



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

July 25, 2002

CORRECTED DECISION

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Cindy M. Fascia, Esq.
NYS Department of Health
ESP-Corning Tower-Room 2509
Albany, New York 12237-0032

Joseph K. Strang, Esq.
Birzon, Quinn & Strang
222 East Main Street
Smithtown, New York 11787

Dieter Heinz Eppel, D.O.
48 Willow Brook Drive
Auburn, New York 13021

RE: In the Matter of Dieter Heinz Eppel, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 02-82) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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:nm
Enclosure

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

In the Matter of

Dieter Heinz Eppel, 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. 02-82

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:**

**Cindy M. Fascia, Esq.
Joseph K. Strang, Esq.**

After a hearing below, a BPMC Committee found that the Respondent committed professional misconduct by engaging in a consensual sexual relationship with a patient during treatment. The Committee voted to place the Respondent's New York medical license (License) on actual suspension for two years and to place the Respondent on probation for three years following the suspension. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's 2002), both parties ask the ARB to nullify or modify that Determination. The Petitioner asks that the ARB make additional factual findings and sustain additional charges. The Respondent asks that the ARB set aside the Committee's Determination and alleges errors by the Committee, the Committee's Administrative Officer and the Petitioner's counsel. After reviewing the record and the review submissions from the parties, the ARB affirms the Committee's Determination that the Respondent engaged in conduct that evidenced moral unfitness, revealed patient information without consent, harassed and/or intimidated a patient and failed to maintain accurate records. We modify the grounds on which the Committee found harassment/intimidation. We also affirm in full the penalty the Committee imposed.

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(3-6), (20), (23) & (31-32)(McKinney Supp. 2002) by committing professional misconduct under the following specifications:

- practicing medicine with negligence on more than one occasion,
- practicing medicine with gross negligence,
- practicing medicine with incompetence on more than one occasion,
- practicing medicine with gross incompetence,
- engaging in conduct that evidences moral unfitness,
- revealing personally identifying information, obtained in a professional capacity, without prior patient consent,
- willfully harassing, abusing or intimidating a patient, physically or verbally, and,
- failing to maintain accurate patient records.

The charges involved the Respondent's relationship with a patient, Patient A, and certain communications between the Respondent and Patient A. A hearing ensued before the Committee which rendered the Determination now on review.

The Committee dismissed all charges alleging negligence and incompetence. The Committee sustained the charge that the Respondent engaged in conduct that evidenced moral unfitness in practice. The Committee found that the Respondent continued to provide prescriptions and medical treatment to Patient A after the Respondent and Patient A entered into a consensual sexual relationship. Also, the Committee sustained the charge that the Respondent harassed, abused or intimidated Patient A. The Committee found that the Respondent informed Patient A that she was on the outside of the Respondent's life and that the Respondent discouraged Patient A from contacting the Respondent's children. In addition, the Committee determined that the Respondent committed professional misconduct by revealing personally identifiable medical information to Patient A, [REDACTED]

██████████ Finally, the Committee found that the Respondent failed to maintain accurate records concerning prescriptions for Prozac and other treatments and medications for Patient A.

The Committee voted to suspend the Respondent's License for five years and to stay the final three years of the suspension. The Committee's Determination required that the Respondent attend one hundred fifty hours of Continuing Medical Education (CME) courses during the two-year actual suspension, including courses on medical ethics and patient boundary violations. The Committee also ordered that the Respondent submit to a psychiatric evaluation and that the Respondent and the Office for Professional Medical conduct (OPMC) receive the results from the evaluation. Following the suspension, the Committee placed the Respondent on probation for three years under the terms that appear at Appendix II to the Committee's Determination.

Review History and Issues

The Committee rendered their Determination on March 19, 2002. This proceeding commenced on March 27, 2002, when the ARB received the Respondent's Notice requesting a Review. The ARB received a Review Notice from the Petitioner on April 3, 2002. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and Response brief and the Petitioner's brief and response brief. The record closed when the ARB received the Respondent's response brief on May 8, 2002.

The Petitioner asks the ARB to affirm the findings that the Committee made and the penalty that the Committee imposed. The Petitioner also asks the ARB to make additional factual findings and to provide additional discussion about the findings the Committee made. The Petitioner also asks that the ARB overturn the Committee and sustain charges that the Respondent's conduct constituted practicing with gross negligence and negligence on more than one occasion.

The Respondent alleges prejudicial error because the Committee's Administrative Officer refused to accept a letter from the Respondent to the Committee after the close of the hearing. The Respondent alleges further that prosecutorial misconduct deprived him of a fair hearing. The Respondent alleges further that the Committee erred in sustaining the moral unfitnes, intimidation, record keeping and revealing information charges. The Respondent also argues that the Committee imposed an overly harsh penalty. The Respondent asks that the ARB set aside the Committee's Determination.

The Petitioner's counsel requested that the ARB's Administrative Officer redact that portion of the Respondent's brief that mentioned the refusal to accept the Respondent's letter following the hearing. The Petitioner's argued that reference to the letter amounted to raising matters with the ARB outside the hearing record. The Respondent's counsel asked the Administrative Officer to redact portions from the Petitioner's brief that asked the Committee to affirm the penalty the Committee imposed. The Respondent's counsel argued that a request to affirm the penalty belonged in a response brief. As the Administrative Officer lacks authorization from the ARB to redact a party's brief, the Administrative Officer provided all the parties' submissions to the ARB for review.

Determination

The ARB ~~has~~ considered the record and the parties' briefs. We reject the Respondent's request to annul the Committee's Determination on procedural grounds and we decline to remand to the Committee to consider the Respondent's letter. We reject the Petitioner's request that we adopt additional findings of fact and that we sustain additional charges. We affirm the Committee's Determination that the Respondent committed professional misconduct by engaging

in conduct that evidenced moral unfitness, intimidating a patient, releasing personally identifying patient information and failing to maintain accurate records. On our own motion, we modify the grounds on which to sustain the intimidation charge. We also affirm in full the penalty that the Committee imposed.

Additional Factual Findings: The ARB rejects the Petitioner's request that we make our own findings of fact to supplement the Hearing Committee Determination. Under N. Y. Pub. Health Law §§ 230(10)(g)(1) & 230c-(a)(4)(McKinney 2002), the Committees make findings of fact and the ARB reviews those findings. The ARB may correct errors by Committees, Matter of Brigham v. DeBuono, 288 A.D.2d 870, N.Y.S.2d (3rd Dept. 1996). The ARB has exercised that authority in the past by amending or deleting some clearly erroneous Committee findings or conclusions. As we noted in a recent case, the ARB has never made a single new finding of fact in any prior case Matter of Dean Cory Mitchell, ARB # 01-120. In this case, the Petitioner requests that the ARB exceed our authority by adopting additional findings of fact. We decline the request.

Prosecutorial Misconduct Allegations: The Respondent's brief at Point V asks that ARB set aside the Committee's Determination, in part, due to misconduct by the Petitioner's counsel. As we noted above, the ARB reviews Determinations by Hearing Committee's. We have held in the past that we lack the authority to invalidate a Committee's Determination on legal procedural grounds. We leave the Respondent to raise that procedural issue with the courts.

Refusal to Receive the Post-Hearing Letter Exhibit: The Respondent's brief at Point VII also alleged legal error by the Committee's Administrative Officer, who refused to present the Committee with a letter that the Respondent submitted following the hearing. The Respondent's review brief offered to submit the letter to the ARB. The Petitioner's counsel

asserted that the Respondent's offer sought to submit material to the ARB from outside the hearing record.

First, as we noted above, we leave the Respondent to ask the courts to annul the Committee's Determination due to the Administrative Officer's refusal to accept the letter. We also refuse to view the letter ourselves, because Pub. Health Law § 230-c(4)(a) limits administrative review to only the record below and the parties' briefs. 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). Under Pub. Health Law § 230-c(4)(b), however, the ARB may remand a case for further proceedings. On our own motion, we considered remanding the case to the Committee so that they could review the letter.

After considering remand, we see no grounds for a remand in this case. First, the Committee's Administrative Officer committed no error in refusing to receive a document following the hearing, when the Petitioner would receive no opportunity to challenge that document, Matter of Ramos v. DeBuono, (supra). In addition, the Respondent offered no explanation about why he made no offer of the information in the letter during the hearing.

Negligence and Gross Negligence Charges: The Petitioner's brief requested that the ARB overturn the Committee and find that the Respondent practiced with negligence on more than one occasion and gross negligence because the consensual relationship with Patient A violated the ~~accepted~~ standard of care. The ARB agrees with the Committee that the Respondent provided medical treatment to Patient A within acceptable standards and that the consensual sexual relationship fell within the realm of moral unfitness rather than negligence.

Moral Unfitness Charge: The Respondent's brief at Point I argues that the Committee erred in finding that the Respondent's conduct evidenced moral unfitness, because the Committee

failed to specify how the Respondent violated Patient A's trust. The Respondent also argued that proof must show patient exploitation in order to establish moral unfitness.

The Respondent's brief failed to cite any authority for the argument that proving moral unfitness requires a showing of exploitation. The Respondent's brief, in discussing penalty, did mention two cases in which the ARB found that a physician's conduct evidenced moral unfitness by engaging in a consensual sexual relationship with a patient, Miller v. Commissioner of Health, 270 A.D.2d 584, 703 N.Y.S.2d 830 (3rd Dept. 2000); Sellkin v. State Board for Professional Medical Conduct, 279 A.D.2d 720, 719 N.Y.S.2d 195 (3rd Dept. 2001). In neither case did the ARB cite patient exploitation as our reason for finding moral unfitness. In Miller, the ARB found that the Dr. Miller's treatment for the patient at issue entailed a fiduciary relationship or a position of trust. We also held that the relationship compromised Dr. Miller's medical judgement. In Sellkin, we found moral unfitness from Dr. Selkin's pattern of engaging in consensual sexual relationships with two patients. In both cases, the Appellate Division for the Third Judicial Department affirmed the ARB Determination.

In this case, the Committee found that the Respondent engaged in ^a [REDACTED] sexual relationship with Patient A, while prescribing medications to the Patient, such as Cefitin, Cipro and Septra. During his testimony, the Respondent agreed that having a sexual relationship with a patient could lead to a loss of objectivity and a potential conflict of interest [Hearing Transcript page 989]. We ~~affirm~~ the Committee's Determination that the Respondent's sexual relationship with Patient A constituted conduct that evidenced moral unfitness.

Revealing Information: The Committee held that the Respondent committed misconduct by revealing to Patient A personally identifiable, medical information, obtained in a professional capacity about two other patients. The Respondent's brief at Point III admits

revealing such information, without patient consent, but argues that the revelation fell short of misconduct because the Respondent made the revelations to benefit the two patients. We find that argument unconvincing. Under Educ. Law § 6530(23), a physician commits misconduct by revealing personally identifiable information about a patient, without patient consent, that the physician obtained in a professional capacity. That statute makes no exception for instances in which a physician intends to benefit a patient. Further, as we will hold below, the ARB infers that the Respondent revealed that information to Patient A as a means to intimidate Patient A, rather than to benefit anyone else. We affirm the Committee's Determination that the Respondent violated Educ. Law § 6530(23).

Intimidating Patient A: As relevant on this review, the Statement of Charges [Petitioner Hearing Exhibit 1] alleged that the Respondent abused or intimidated Patient A by:

- revealing to Patient A personally identifying information about other patients [Factual Allegation A.6], and,
- drawing a relationship diagram for Patient A and telling the Patient that she used to be on the inside of the circle and now she was on the outside [Factual Allegation A.8(g)].

The Committee sustained both Factual Allegations [Committee Findings of Fact (FF) 38-40, 48], but found that the Respondent's conduct amounted to intimidating or abusing a patient only as to FF 48, that related to the relationship diagram.

The Respondent's Brief at Point II contended that the Committee erred in finding that the Respondent's remarks about the relationship diagram constituted misconduct. The Respondent argued that nothing about the relationship diagram constituted intimidation. As we noted above,

the Respondent's brief at Point III argued that revealing the patient information fell short from misconduct, because the Respondent made the revelations to benefit the patients.

A majority of the ARB members agree with the Respondent that the remarks about the relationship diagram and the Respondent's attempt to dissuade Patient A from maintaining contact with the Respondent's grown children failed to amount to intimidation or harassment. We vote 3-2 to overturn the Committee's conclusion that such conduct constituted harassment or intimidation.

In reviewing the Committee's Determination that the Respondent revealed identifiable patient information about other patients to Patient A, the ARB has concluded, however, that such conduct also amounted to misconduct under Educ. Law § 6530(31), as harassing and/or intimidating a patient. We infer that by revealing information to Patient A about other patients, the Respondent demonstrated that he could also reveal such information about Patient A to others without Patient A's consent. We hold that by demonstrating such a willingness to reveal information about patients, the Respondent attempted to intimidate or harass Patient A.

In revealing information about Patient E, [REDACTED], the Respondent asked Patient A to intervene [REDACTED] concerning his drinking. When Patient A stated that it wasn't her place to do this, the Respondent told Patient A that Patient E would die otherwise [FF 39]. We conclude that such statement about Patient E also constituted harassment.

Under our statutory authority, the ARB may substitute our judgement for the Committee's judgement in sustaining or dismissing charges, Matter of Spartalis v. State Bd. for Prof. Med. Cond., 205 A.D.2d 940, 613 N.Y.S.2d 759 (Third Dept. 1994). The ARB may also substitute our judgement on our own motion, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). We elect to exercise that authority here.

We vote 5-0 to overturn the Committee and hold that the Respondent violated Educ. Law §6530(31), by revealing to Patient A information about other patients.

Inaccurate Records: The Committee found that the Respondent failed to maintain accurate medical records for Patient A, concerning prescriptions for Prozac and other treatments and medications. The Respondent's brief at Point IV concedes that he failed to document transactions during the sexual relationship with Patient A, but asserts that those transactions fell outside the physician-patient relationship. The Respondent also argues that the omissions in the record provided no basis for a misconduct finding, as the transactions played no role in the Patient's overall health. The ARB finds both arguments unconvincing.

A physician fails to maintain an accurate medical record when the record fails to convey objectively meaningful medical information concerning the patient treated to subsequent treating physicians, Matter of Bogdan v. N.Y Bd. for Prof. Med. Cond., 195 A.D.2d 86, 606 N.Y.S.2d 381 (3rd Dept. 1993). The Respondent continued a physician-patient relationship with Patient A by continuing to prescribe medication and provide treatment to the Patient. The Respondent's record for the Patient failed to contain objectively meaningful information for subsequent treating physicians, by failing to list the treatments or medication that the Respondent provided. The ARB affirms the Committee's Determination that the Respondent failed to maintain accurate records for Patient A.

Penalty: The Respondent's brief at Point VI argued that the Committee imposed a disproportionately harsh penalty against the Respondent. The Respondent argued that the ARB approved much less severe sanctions, for similar misconduct, against the Respondents in the Miller and Selkin cases. We disagree. In Miller, we noted that a period on actual suspension would constitute an appropriate penalty for a physician who engaged in a sexual relationship

with a patient. We noted that an actual suspension would demonstrate no tolerance for those who engage in morally unfit conduct. In Miller, however, we found mitigating circumstances in the Respondent's genuine remorse over his conduct and we imposed probation without an actual suspension.

In this case, the Committee made no finding that the Respondent showed any remorse for his conduct. The Respondent has admitted his sexual relationship with Patient A, has admitted that he continued to prescribe for Patient A during the relationship, has admitted that he failed to record the prescriptions in the Patient's medical record and has admitted that he revealed information about other patients to Patient A. The Respondent denies, however, that such acts constitute misconduct. The Respondent's refusal to show remorse for such conduct presents the Respondent as at risk to repeat such conduct in the future. We agree with the Committee that an actual period on suspension will demonstrate to the Respondent that his actions constituted misconduct and that such conduct in the future could result in the Respondent's permanent removal from medical practice in New York. We also agree with the Committee that the Respondent should complete an evaluation and continuing education during the suspension and serve on probation following the suspension. The Respondent's brief contained no specific challenge to the probationary terms that the Committee imposed. We vote 5-0 to affirm the Committee's Determination on penalty in full.

ORDER

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

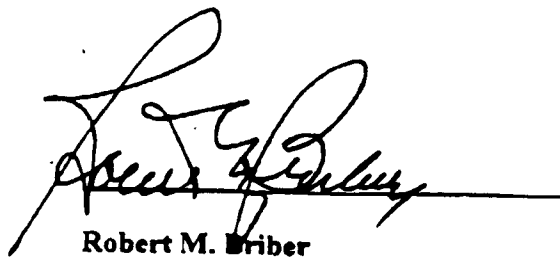
1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct by engaging in conduct that evidenced moral unfitness, revealing patient information without consent, harassing and/or intimidating a patient and failing to maintain accurate patient information.
2. The ARB modifies the grounds on which the Committee sustained the harassment/intimidation charge.
3. The ARB affirms the Committee's Determination to suspend the Respondent for five years, to stay the last three years of the suspension, to require the Respondent to obtain an evaluation and continuing education during the suspension and to place the Respondent on probation for three years following the suspension, under the terms that appear at Appendix II to the Committee's Determination.
4. The ARB declines to make additional factual findings or to sustain additional charges or to remand the case to the Committee for further proceedings.

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 Dieter Heinz Eppel, D.O.

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

Dated: June 15, 2002

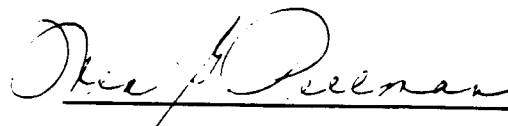


Robert M. Briber

In the Matter of Dieter Heinz Eppel, D.O.

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

Dated: 6-10, 2002

A handwritten signature in cursive script, reading "Thea Graves Pellman", written over a horizontal line.

Thea Graves Pellman

In the Matter of Dieter Heinz Eppel, D.O.

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

Dated: 6/28, 2002



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

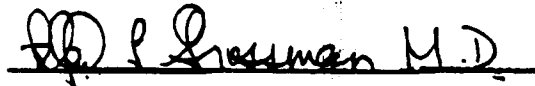
Winston S. Price, M.D.

In the Matter of Dieter Heinz Eppel, D.O.

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

Matter of Dr. Eppel.

Dated: 07/18, 2002

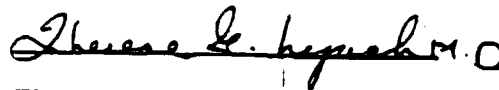


Stanley L. Grossman, M.D.

In the Matter of Dieter Heinz Eppel, D.O.

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

Dated: June 10, 2002



Therese G. Lynch, M.D.