



# STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

December 4, 1998

Dennis P. Whalen  
*Executive Deputy Commissioner*

## **CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Claudia Morales Bloch, Esq.  
NYS Department of Health  
145 Huguenot Street  
New Rochelle, NY 10801

Alan Lambert, Esq.  
Lifshutz, Polland & Associates, P.C.  
675 Third Avenue  
New York, NY 10017

**RE: In the Matter of Joseph T. Witek, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No.98-188) 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.

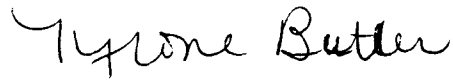
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified 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 Butler". The signature is written in a cursive style with a large initial 'T'.

Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:mla

Enclosure

**STATE OF NEW YORK : DEPARTMENT OF HEALTH (Petitioner)**

**COPY**

**In The Matter Of**

**Joseph T. Witek, M.D. (Respondent)**

**Administrative Review  
Board (ARB)  
Determination and  
Order 98 - 188**

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

**Before Board Members : Briber, Grossman, Lynch, Price & Shapiro.  
Administrative Law Judge James F. Horan served as the Board's Administrative Officer.**

**For the Respondent: Alan Lambert, M.D., J.D.  
For the Petitioner: Claudia Morales Bloch, Esq.**

In this proceeding, pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1998), the ARB considers the penalty to impose against the Respondent's New York medical license (License) for criminal conduct in Florida and for obtaining his New York License through fraud. After a hearing on charges that the Respondent's actions constituted professional misconduct for a New York physician, a BPMC Committee sustained the charges and voted to revoke the Respondent's License. Both parties now ask the ARB to review that Committee's Determination, with the Petitioner requesting that we correct errors in the Committee's Determination and sustain the revocation penalty, and the Respondent asking that we overturn the penalty, remand for a new hearing or remand for further proceedings by the original Committee. After considering the record and the parties' written submissions, we vote 5-0 to revoke the Respondent's License, due to his fraudulent conduct in obtaining his License.

**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) (McKinney Supp. 1998), by:

- committing conduct in another state (Florida) that resulted in a criminal conviction and that would constitute a crime in New York, if the Respondent had committed such conduct here.

A hearing ensued pursuant to N.Y. Pub. Health Law § 230(10)(p)(McKinney Supp. 1998), before a BPMC Committee. In hearings pursuant to that statute (Direct Referral Proceeding), the Committee considers only 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 Petitioner's Statement of Charges [Petitioner Exhibit 1] also alleged that the Respondent violated N. Y. Educ. Law §§ 6530(1) & 6530(21)(McKinney Supp. 1998) by:

- obtaining his New York medical license fraudulently; and,
- willfully making and filing a false report.

The Committee considered those charges pursuant to the procedures in N.Y. Pub. Health Law §230(10)(e) (McKinney Supp. 1998). Following the hearing on all the charges the Committee rendered the Determination now under review.

The Committee determined that Courts in Florida convicted the Respondent on the following dates for the following crimes:

- on January 20, 1986 for knowingly and willingly operating a motor vehicle under the influence of an alcoholic beverage, a misdemeanor;
- on August 1, 1989 for driving while under the influence or with an unlawful blood alcohol level, a misdemeanor; and,
- on April 25, 1996 for leaving the scene of an accident involving injury, a felony, and driving under the influence involving property damage or personal injury, a misdemeanor.

The Committee found that the Respondent's 1996 conduct, if committed in New York, would constitute the crimes: leaving the scene of a personal injury accident and driving while intoxicated. The Committee sustained the charge that the Respondent's criminal conduct in Florida constituted professional misconduct under N. Y. Educ. Law § 6530(9)(a)(iii) (McKinney Supp. 1998).

The Committee made further findings that the Respondent submitted an application for medical licensure in New York on December 21, 1992. The application contained the following question:

*"Have you ever been convicted of a crime (felony or misdemeanor) in any state or county?"*

The Respondent answered "no" to that question, despite his 1986 and 1989 convictions in Florida. The Committee determined that the Respondent's answer on the application constituted obtaining a license fraudulently, which constitutes misconduct under N. Y. Educ. Law §6530(1) (McKinney Supp. 1998),

and willfully filing a false report, which constitutes professional misconduct under N. Y. Educ. Law §6530(21) (McKinney Supp. 1998).

The Committee voted to revoke the Respondent's License to practice medicine in New York. The Committee stated that they found insufficient mitigating evidence in the record to justify the public risk from allowing the Respondent to practice medicine in New York State. The Committee noted that the Respondent submitted only a completion certificate from a treatment and rehabilitation program, with no details about the program or the Respondent's involvement, and that the Respondent introduced an expert witness, with limited alcohol dependency credentials. That expert based his evaluation about the Respondent on a ninety minute interview with the Respondent and written summaries from clinical interviews with others. The Committee rendered their Determination August 24, 1998.

#### **Review History and Issues**

This proceeding commenced on September 2, 1998 when the ARB received the Respondent's Notice requesting a Review. The ARB received a separate Review Notice from the Petitioner on September 9, 1998. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and reply brief and the Respondent's brief and reply brief. The record closed when the ARB received the Petitioner's reply brief on October 21, 1998.

The Petitioner asks that the ARB sustain the Committee's Determination revoking the Respondent's License, but requests that the ARB modify and clarify the Committee's Determination, to:

- state specifically that the Committee sustained all three misconduct specifications;
- correct the numerical ordering in the factual findings that occurred after Finding 7;
- clarify the Determination concerning mitigation; and,
- specify that each misconduct specification, independently, would justify revoking the Respondent's License.

As to the mitigating evidence, the Petitioner argues that the ARB should clarify that the Respondent

submitted woefully inadequate evidence to assess the recovery and rehabilitation from an alcohol problem, necessary to assure patient safety.

The Respondent's brief cites to errors in the hearing below and argues that the Committee imposed an excessively harsh penalty that failed to weigh the mitigating evidence. As to the hearing, the Respondent contends that:

- the Committee's Administrative Officer refused improperly to admit evidence that the Respondent offered;
- the Petitioner's counsel caused prejudice to the Respondent by asking questions relating to conduct outside the Statement of Charges; and,
- the Committee made misrepresentations to the Respondent, on which he relied to his detriment, when he chose against presenting evidence at an additional hearing day.

As to mitigation, the Respondent argues that the Committee failed to consider the Respondent's distinguished medical career, his successful rehabilitation from an alcohol problem and that a rehabilitated Respondent reported truthfully his most recent Florida criminal conviction in his 1996 Application to renew his New York License. As to the penalty, the Respondent characterizes revocation as inconsistent with the statutory objective to rehabilitate physicians and as disproportionate to the findings. The Respondent requests, in the alternative, that the ARB overturn the Committee's Determination and impose a penalty that includes monitoring, or annul the Committee's Determination and order a new hearing, or remand to the Committee who rendered the Determination on review, so the Respondent may offer further evidence concerning his successful rehabilitation.

#### **Determination**

All ARB Members participated in this case, considered the record and considered the parties' briefs. We sustain the Committee's Determination that the Respondent's conduct in Florida and New York constituted professional misconduct under N. Y. Educ. Law §§ 6530(1), 6530(9)(a)(iii) & 6530(21) (McKinney Supp. 1998). The Respondent made no challenge to the Committee's

Determination on the charges. We reject the Respondent's request that we annul the Committee's Determination and order a new hearing, we reject the Respondent's request that we remand for further proceedings before the Committee below and we sustain the Determination revoking the Respondent's License, although we substitute our judgement for the Committee's in specifying the reasons why revocation constitutes the appropriate penalty in this case.

The Respondent asked in the alternative that the ARB overturn the Committee and order a new hearing. We reject that request because we lack the authority to order a new hearing. Under N.Y. Pub. Health Law § 230-c(4)(b)(McKinney's Supp. 1998) the ARB may remand a case only: "*to the committee on professional conduct for reconsideration or further proceedings*". We interpret that statute to limit us to remanding only to the original Committee. The statute provides no authority for the ARB to order a new hearing. The Respondent should direct his request for a new hearing to the courts. We also decline to remand the case to the original Committee for further proceedings. The Respondent requested that remand to present additional evidence on rehabilitation, claiming that a misrepresentation by the Committee induced the Respondent to decide against presenting additional evidence at the hearing. We hold that, in alleging that error by the Committee, the Respondent raised an additional legal issue that he should argue in the courts. We hold further that the mitigating evidence the Respondent would offer about rehabilitation from his alcohol problem would address only one charge against him, the Florida convictions, and ignore the equally serious charges concerning the Respondent's fraudulent licensure application.

We sustain the Committee's Determination revoking the Respondent's License, because the Respondent obtained his New York License fraudulently. We, therefore, consider that License void. The evidence demonstrates that the Respondent withheld knowingly information about his 1986 and 1989 alcohol related criminal convictions in Florida on his application for licensure in New York. We infer that the Respondent withheld that information to deceive the State and prevent New York from learning about the convictions and inquiring into whether the Respondent suffered an alcohol abuse problem, that would impair his ability to provide safe and adequate care in New York. We hold that the Respondent's fraudulent conduct demonstrates that he lacks integrity and demonstrates his unfitness to practice medicine in New York.

The Respondent argued that the Committee ignored mitigating evidence when they revoked his License. We conclude that the Respondent's mitigating evidence addressed only the Respondent's problem with alcohol. If the Respondent had offered credible evidence concerning his rehabilitation from the alcohol problem, and the Florida convictions had constituted his only misconduct, then a sanction including monitoring in some form, might address that problem adequately enough to protect the public. This case, however, involved the fraudulent Licensure Application in addition to the Florida convictions. We reject the Respondent's contention that the evidence he offered provided any mitigation concerning the fraudulent Application. The Respondent's brief argues that, although he withheld information in his 1992 Licensure Application and his 1994 New York Renewal Application concerning the prior criminal convictions in Florida, he did report his 1996 Florida conviction in his 1996 Renewal Application. The Respondent can point to no evidence, however, that he ever informed New York about the 1986 or 1989 Florida conviction or that he ever told New York that he had obtained his License in this state by withholding information on his 1992 Application.

We reject the Respondent's further argument that revoking his License for fraud would ignore the statutory intention to encourage rehabilitation. Although treatment can aid a substance abuser and retraining or continuing education can aid a physician who demonstrates incompetence, we have held before, that no retraining or continuing education can aid a physician who lacks integrity, Matter of Bezar v. DeBuono, 240 A.D.2d 978, 659 N.Y.S.2d 547 (Third Dept. 1997). We also reject the Respondent's argument that by revoking the Respondent's License we depart from case precedent. The ARB has held consistently that fraud in applications by a physician constitutes sufficient reason standing alone to revoke that physician's License, Matter of Bezar v. DeBuono, (supra); Matter of Jadoo v. DeBuono, 235 A.D.2d 644, 652 N.Y.S.2d 408 (Third Dept. 1997); Matter of Glassman v. Comm. of Health of State of N.Y., 208 A.D.2d 1060, 617 N.Y.S.2d 634 (Third Dept. 1994).



**ORDER**

**NOW**, based upon this Determination, the Review Board renders the following **ORDER**:

1. The ARB **SUSTAINS** the Committee's Determination that the Respondent committed professional misconduct.
  
2. The ARB **SUSTAINS** the Committee's Determination revoking the Respondent's License to practice medicine in New York State.

**Robert M. Briber**

**Sumner Shapiro**

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

**Stanley L. Grossman, M.D.**

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

**In The Matter Of Joseph T. Witek, M.D.**

**Therese G. Lynch, M.D.**, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Witek.

Dated : Nov 28, 1998

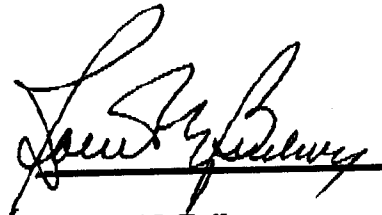


**Therese G. Lynch, M.D.**

**In The Matter Of Joseph T. Witek, M.D.**

**Robert M. Briber**, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Witek.

**Dated : November 30 , 1998**

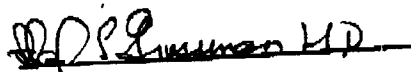


**Robert M. Briber**

**In The Matter Of Joseph T. Witek, M.D.**

**Stanley L. Grossman, M.D.**, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Witek.

Dated: 11/30, 1998



**Stanley L. Grossman, M.D.**

**In The Matter Of Joseph T. Witek, M.D.**

**Sumner Shapiro**, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Witek.

**DATED:** December 1, 1998

  
Sumner Shapiro