



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

August 18, 2005

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

David C. Vidrine, Esq.
Mumphrey Law Firm, L.L.C.
P.O. Box 90
Chalmette, Louisiana 70044-0090

Michael Arthur Schwartz, M.D.
P.O. Box 641120
Kenner, Louisiana 70064-1120

RE: In the Matter of Michael Arthur Schwartz, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 05-037) 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.

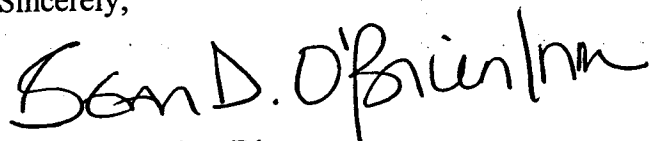
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified 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/nm". The signature is written in a cursive, somewhat stylized font.

Sean D. O'Brien, Director
Bureau of Adjudication

SDO:nm
Enclosure

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

In the Matter of

**Michael Arthur Schwartz, M.D.
(Respondent)**

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

Administrative Review Board (ARB)

Determination and Order No. 05-037

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): Paul Robert Maher, Esq.

**For the Respondent: Mumphrey Law Firm, L.L.C.
David C. Vidrine, Esq., of Counsel**

In this proceeding, we consider the action to take against the Respondent's license to practice medicine in New York State (License), following a disciplinary proceeding against the Respondent's medical license in Alabama. After a hearing, a BPMC Committee found that the findings in the Alabama proceeding provided grounds to take action against the Respondent's License and the Committee voted to revoke that License. In this proceeding pursuant to N.Y. Pub. Health Law (PHL) § 230-c (4)(a)(McKinney 2005), the Respondent asks the ARB to overturn the Committee's Determination on the grounds that the Committee lacked jurisdiction. After considering the hearing record and the parties' review submissions, we affirm the Committee's Determination, with a slight modification, and we reject the Respondent's arguments concerning jurisdiction.

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)(b) & (9)(d) by committing professional misconduct because:

- the duly authorized professional disciplinary agency from another state, Alabama, found the Respondent guilty for professional misconduct [§6530(9)(b)] and/or took disciplinary action against the Respondent's medical license in that state [§6530(9)(d)], 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 Alabama would constitute misconduct if committed in New York, under the following specifications:

- practicing the profession fraudulently, a violation under EL § 6530(2),
- practicing the profession while impaired, a violation under EL § 6530(7),
- being a perpetual abuser of drugs or suffering from a psychiatric condition which impairs practice, a violation under EL § 6530(8)
- failing to comply with an order of the Board for Professional Medical Conduct, a violation under EL § 6530(15),
- engaging in conduct that evidences moral unfitness, a violation under EL § 6530(20), and,
- willfully making or filing a false report, a violation under EL § 6530(21).

The proceeding commenced by a Summary Order from the Commissioner of Health, pursuant to N.Y. Pub. Health Law § 230(12)(b). The Order suspended the Respondent's License summarily, upon the Commissioner's Determination that the Respondent's practice of medicine constituted an imminent danger to the health, safety and welfare of the people of New York.

An expedited hearing (Direct Referral Proceeding) followed pursuant to N.Y. Pub. Health Law §230(10)(p)(McKinney 2004), 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 Respondent failed to appear at the hearing or to file an answer.

The Committee found that the Respondent had received proper service of the Notice of Hearing in this case, that the Respondent had requested and received numerous adjournments, and that the Respondent still failed to appear at hearing or file an answer. The Committee found further that the Alabama State Board of Medical Examiners (Alabama Board) issued an order in October 2001 directing the Respondent to submit to a complete examination, including an evaluation for chemical dependency. The Alabama Board's action followed a referral from the Alabama Physician's Health program after the Respondent refused an evaluation for possible impairment and refused to submit to random urine screens. The Respondent also failed to cooperate with the New York Physician's Health Program (PHP) and informed "New York authorities" that he would not return to practice in New York State due to osteoarthritis. In September 2002, the Alabama Board issued an Order finding the Respondent guilty of unprofessional conduct and inability to practice medicine with reasonable skill and safety, due to excessive use of substances or as a result of a physical condition [Hearing Exhibit 5]. The

Alabama Board suspended the Respondent's Alabama medical license indefinitely and fined the Respondent \$5000.00.

The Committee determined that the Alabama Board's Order made the Respondent liable for action against his License pursuant to EL §§ 6530(9)(b) & 6530(9)(d). The Committee determined further that the Respondent's conduct, if committed in New York, would have constituted being a habitual abuser of drugs and alcohol and failing to comply with a BPMC order to undergo a medical or psychiatric examination. The Committee stated that the Alabama Board's findings constituted the basis for the New York misconduct findings against the Respondent.

The Committee voted to revoke the Respondent's License. The Committee found no evidence in the record that the Respondent had taken any steps to regain his Alabama license and nothing to indicate that the Respondent ever underwent the evaluation that the Alabama Board ordered. The Committee found that the Respondent's failure to undergo an evaluation or to appear at or file an answer in the Direct Referral Proceeding left the Committee with no way to judge whether a penalty less severe than revocation could protect patients.

Review History and Issues

The Respondent received a copy of the Committee's Determination on March 23, 2005. This proceeding commenced on April 4, 2005, 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 reply brief. The Respondent requested and the Petitioner consented to an extension in the statutory time frame for filing

briefs. The Respondent submitted his brief to the ARB by letter on July 1, 2005. The record closed when the ARB received the Petitioner's reply brief on July 13, 2005.

The Respondent's brief argued that the Committee lacked jurisdiction to take action against the Respondent's License, because the Respondent advised both Alabama and New York that the Respondent would no longer practice in these states due to osteoarthritis. The Respondent argued that no basis existed for the Alabama Board's Order, for the Determination that the Committee based on the Alabama Order or for the Commissioner's Summary Order that found the Respondent constituted an imminent danger to the people of New York.

The Petitioner replied that the Respondent continued to hold his License, despite his representation that he would not return to practice. The Petitioner argued that the Respondent's License provided the basis for jurisdiction. As to the Alabama Order, the Petitioner argued that the Respondent would have to challenge that Order in Alabama. The Petitioner argued that the Alabama Order provided the basis for the Committee to revoke the Respondent's License.

ARB Authority

Under PHL §§ 230(10)(i), 230-c(1) and 230-c(4)(b), the ARB may review Determinations by Hearing Committees to determine whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law and whether the Penalty is appropriate and within the scope of penalties which PHL §230-a permits. 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 N.Y.S.2d 381 (3rd Dept. 1993); in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 NYS

2d 759 (3rd Dept. 1994); and in determining credibility, Matter of Minielly v. Comm. of Health, 222 A.D.2d 750, 634 N.Y.S.2d 856 (3rd Dept. 1995). The ARB may choose to substitute our judgment and impose a more severe sanction than the Committee on our own motion, even without one party requesting the sanction that the ARB finds appropriate, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). In determining the appropriate penalty in a case, the ARB may consider both aggravating and mitigating circumstances, as well as considering the protection of society, rehabilitation and deterrence, Matter of Brigham v. DeBuono, 228 A.D.2d 870, 644 N.Y.S.2d 413 (1996).

The statute provides no rules as to the form for briefs, but the statute limits the review to only the record below and the briefs [PHL § 230-c(4)(a)], so the ARB will consider no evidence from outside the hearing record, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3rd Dept. 1997).

A party aggrieved by an administrative decision holds no inherent right to an administrative appeal from that decision, and that party may seek administrative review only pursuant to statute or agency rules, Rooney v. New York State Department of Civil Service, 124 Misc. 2d 866, 477 N.Y.S.2d 939 (Westchester Co. Sup. Ct. 1984). The provisions in PHL §230-c provide the only rules on ARB reviews.

Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination that the Respondent engaged in professional misconduct and we affirm the Committee's Determination to revoke the Respondent's License. We reject the Respondent's argument that the Committee lacked jurisdiction to take action against the Respondent's License.

The Respondent argued that he held an inactive New York license, because he sent a letter to “the New York authorities” indicating that he would not return to practice in New York. We reject the argument that the Committee lacked jurisdiction due the representations in the Respondent’s letter about an inactive license. Under EL § 6502(1), a New York medical license remains valid during the licensee’s life, unless revoked, annulled or suspended. We hold that the jurisdiction in this case came from the Respondent’s still valid License and from PHL §230(10)(p), which allows the Director of the Office for Professional Medical Conduct (OPMC) to institute proceedings against licensees for violations under EL § 6530(9).

The Respondent also challenged the jurisdiction to begin this action through a Commissioner’s Summary Order under PHL § 230(12)(b). We note first the Summary Order constitutes a temporary measure that remains in effect only until the Committee renders a Determination on the hearing. The Summary Order in this case holds no effect any longer, following the Committee’s Determination, and the action revoking the Respondent’s License took place under PHL § 230(10)(p), rather than under the Summary Order. Further, under PHL §230-c(1), the ARB holds no authority to review a Commissioner’s Order.

The Respondent also argued that Alabama held no jurisdiction over the Respondent. The ARB holds that we lack authority to review the Alabama Board’s jurisdiction. The Respondent will have to challenge the Alabama Board’s Order in courts with the authority to review the Alabama Board’s Order. Absent a later order from the Alabama Board rescinding the Order in this case or a decision from a court overturning the Alabama Board, the ARB and the Committee must assume that the Alabama Board acted legally.

We affirm the Committee’s Determination that the Alabama Board’s Order provided the Committee the grounds on which to take action against the Respondent’s License under EL

§§6530(9)(b) and 6530(9)(d). We agree with the Committee that the Respondent's refusal to comply with the Alabama Board's order to undergo examinations would constitute misconduct in New York under EL § 6530(15), for failing to comply with a Board order. The Committee also found that the Alabama Board's Order provided the grounds to find a violation under EL §6530(8) for being a habitual abuser of certain substances or having a psychiatric condition that impairs the ability to practice.

The ARB modifies the Committee's Determination to note that further grounds existed to sustain the misconduct charges against the Respondent. The Committee found that the Respondent failed to file an answer to the charges in the Direct Referral Hearing. Under PHL §230(10)(c), the failure to file an answer is deemed an admission on all the charges.

We agree with the Committee that revocation provides the only appropriate penalty in this case. The Respondent's brief admitted that the Respondent suffered an arthritic condition¹. The Respondent provided no information about how badly that condition might impair practice and the Respondent never submitted to an evaluation in Alabama to allow the Alabama Board to judge the nature of that impairment. The Respondent also failed to undergo a substance abuse evaluation in Alabama and he refused to participate in a PHP investigation here in New York. These refusals raise even greater concerns. Although the Respondent stated that he planned no return to practice in New York, that statement binds the Respondent in no way legally. The Respondent could activate his New York License merely by registering and paying a registration fee. If the Respondent really intended to terminate his License in New York voluntarily, he could have surrendered the License. The record provides no indication that the Respondent attempted

¹ The Respondent's review brief referred to osteoarthritis. The Alabama Board's Order referred also to rheumatoid arthritis.

such a surrender. The ARB votes 5-0 to affirm the Committee's Determination to revoke the Respondent's License.

ORDER

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

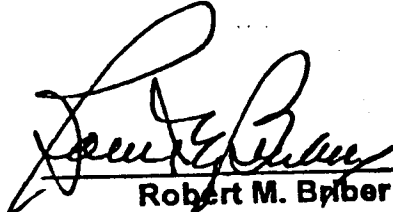
1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB affirms the Committee's Determination to revoke the Respondent's License.

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 Michael Arthur Schwartz, M.D.

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

Dated: August 17, 2005



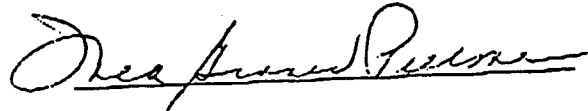
Robert M. Briber

In the Matter of Michael Arthur Schwartz, M.D.

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

Matter of Dr. Schwartz.

Dated: Aug 17, 2005



Thea Graves Pellman

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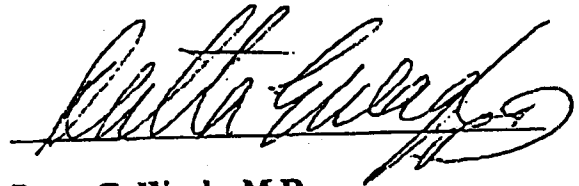
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In the Matter of Michael Arthur Schwartz, M.D.

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

Matter of Dr. Schwartz.

Dated: 8/18/, 2005



Datta G. Wagle, M.D.

In the Matter of Michael Arthur Schwartz, M.D.

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

Matter of Dr. Schwartz.

Dated: August 18, 2005

Stanley L. Grossman M.D.

Stanley L. Grossman, M.D.

In the Matter of Michael Arthur Schwartz, M.D.

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

Dated: Aug 16, 2005



Therese G. Lynch, M.D.