



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

April 22, 2002

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

Joseph L. Lanza, Esq.
Richard Haynes & Associates
4300 Scotland
Houston, Texas 77007-7394

Thomas Ernest Gray, M.D.
c/o Frank Watson
10910 White Thorn
Houston, Texas 77016

Thomas Ernest Gray, M.D.
12500 Wallisville Road
Houston, Texas 77013

RE: In the Matter of Thomas Ernest Gray, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 01-252) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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, appearing to read "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

Thomas Ernest Gray, 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. 01-252

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:

Joseph L. Lanza, Esq.

In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's 2002), the ARB determines the penalty to impose against the Respondent's New York Medical License (License), following the Respondent's criminal conviction for Driving While Intoxicated (DWI). After a hearing below, a BPMC Committee suspended the Respondent's License until the Respondent submits an evaluation report that proves the Respondent fit to practice and without a dependence on alcohol. The Respondent now asks the ARB to overturn that penalty as excessive and unfair. After reviewing the hearing record and review submissions from both parties, the ARB affirms the Committee's Determination to suspend the Respondent's License pending the review, but we modify the terms for the evaluation.

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)(ii)(McKinney Supp. 2002) due to the Respondent's conviction for a crime under Federal Law. The Petitioner's Statement of Charges [Petitioner Hearing Exhibit 1] alleged the Respondent's conviction for Driving While Intoxicated at a United States military base in Texas. An expedited hearing (Direct Referral Proceeding)

ensued pursuant to N.Y. Pub. Health Law §230(10)(p)(McKinney 2002), before a BPMC Committee, which 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, see In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The evidence before the Committee showed the Respondent's conviction in the United States District Court for the Western District of Texas for Driving While Intoxicated. The Court sentenced the Respondent to serve two years on probation and to pay a \$1000.00 fine.

In assessing whether to impose any penalty for the Respondent's Texas misconduct, the Committee noted that the Respondent's counsel asked the Committee to give the Respondent the benefit of the doubt, but the Respondent himself failed to testify even though present at the hearing. The Committee's Administrative Officer warned the Respondent that the Committee could draw an adverse inference from such refusal to testify. The Committee stated that they would have expected the Respondent to testify that the Texas conviction constituted an aberration that proved nothing about his fitness to practice. The Committee also stated that they found no evidence in the record, to lead the Committee to trust in the Respondent's fitness to practice safely in New York. The Committee voted to suspend the Respondent's License until the Respondent obtains an evaluation report concluding that the Respondent is fit physically and mentally to practice and showing no dependence on alcohol that would compromise the Respondent's ability to practice.

Review History and Issues

The Committee rendered their Determination on October 31, 2001. This proceeding commenced on November 19, 2001, 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 response brief. The record closed when the ARB received the response brief on January 30, 2002. During the period for filing briefs, the

Administrative Officer for the ARB granted the Respondent an extension for filing a brief. The Petitioner objected to the ARB about the extension and argued that the Respondent failed to meet the extension date for filing the brief.

The Respondent argues that the Committee erred by punishing the Respondent for alcohol dependency, when the charges against the Respondent alleged only a criminal conviction for DWI. The Respondent argues that the criminal conviction provides an insufficient ground for concluding that the Respondent suffers chemical dependency and that the suspension constitutes an excessive penalty. In reply, the Petitioner argues that the conviction provided a basis for the Committee's Determination.

Determination

The ARB has considered the record and the parties' briefs. We reject the Petitioner's request that we dismiss the Petitioner's review notice. We affirm the Committee's Determination that the Respondent's Federal Conviction constituted professional misconduct under N. Y. Educ. Law §§ 6530(9)(a)(ii). Neither party challenged the Committee's Determination on that ground. The ARB also affirms the Committee's Determination to suspend the Respondent's License pending the results from a medical evaluation, although we modify the terms for the evaluation in part.

We disagree with the Respondent's assertion that the Committee punished the Respondent for chemical dependency. A penalty for chemical dependency must properly include requirements that the chemically dependent licensee undergo screenings and treatment and, if the licensee continued in practice, that the licensee practice with at least a sobriety monitor, if not a practice monitor as well. This Committee imposed no such conditions. The Committee ordered

an evaluation only, and placed no ongoing restrictions on the Respondent's practice after such time as the Respondent presents an evaluation that demonstrates the Respondent's fitness to practice and freedom from alcohol dependency.

The Respondent's DWI conviction did provide the Committee reason to inquire about any underlying alcohol problem. The Respondent's testimony at the BPMC Hearing could have provided all the answers necessary for such an inquiry, but the Respondent refused to testify, despite the Administrative Officer's warning about a possible adverse inference. The ARB concludes that the conviction and the Respondent's refusal to testify at the hearing provided the Committee sufficient grounds to order that the Respondent undergo an evaluation. The evaluation will provide the answers that the Committee never received from testimony. We also hold that the Committee acted appropriately in suspending the Respondent until such time as the Respondent provides the evaluation.

The ARB votes 5-0 to modify the terms for the evaluation. We direct that the Respondent undergo an evaluation to determine whether the Respondent suffers a dependence on alcohol or any other substance that would compromise the Respondent's ability to practice medicine. The Respondent shall nominate the physician to conduct the evaluation, subject to approval by the Office for Professional Medical Conduct (OPMC). We suspend the Respondent License's until such time as the Respondent submits an evaluation to OPMC that certifies that the Respondent suffers no dependence that would compromise his ability to practice medicine safely and effectively.

ORDER

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

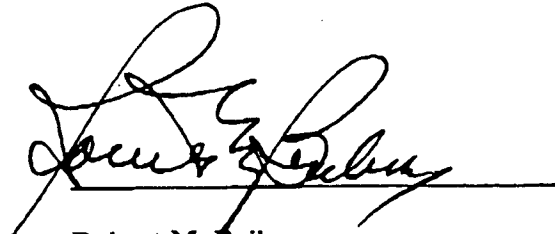
1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB affirms the Committee's Determination to suspend the Respondent's License until he completes an evaluation to determine whether the Respondent suffers from dependence on alcohol or any other substance.
3. The ARB modifies the Committee's Determination concerning the terms for the evaluation.

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 Thomas Ernest Gray, M.D.

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

Dated: 3/24, 2002



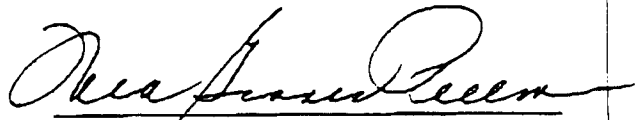
Robert M. Briber

In the Matter of Thomas Ernest Gray, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Gray.

Dated: 3/7, 2002



Thea Graves Pellman

In the Matter of Thomas Ernest Gray, M.D.

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

Dated: 4/15, 2002

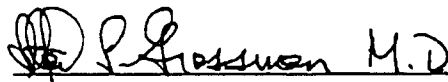
A handwritten signature in cursive script, appearing to read "Winston S. Price", is written above a horizontal line.

Winston S. Price, M.D.

In the Matter of Thomas Ernest Gray, M.D.

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

Dated: April 18, 2002

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Stanley L Grossman, M.D.

In the Matter of Thomas Ernest Gray, M.D.

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

Dated: March 9, 2002

Therese G. Lynch M.D.

Therese G. Lynch, M.D.