



**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

433 River Street, Suite 303

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Antonia C. Novello, M.D., M.P.H., Dr. P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

October 25, 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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433 River Street – Fourth Floor
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Dan G. Alexander, M.D.
21 Porter Avenue
Jamestown, New York 14701

RE: In the Matter of Dan G. Alexander, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 00--169) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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

Dan G. Alexander, 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. 00-169

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):
For the Respondent:**

**Anthony M. Benigno, Esq.
Peter G. Barber, Esq.**

After a hearing below, a BPMC Committee determined that the Respondent abused two patients and practiced with negligence on more than one occasion. The Committee voted to revoke the Respondent's License to practice medicine in New York State (License). In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 2000), both parties ask the ARB to nullify or modify the Committee's Determination. The Petitioner requests that the ARB sustain additional charges against the Respondent. The Respondent alleges errors by the Committee and their Administrative Officer and asks the ARB to overturn the Committee in full or to remand the case for further proceedings. After reading the hearing record and the submissions by the parties, we sustain the Committee's Determination on the charges and their Determination to revoke the Respondent's License. We amend, however, the reasoning that the Committee employed in rendering their Determination on the penalty.

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(2-3), (5), (20) & (31-32)(McKinney Supp. 2000) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- practicing medicine with negligence on more than one occasion,
- practicing medicine with incompetence on more than one occasion,
- engaging in conduct that evidences moral unfitness,
- willfully harassing or abusing a patient, and,
- failing to maintain accurate patient records.

The charges alleged the Respondent made inappropriate remarks to and/or touched inappropriately three medical staff, Nurses A-C, and five patients, A-E. A hearing ensued before the Committee who rendered the Determination now on review.

The Committee found that the Respondent made inappropriate remarks to Nurses A, B and C and Patients A and B, but the Committee found that the remarks failed to evidence moral unfitness. As to Patient C, the Committee found that the Respondent touched the Patient's breasts without adequate justification, failed to perform an adequate breast examination, made an inappropriate comment to the Patient and failed to maintain an accurate record for the Patient. As to Patient D, the Committee found that the Respondent touched the Patient's breasts in a manner without medical justification, touched the Patient's vagina and pubic area in a manner without medical justification and failed to perform a proper breast examination. As to Patient E, the Committee found that the Respondent failed to obtain a complete medical history, to document adequately or conduct a physical examination and to determine whether the Patient received concurrent medication. The Committee determined that the Respondent practiced with negligence on more than one occasion in treating Patients C, D and E, but dismissed charges that the Respondent practiced with incompetence on more than one occasion in treating those

Patients. The Committee also determined that the Respondent's conduct towards Patients C and D constituted patient abuse and evidenced moral unfitness in practicing medicine.

In making their findings and conclusions, the Committee found credible the testimony by Nurse C and by Patients A - D. The Committee rejected testimony by Patient E that the Respondent engaged in inappropriate conduct with that Patient. The Committee also rejected testimony by the Respondent and Ann Anderson, who testified that she was present as a chaperone when the Respondent examined Patient D.

The Committee voted to revoke the Respondent's License. The Committee stated that the Respondent must be punished for heinous and immoral patient abuse and for preying upon patients for his own sexual gratification. The Committee suggested that the Respondent suffers from a deep seated psychological problem that manifests itself in lack of impulse control. The Committee found no firm scientific basis to indicate a chance for rehabilitating the Respondent and noted that the Respondent offered no evidence on leniency and no argument on rehabilitation.

Review History and Issues

The Committee rendered their Determination on June 6, 2000. This proceeding commenced on June 15 & 19, 2000, when the ARB received the Respondent's and Petitioner's Notices requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's and the Respondent's briefs and the Petitioner's and the Respondent's response briefs. The record closed when the ARB received the Respondent's response brief on July 31, 2000.

The Respondent contends that the Committee made their Determination by only the most slender findings and that errors at the hearing warrant reversing the Committee's Determination. The Respondent raised five issues for review.

- I. The Committee's Administrative Officer barred one of the Respondent four attorneys improperly from the hearing.
- II. The Administrative Officer limited cross-examination improperly on the Patients.
- III. The Committee erred in their credibility determination, by rejecting testimony by Ann Anderson and in failing to appreciate changes in complaints by Patients C & D.
- IV. The Committee made conclusions inconsistent with their findings when the Committee sustained the negligence charges concerning Patient E.
- V. The Committee made an improper psychological diagnosis on the Respondent without basis in the evidence.

The Respondent asks that the ARB reverse the Committee's Determination, or in the alternative, remand to the Committee for further proceedings.

The Petitioner asks that the ARB overrule the Committee and sustain charges that the Respondent's inappropriate comments to Nurses A, B and C and to Patients A, B and C evidenced moral unfitness in practicing medicine.

Determination

The ARB has considered the record and the parties' briefs. We overrule the Committee and vote 4-1 to sustain additional moral unfitness charges. We vote 5-0 to reject the Respondent's request that we remand for further proceedings. We affirm the Committee's Determination that the Respondent committed professional misconduct. We also affirm the Committee's Determination to revoke the Respondent's License, but we amend the reasoning behind that Determination.

Procedural Challenges and Remand Request: In the Respondent's Review Issues I and II, the Respondent challenges procedural rulings by the Committee's Administrative Officer that limited cross-examination and limited the number of attorneys for the Respondent who could be present in the hearing room. Those challenges raise legal questions beyond our expertise and we direct the Respondent to raise those issues with the courts. We decline to overrule the Committee's Determination or to remand on those grounds.

Additional Moral Unfitness Charges: The Committee found that the Respondent made inappropriate comments to Nurses A-C and Patients A-C, but concluded that the remarks fell short from evidencing moral unfitness. Four ARB Members, Mr. Briber, Dr. Lynch, Dr. Grossman and Ms. Pellman agree with the Committee and vote to sustain their Determination on the moral unfitness charges concerning the remarks to Nurses A-C and Patient A. Dr. Price felt the remarks to the Nurses constituted conduct that evidenced moral unfitness. As to the comments to Patients C and D, Dr. Price, Dr. Grossman, Dr. Lynch and Ms. Pellman vote to overturn the Committee and to sustain the charges that the Respondent's remarks to the Patients evidenced moral unfitness. Mr. Briber finds the Respondent's comments failed to evidence moral unfitness and he votes to sustain the Committee's finding on those charges concerning Patients C and D.

Credibility Findings on the Sustained Charges: The Committee determined that the Respondent practiced with negligence on more than one occasion in treating Patients C-E and that the Respondent evidenced moral unfitness and willfully abused patients when he touched Patients C and D inappropriately. The Respondent's brief argues that the determination on those charges turned on the Committee's conclusions on credibility, between the accusations by the Patients and the denials by the Respondent and Ann Anderson. In requesting the ARB to

overturn the Committee's Determination, the Respondent asks that the ARB substitute our judgement for the Committee's in assessing witness credibility.

Any appellate or reviewing body owes deference to a fact finder for the fact finder's judgement about the credibility of the witnesses who testified before the fact finder. The ARB members served on BPMC Hearing Committees before joining the ARB and we know that reading hearing transcripts provides no substitute for the chance to observe witnesses testify in person. We see no reason to upset the Committee's Determination on credibility.

As to the charges concerning Patients C and D, the Committee found the Patient's testimony credible. As to changes in Patient D's testimony, the Committee found no problem with the changes because Patient D became more precise in describing the incident [Committee Determination, pages 14-15]. The Committee rejected the Respondent's testimony, as they may reject the testimony by any witness, and the Committee gave an extensive explanation about why they doubted the Respondent's explanations here. The Committee also rejected testimony by the Respondent's former employee-chaperone, Ms. Anderson, due to Ms. Anderson's interest in the matter. The Respondent called that finding an error, because Ms. Anderson was not the Respondent's employee. The Respondent also argued that, under the Committee's analysis, no physician could rely on testimony by a chaperone associated with a physician. [Respondent's Brief page 19]. We disagree. Ms. Anderson showed her interest in the case and her bias to the Respondent when she testified in reference to the Respondent "I'm here to defend him, okay?" [February 24th Hearing Transcript, page 73]. The record also indicated that Ms. Anderson's testimony conflicted with prior statements by the Respondent. Ms. Anderson testified that she was present during the examination on Patient D [February 24th Hearing Transcript, page 26]. The Respondent told Health Department Investigator Rickard that no chaperone was present in

the room when the Respondent examined Patient D [February 1st Hearing Transcript, page 142]. The statements by Ms. Anderson gave the Committee specific reasons to reject Ms. Anderson's testimony.

The testimony and other evidence, that the Committee found credible in resolving the charges concerning Patients C and D, provided sufficient evidence to prove that the Respondent practiced with negligence on more than one occasion, willfully abused the Patients and engaged in conduct that evidenced moral unfitness.

The Respondent also argued that the Committee made a Determination inconsistent with their findings by sustaining charges that the Respondent practiced with negligence in treating Patient E. The Respondent argued that the Committee based their conclusion improperly on testimony by Patient E, whom the Committee found unreliable as a witness. We sustain the Determination on that charge. The Committee's findings on the care to Patient E [Findings of Fact (FF) 18-23] indicate that the Committee based those findings on testimony by the Petitioner's expert, Dr. Ian Frankfort, on the Respondent's medical records for Patient E and on some testimony by the Respondent [FF 21]. That evidence established that the Respondent practiced with negligence on more than one occasion in treating Patient E.

Penalty: We affirm the Committee's Determination to revoke the Respondent's License. The Respondent's brief made no argument that revocation constitutes an inappropriate penalty for willfully abusing two patients. The Respondent instead denied that the abuse occurred. We have already upheld the Committee's Determination that rejected the Respondent's denial. The Respondent also challenged the Committee's statements about the Respondent suffering a psychological problem [Committee Determination, page 24]. We agree with the Respondent that no evidence from the hearing provided the Committee with the basis to make a diagnosis on the Respondent's health. We also find disturbing the statement that the Committee made on

rehabilitation, for which the Committee relied on their experience as BPMC members, rather than on evidence in the record. Although we disagree with the reasoning the Committee used in making their penalty Determination, we hold that the evidence in this case supported License revocation as the penalty. The ARB may substitute our judgement for the Committee's in making determinations on penalty, Matter of Minielly v. State Bd. for Prof. Med. Cond., 205 A.D.2d 940, 613 N.Y.S.2d 759 (3rd Dept. 1994). We elect to substitute our reasoning for the Committee's in this case.

Sexual misconduct towards patients impairs a physician's judgement, harms patients and violates the trust that the public in general and the patients in particular place in physicians. Such conduct disregards a physician's duty for the physician's sexual gratification. This record reveals a pattern of disrespect by the Respondent that culminated in abuse against two patients. We conclude that the Respondent will remain at risk to repeat his misconduct if we allow him to retain his License. License revocation provides the proper penalty against the Respondent for violating his Patients' trust.

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 revoking 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 Dan G. Alexander, M.D.

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

Dated: September 14, 2000

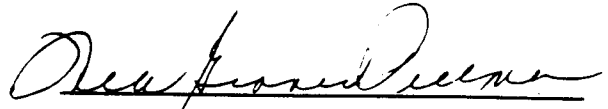


Robert M. Briber

In the Matter of Dan G. Alexander, M.D.

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

Dated: Sept 8, 2000

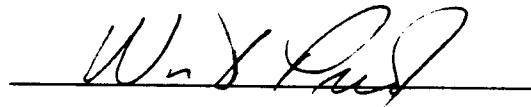
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Thea Graves Pellman

In the Matter of Dan G. Alexander, M.D.

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

Dated: OCT 11, 2000

A handwritten signature in black ink, appearing to read "W. S. Price", is written over a horizontal line.

Winston S. Price, M.D.

In the Matter of Dan G. Alexander, M.D.

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

Dated: Sept 16, 2000

Therese G. Lynch M.D.

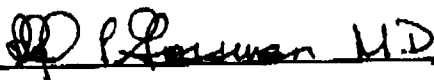
Therese G. Lynch, M.D.

In the Matter of Dan G. Alexander, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Alexander.

Dated: September 14, 2000

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Stanley L Grossman, M.D.