action against his License pursuant to Educ. Law § 6530(9)(a)(iii). The Committee also determined that the North Carolina surrender made the Respondent liable for disciplinary action against his License pursuant to Educ. Law § 6530(9)(d).

The Committee then turned to considering the appropriate sanction. The Committee stated that the Respondent's testimony at the hearing raised more questions than answers. The Committee noted that the Respondent denied being under the influence of alcohol or illicit drugs at the time of his Tennessee arrest, but that the Respondent failed to explain adequately why he entered the guilty plea to Driving Under the Influence. The Respondent also testified that he was unemployed, unable to work more than four hours per day or sixteen hours per week and that he had applied for disability benefits. The Respondent failed to present documentation concerning his medical problems and stated he recently received a neurological evaluation with which he disagreed. The Committee noted that the Respondent appeared flat and depressed.

The Committee voted to suspend the Respondent's License for one year. The Committee indicated that they based the suspension on the need to protect the public from whatever problems the Respondent may have been experiencing. The Committee also stated that further evaluation would be necessary to determine the nature of the Respondent's condition and whether he can practice safely. The Committee stated that the one-year suspension would give

OPMC time to require the Respondent to undergo a thorough medical/psychiatric Evaluation pursuant to Pub. Health Law § 230(7). The Committee found such an Evaluation beyond the scope of the Direct Referral Hearing.

Review History and Issues

The Committee rendered their Determination on June 30, 2004. This proceeding commenced on July 9, 2004, when the ARB received the Respondent's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record and the Department's brief. The Respondent submitted no reply brief. The record closed when the ARB received the Department's brief on August 6, 2004.

The Petitioner requested that the ARB overturn the Committee and revoke the Respondent's License. The Petitioner argued that the Respondent's misconduct and his hearing testimony raise questions about his fitness to practice and that the Respondent has failed to provide any evidence that he can practice safely.

Determination

The ARB has considered the record and the parties' briefs. We annul the Committee's Determination to suspend the Respondent's License. Pursuant to our authority under Pub. Health Law § 230-c(4)(b), we remand this case to the Committee to oversee the Evaluation under Pub. Health Law 230(7). Following the Evaluation, the Committee shall issue a Supplemental Determination in which they can utilize any relevant findings from the Evaluation proceeding to order an appropriate penalty.

We agree with the Committee that the Respondent's hearing testimony raises more questions than provides answers. We also agree that such testimony and the evidence from the Tennessee criminal conviction and the North Carolina disciplinary proceeding provide the grounds for a BPMC Committee to order an Evaluation under § 230(7). We disagree with the Committee that such an Evaluation lies beyond the scope of a Direct Referral Proceeding. As relevant on this issue, § 230(7) provides that:

"...A committee on professional conduct, on notice to the licensee and after affording the licensee, the office of professional medical conduct, and their attorneys an opportunity to be heard, shall have the authority to direct a licensee to submit to a medical or psychiatric examination when the committee has reason to believe the licensee may be impaired by alcohol, drugs, physical disability or mental disability. The committee, with the advice of the licensee and the office of professional medical conduct, shall designate the physician who will conduct the examination. The results of the examination shall be provided by the examining physician to the committee, the licensee, and the office of professional medical conduct. The licensee may also obtain a physician to conduct an examination the results of which shall be provided to the committee and the office of professional medical conduct".

The statute allows any professional conduct committee, which would include a Direct Referral Committee, to order an Evaluation. In addition, a committee in a Direct Referral Committee can consider evidence on a licensee's more recent medical or psychiatric condition in determining the sanction necessary to protect the public in a Direct Referral Order, Hason v. Department of Health, 295 A.D.2d 818, 744 N.Y.S.2d 86 (3rd Dept. 2002).

We conclude that the Committee imposed an inappropriate sanction in this case, by imposing the one-year suspension as a temporary measure until OPMC could convene a separate BPMC Committee to conduct the Evaluation proceeding. We annul the suspension and remand to the Committee. The Committee shall act expeditiously to provide the parties the opportunity to comment on the Evaluation and to nominate the physician or facility to conduct the examination. The parties may seek the comments and nominations in writing rather than

convening an additional hearing day. Upon receiving the Evaluation and any results from another physician that the Respondent provides, the Committee shall have the choice to conduct a further hearing or to deliberate on the record then before them. The Committee shall then issue a Supplemental Determination on the appropriate sanction for the Respondent's misconduct. Either party may seek administrative review on the Supplemental Determination. The Respondent shall be responsible to pay any costs for the Evaluation and for any separate examination that the Respondent wishes to undergo.

ORDER

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

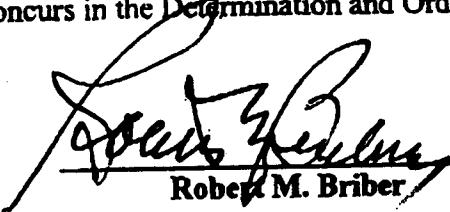
1. The ARB annuls the Committee's Determination to suspend the Respondent's License.
2. The ARB remands this case to the Committee so that the Committee can send the Respondent for an Evaluation pursuant to Pub. Health Law § 230(7).
3. The Committee shall render a Supplemental Determination following the Evaluation process and either party may seek further review on the Supplemental Order.

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 Sarwar Murtuza, M.B.B.S.

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

Dated: 9/02/2004

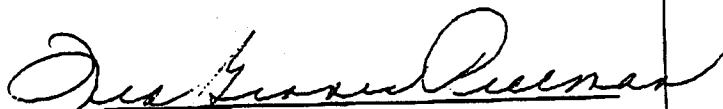


Robert M. Briber

In the Matter of Sarwar Murtuza, M.B.B.S.

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

Dated: Sept. 3, 2004



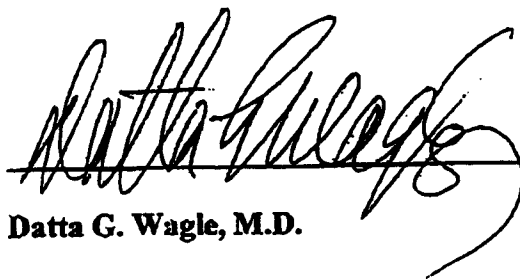
Thea Graves Pellman

In the Matter of Sarwar Murtuza, M.B.B.S.

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

Matter of Dr. Murtuaza.

Dated: 9/3/, 2004



Datta G. Wagle, M.D.

In the Matter of Sarwar Murtuza, M.B.B.S.

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

Dated: Sept 3, 2004

Therese G Lynch M.D.

Therese G. Lynch, M.D.