



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

February 2, 2001

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Denise Lepicier, Esq.
NYS Department of Health
5 Penn Plaza – 6th Floor
New York, New York 10001

Said Dounel, M.D.
102-10 66th Road
Forest Hills, New York 11375

Matthew I. Kupferberg, Esq.
Harris, Beach & Wilcox
Two World Trade Center-85th Floor
New York, New York 10048

RE: In the Matter of Said Dounel, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 00-269) 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.

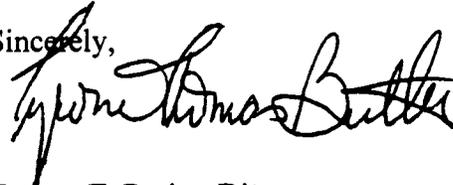
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified 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

Said Dounel, 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. 00-269

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:**

**Denise Lepcier, Esq.
Matthew Kupferberg, Esq.**

After a hearing below, a BPMC Committee determined that the Respondent knowingly ordered unnecessary test on patients, for the Respondent's financial gain. The Committee voted to suspend the Respondent's License to two years, to fine him Forty Thousand Dollars (\$40,000.00) and to order him to complete continuing medical education (CME) courses. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 2000), both parties ask the ARB to overturn the Committee. The Respondent requests that the ARB nullify the Committee's findings or to dismiss the charges. The Petitioner requests that the ARB change the penalty and revoke the Respondent's License. After reviewing the hearing record and the briefs from the parties, we affirm the Committee's Determination that the Respondent committed serious and repeated professional misconduct. We overturn the Committee's Determination on penalty and we vote unanimously to revoke the Respondent's 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(2-3), 6530(5), 6530(17), 6530(20), 6530(31) &

6530(35) (McKinney Supp. 2001) 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,
- exercising undue influence over a patient,
- engaging in conduct that evidences moral unfitness,
- willfully harassing, abusing or intimidating a patient, and,
- ordering excessive tests.

The charges involved medical services that the Respondent offered to four persons, Patients A through D. The charges also alleged that the Respondent abused Patient A sexually. The record refers to the Patients by letters to protect patient privacy. The Respondent denied all the charges and a hearing ensued before the BPMC Committee that rendered the Determination now on review.

The Committee found insufficient credible evidence to support the charges that the Respondent abused Patient A sexually. On the specification charging intimidating a patient, the Committee found that the Respondent intimidated Patients B-D into undergoing unnecessary tests, by indicating that examination findings suggested dire results. On the moral unfitness charge, the Committee found that the Respondent:

- repeatedly misrepresented medical conditions to induce patients to undergo unnecessary tests,
- falsified the record for Patient A, and,
- encouraged Patient B to record non-existent patient complaints.

On the negligence and incompetence specifications, the Committee found that the Respondent:

- performed inadequate examinations and recorded inadequate histories,
- ordered tests without medical indication, and,
- failed to follow up abnormal test results.

On the fraud specification, the Committee found that the Respondent falsified records and misrepresented conditions to induce patients to undergo unnecessary tests. On the undue influence specification, the Committee found that the Respondent exercised undue influence over the Patients by scaring or intimidating the Patients to undergo unnecessary tests. The Committee also sustained the specification that charged that the Respondent ordered tests without medical indication.

In making their findings on the charges, the Committee indicated that they found that Patients B-D testified credibly. They found Patient A non-credible in her testimony on the sexual abuse allegations. The Committee also found the Respondent's former employee credible in her testimony concerning the Respondent's examination on Patient A. The Committee noted that the Respondent presented several character witnesses. The Committee gave little weight to that testimony, because the character witnesses failed to address the allegations against the Respondent. The Committee found the Respondent's testimony unbelievable and the Committee stated that they found the Respondent's attempts to manipulate the record troubling.

The Committee voted 1.) to suspend the Respondent's License for two years, 2.) to require the Respondent to complete continuing medical education courses in record-keeping, history taking and ethics, and, 3.) to fine the Respondent Forty Thousand Dollars (\$40,000.00).

Review History and Issues

The Committee rendered their Determination on September 29, 2000. This proceeding commenced on October 17, 2000, when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and response brief and the Respondent's brief and response brief. The record closed when the Respondent submitted his response brief on or about December 20, 2000. Each party also submitted letters to the Committee's Administrative Officer, concerning the Petitioner's brief.

The Respondent asks the ARB to reverse the Committee's Determination and raises six issues for review.

1. The Petitioner filed a late notice of review by serving the Respondent twenty-three days from service of the Committee's Order, rather than the fourteen days specified under the statute.
2. The Petitioner served a late brief on the Respondent, demonstrating a repeated failure to perfect service properly.
3. The Committee erred by according no weight to the testimony by the Respondent's character witnesses.
4. The Committee sustained charges about which the Respondent received no notice.
5. Insufficient evidence appeared in the record to support the charges that the Respondent exploited patients for financial gain.
6. The Committee imposed an excessive penalty.

The Respondent requests that the ARB dismiss the findings against the Respondent, or in the alternative, void the sanctions the Committee imposed and substitute a censure and reprimand.

The Petitioner asks that the ARB affirm the Committee's Determination on the charges, but overturn the Committee's Determination on penalty. The Petitioner asks the ARB to revoke the Respondent's License for abusing the Patients' trust, defrauding the Patients' and ignoring significant medical issues to the Patients' detriment.

Determination

The ARB has considered the record and the parties' briefs. We find that the Petitioner submitted a timely review notice and review brief to the ARB. We find no ground to dismiss due

the late brief that the Petitioner served on the Respondent. We affirm the Committee's Determination on the charges, but we overturn their Determination on the penalty. We vote 5-0 to revoke the Respondent's License.

Review Notice: The review standards in N.Y. Pub. Health Law § 230-c(4)(a) restrict the ARB to considering the hearing record and submitted briefs only. The ARB's Administrative Officer permitted the parties in this case to submit a supplemental record as attachments to their briefs. The supplemental record contained information on whether the Petitioner filed a timely review notice. The Administrative Officer permitted the additional material, because the Appellate Division for the Third Judicial Department has ruled that the ARB may review whether a party has served a timely review notice, Matter of Weg v. DeBuono, 269 A.D.2d 683, 703 N.Y.S.2d 301 (3rd Dept. 2000).

The record indicates that the Committee's Chair signed the Committee's Determination on September 23, 2000. The Bureau of Adjudication mailed that Determination from Troy, NY to the parties on Thursday, September 28, 2000. The Petitioner received the Determination in New York City on Monday, October 2, 2000. The Petitioner mailed a review notice to the ARB and to the Respondent's former counsel on October 10, 2000 and a second notice to the ARB and the Respondent on October 16, 2000.

Under § 230-c(4)(a), a party must serve a review notice on the Board by certified mail within fourteen days from service of the Committee's Determination. Service on the parties becomes effective upon receipt or seven days after mailing, whichever comes first, Matter of Weg v. DeBuono, (supra). As the Petitioner received the Committee's Determination on October 2, 2000, the Petitioner served a timely notice by sending the notice by certified mail on October 16, 2000. The Respondent argued incorrectly that the Petitioner served notice twenty-three days

from service of the Committee's Determination. Apparently, the Respondent mistook the date the Committee Chair signed the Determination, September 23, 2000, as the date for service.

Review Briefs: By letter on November 14, 2000, the ARB's Administrative Officer granted the parties an extension in the time for filing review briefs, at the Petitioner's request, until December 1, 2000. Both parties mailed their briefs to the ARB by that date, but the Petitioner failed to mail their brief to the Respondent until December 12, 2000, apparently due to an office error. The Respondent filed a response to the Petitioner's brief on or about December 20, 2000. Under § 230-c(4)(a):

" All parties have thirty days from service of the notice of review to submit briefs to the board. A notice of review shall be perfected only if a brief is timely submitted. All parties have seven days from the receipt of a submitted brief to file a response. "

The ARB holds that the Petitioner perfected their review notice, by filing a timely brief with the ARB. No prejudice accrued to the Respondent from receiving that brief at a later time, because the Respondent received a full seven days to file a response. The late brief may have delayed the ARB's review over the case, but the Administrative Officer had already granted a delay in the review by extending the time for filing briefs at the Respondent's request. In a letter on this issue on December 14, 2000, the Respondent's counsel argued that the late brief demonstrated a repeated failure by the Petitioner to perfect process service properly. We disagree. We have ruled above that the Petitioner filed a timely review notice.

The Committee's Determination on Credibility: The Respondent's brief argues that the Committee erred by rejecting testimony by the Respondent's character witnesses concerning the Respondent's reputation for honesty. We see no error. The Committee as the finder of fact weighs conflicting evidence in making their findings and the Committee may reject any evidence when they find more compelling contradictory evidence. In finding the Respondent lacked

credibility as a witness, the Committee found the character witnesses' testimony less compelling than the Respondent's admission that he tried to influence Patient B to provide false information and the evidence in the record showing that the Respondent placed false information in the record for Patient A. The Committee also observed the Respondent's testimony, which they called totally unbelievable.

The Determination on the Charges: We also reject the Respondent's contention that the Committee disciplined the Respondent on charges for which the Respondent received no notice. The Petitioner's Statement of Charges gives the Respondent clear notice that the Petitioner charged the Respondent with knowingly ordering unnecessary tests on four patients, with creating or attempting to create false patient records, with failing to follow up abnormal test results and with providing patients incorrect information to induce the patients to return for additional office visits and undergo unnecessary testing. The Committee made their findings and conclusions on those charges and based their Determination on the charges they sustained.

The Respondent also argued that the evidence failed to prove financial gain to the Respondent. We conclude that the Committee's findings and conclusions demonstrated that the Respondent knowingly induced patients to undergo unnecessary tests. The Respondent charged patients and received payment for these unnecessary tests and unnecessary office visits. The record demonstrated that the Respondent engaged in a pattern of such conduct. The evidence provided the Committee the basis to infer that the Respondent ordered the tests solely to receive additional fees, for his financial gain rather than for the Patient's needs.

The Respondent also alleged that the Petitioner failed to prove the charges by preponderant evidence. In sustaining the misconduct specifications, the Committee relied upon testimony by Patients B-D, on expert testimony by the Petitioner's expert Dr. Bonanno and on

the Respondent's own records. The Committee also commented on the Respondent's failure to offer testimony on his behalf from an independent medical expert. The Committee rejected the testimony by the Respondent and by staff persons dependent on the Respondent for their livelihood. In his arguments about preponderance, the Respondent argues in effect that the Committee erred by failing to believe the Respondent and by failing to resolve every conflict in evidence to the Respondent's benefit or in the light most favorable to the Respondent's case. We hold that the evidence the Committee found credible constituted preponderant evidence to prove the misconduct specifications.

Determination on Penalty: The Committee made extensive factual findings on the charges and then went into great detail concerning their determinations on credibility and their conclusions on the misconduct specifications. The Committee provided no discussion or explanation, however, concerning their reasoning for the penalty they imposed. The Committee failed to explain why they felt an ethics course could correct the Respondent's repeated fraudulent conduct or why they concluded that the Respondent possesses the insight into his deficiencies and remorse for his conduct, which would lead the Respondent to alter his practice. The Committee also failed to detail any mitigating factors they found in this case.

The evidence proved that the Respondent violated the trust these Patients placed in him by knowingly misrepresenting information, to induce or intimidate the Patients into undergoing unnecessary tests for the Respondent's financial gain. The Respondent also placed the Patients at risk by failing to follow up abnormal results. The Respondent then attempted to manipulate evidence in the case to effect the case's outcome. We see nothing in the evidence to indicate that the Respondent will change his practice if he receives a chance to return to practice. We conclude that the Respondent presents a danger to repeat this misconduct in the future and place

future patients at risk. The Respondent's conduct evidences his unfitness to practice medicine in New York. We vote to overturn the Committee and to revoke the Respondent's License.

ORDER

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

1. The ARB **HOLDS** that the Petitioner has filed a timely review notice and review brief with the ARB.
2. The ARB **AFFIRMS** the Committee's Determination that the Respondent committed professional misconduct.
3. The ARB **OVERTURNS** the penalty that the Committee imposed.
4. The ARB **REVOKES** 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 Said Dounel, M.D.

Robert M. Briber, an ARB Member concurs in the Determination and
Order in the Matter of Dr. Dounel.
Dated: 1/30/ 2001



Robert M. Briber

In the Matter of Said Dounel, M.D.

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

Dated: 1/22, 2001



Thea Graves Pellman

In the Matter of Said Dounel, M.D.

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

Dated: 1/19, 2001



Winston S. Price, M.D.

In the Matter of Said Dounel, M.D.

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

Dated: February 27, 2003

Therese G. Lynch M.D.

Therese G. Lynch, M.D.

In the Matter of Said Dounel, M.D.

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

Dated: January 25, 2001

Stanley L. Grossman M.D.

Stanley L Grossman, M.D.