



# 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.  
*Commissioner*

Dennis P. Whalen  
*Executive Deputy Commissioner*  
December 3, 1999

## CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Paul Maher, Esq.  
New York State Department of Health  
Hedley Park Place  
433 River Street – 4<sup>th</sup> Floor  
Albany, New York 12180

Ronald E. Fincher, M.D.  
2787 Margaret Mitchell Drive, NW  
Atlanta, Georgia 30327

### **RE: In the Matter of Ronald E. Fincher, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 99-222) 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.

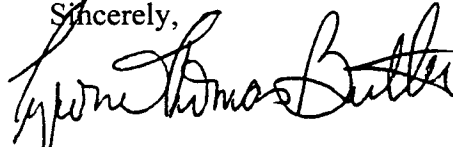
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

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

**In the Matter of**

**Ronald E. Fincher, MD. (Respondent)**

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

**COPY**

**Administrative Review Board (ARB)**

**Determination and Order No. 99-222**

**Before ARB Members Grossman, Lynch, Shapiro, Price and Briber  
Administrative Law Judge James F. Horan drafted the Determination**

**For the Department of Health (Petitioner): Paul R. Maher, Esq.  
For the Respondent: No Submission**

In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 1999), the ARB considers whether to take disciplinary action against a physician with a New York medical license, who practiced while impaired by alcohol in Virginia. After a hearing on this issue below, a BPMC Committee determined that the Respondent's Virginia conduct failed to constitute misconduct in New York. The Petitioner now requests that the ARB overturn that Committee Determination, sustain misconduct charges against the Respondent and revoke or suspend his License to practice in New York. Upon reviewing the record, we hold that the Respondent's practice while impaired on a single occasion in Virginia constituted misconduct under the New York Education Law. We vote to censure and reprimand the Respondent and to place him on probation for one year.

### 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) & 6530(9)(d)(McKinney Supp. 1999) because:

- another state's (Virginia) duly authorized disciplinary agency a.) found the Respondent guilty for improper professional practice [§ 6530(9)(b)] and/or b.) took disciplinary action against the Respondent [§ 6530(9)(d)], for,
- conduct that would have constituted professional misconduct in New York, if the Respondent had committed the conduct here.

The charges arose from a finding by the Virginia Board of Medicine (Virginia Board), that the Respondent attended a patient while impaired by alcohol. The Petitioner charged further the Respondent's conduct in Virginia, if committed in New York, would have amounted to:

- practicing medicine with gross negligence, a misconduct violation under N. Y. Educ. Law § 6530(4)(McKinney Supp.),
- practicing the profession while impaired by alcohol, a misconduct violation under N. Y. Educ. Law § 6530(7)(McKinney Supp.), and,
- engaging in conduct in practice that evidences moral unfitness, a misconduct violation under N. Y. Educ. Law § 6530(20)(McKinney Supp.).

An expedited hearing (Direct Referral Proceeding) ensued pursuant to N.Y. Pub. Health Law §230(10)(p)(McKinney Supp. 1998), before a BPMC Committee. In such a 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 Committee found that the Virginia Board reprimanded the Respondent for misconduct in 1998. The Virginia Board determined that the Respondent had answered a hospital page to assist in an imminent birth in May 1997, following his attendance at a wine tasting festival. After a staff member at the hospital reported smelling alcohol on the Respondent's breath, the Respondent submitted to a blood test. The Virginia Board determined that the blood test showed the Respondent's blood alcohol level at .098.

The Committee accepted the Virginia Board's Determination concerning the .098 blood level, but noted that .10 blood level constitutes the legal level for intoxication in New York under N.Y. Veh. & Traf. § 1192(2) (McKinney Supp. 1999). The Committee also found appropriate the hospital records that the Respondent wrote for the delivery at issue [see Respondent Exhibit A]. The Committee concluded that the conduct for which Virginia disciplined the Respondent would fail to constitute misconduct in New York. The Committee also determined that the Respondent would present no danger to patients in New York. The Committee voted to dismiss the misconduct charges.

### **Review History and Issues**

The Committee rendered their Determination on August 31, 1999. This proceeding commenced on September 9, 1999, when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record and the Petitioner's brief. Following a request by ARB Member Lynch, the ARB's Administrative Officer also provided the ARB with copies of the provisions from N.Y. Veh. & Traf. Law §§ 1192(1), (2) & (3) and 1195(2) (McKinney Supp. 1999), that pertain to driving while intoxicated

or impaired. The Respondent made no submission. The record closed when the ARB received the Petitioner's brief on October 12, 1999.

The Petitioner requests that the ARB modify the Committee's Determination, by finding the Respondent guilty for gross negligence, practicing while impaired and moral unfitness. The Petitioner argues that the Committee considered the New York standard for driving while intoxicated inappropriately. The Petitioner argues further that practicing under the influence demonstrates moral unfitness per se. The Petitioner contends that the Virginia Board resolved the practicing while impaired charge by their finding and that the Committee must accept the Virginia Board's conclusion. The Petitioner requests that the ARB revoke or suspend the Respondent's License to practice in New York.

#### **Determination**

All ARB members have participated in this case and considered the record. We vote to overturn the Committee, to sustain the charges in part, to censure and reprimand the Respondent and to place him on probation for one year, should he ever begin full time medical practice in New York.

Under N. Y. Educ. Law §§ 6530(9)(b) & 6530(9)(d) (McKinney Supp. 1999), the Petitioner must satisfy a two tier test to prove professional misconduct. Under the first tier, the Petitioner must show that another's state's duly authorized disciplinary body found the Respondent guilty for professional misconduct [6530(9)(b)] or disciplined the Respondent for misconduct [6530(9)(d)]. Under the second tier, the Petitioner must show that the conduct that resulted in the guilty finding or disciplinary action would have constituted misconduct under the New York Education Law, if the Respondent had committed the conduct in New York.

The evidence clearly demonstrated that the Virginia Board found the Respondent guilty for and disciplined the Respondent for practicing while impaired. That evidence proved the elements in the test's first tier. In considering whether the Respondent's conduct constituted misconduct in New York, the Virginia Board's finding, that the Respondent attended a patient with a .098 blood alcohol level, certainly bound the Committee. The Committee had the authority, however, to consider whether those facts constituted misconduct in New York, separate from the Virginia Board's determination that the conduct constituted misconduct in Virginia, Matter of Ricci v. Chassin, 220 A.D.2d 828, 632 N.Y.S.2d 303 (Third Dept. 1995). As the Education Law provides no definition for alcohol impairment, we also see no error by the Committee in consulting another New York statute to see how that statute defines impairment. We disagree with the Committee though in the conclusion they reached on whether the facts proved a violation under the New York Education Law for practicing while impaired. The ARB may substitute our judgement for the Committee's in making a determination on the charges or the penalty in a case, Matter of Bogdan v. Med. Conduct Bd. 195 AD 2d 86, 606 NYS 2d 381 (Third Dept. 1993); Matter of Spartalis v. State Bd. for Prof. Med. Conduct, 205 AD 2d 940, 613 NYS 2d 759 (Third Dept. 1994). We elect to exercise that authority in this case.

Provisions in N.Y. Veh. & Traf. Law §§ 1192(1), (2) & (3) (McKinney Supp. 1999) prohibit driving while intoxicated or impaired by alcohol. Under § 1192(2), a person drives while intoxicated per se, if that person operates a motor vehicle with a blood alcohol level that exceeds .10. The Committee based their Determination on the charges on that statute. The charges, however, alleged that the Respondent's conduct in Virginia would have constituted practice while impaired in New York, rather practice while intoxicated. Under N.Y. Veh. & Traf. Law § 1195(2)(b) (McKinney Supp. 1999), evidence that a person operated a motor vehicle with a .05-.07 blood level constitutes relevant evidence that a person operated a motor vehicle while impaired. Under § 1192(c), evidence that a person operated a motor vehicle with a blood alcohol

level from .07-.10 constitutes prima facie evidence that a person operated a motor vehicle while impaired. Prima facie evidence means evidence sufficient to explain a fact, if without rebuttal or contradiction, BLACK'S LAW DICTIONARY, FIFTH EDITION 1979.

Under the New York Vehicle and Traffic Law, the Respondent's .098 blood alcohol level would satisfy the test for impairment for operating a vehicle. We hold that, if the Respondent's blood alcohol level would prove his impairment for driving a car, the level certainly proves his impairment for practicing medicine and specifically would prove his impairment for assisting in a delivery. We sustain the charge that the Respondent's conduct would represent misconduct in New York, pursuant to N. Y. Educ. Law §§ 6530(9)(b), 6530(9)(d) and 6530(7)(McKinney Supp. 1999).

We reject the Petitioner's request that we also sustain the charge that the Respondent's Virginia conduct would also constitute practicing medicine with gross negligence and engaging in conduct that evidenced moral unfitness. The Petitioner's brief offered no explanation as to how the conduct amounted to gross negligence and the Petitioner offered only the conclusive statement that practicing while impaired demonstrates moral unfitness per se.

We also reject the Petitioner's request that we revoke or suspend the Respondent's New York License. The Committee concluded that the Respondent presented no danger to patients in New York. The evidence showed only a single incident in which the Respondent appeared impaired. Virginia also decided that the Respondent posed no danger to patients in that state, by limiting their sanction to a reprimand. Further, at the August 1999 Direct Referral Proceeding below, the Petitioner's attorney requested as a sanction only: a censure and reprimand and some limited monitoring for one year, if the Respondent returned to practice in New York [Hearing Transcript pages 41-42]. The Petitioner's brief fails to explain how the Respondent has become any greater danger from August until now.



We hold that the Respondent demonstrated terrible judgement in consuming alcohol while on call and in responding to a call after having consumed sufficient alcohol to result in a .098 blood alcohol level. We vote to censure and reprimand the Respondent. We also conclude that a minimum period on probation will assure the public's protection and will assure the Respondent has shown no repeat bad judgement. We place the Respondent on probation for one year, under the terms we specify in the Appendix to this Determination. The probation shall commence at the time the Respondent begins medical practice in New York.

**ORDER**

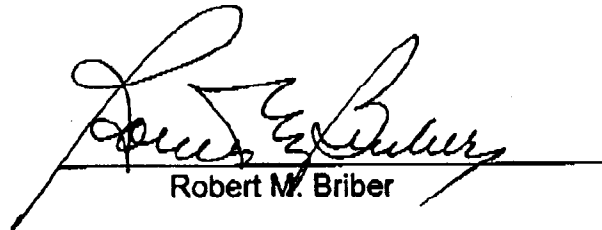
NOW, with this Determination as our basis, the ARB renders the following **ORDER**:

1. The ARB **OVERTURNS** the Committee's Determination and holds that the Respondent committed professional misconduct.
  
2. The ARB **CENSURES and REPRIMANDS** the Respondent and **PLACES** the Respondent on probation for one year, under the Terms that appear in the Appendix to this Determination. The probation shall commence at such time as the Respondent begins medical practice 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 Ronald E. Fincher, M.D.**

Robert M. Briber, an ARB Member, concurs in the Determination and  
Order in the Matter of Dr. Fincher.  
Dated November 29, 1999

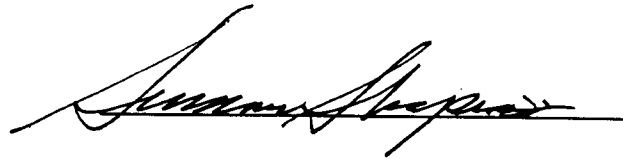


Robert M. Briber

**In the Matter of Ronald E. Fincher, M.D.**

**Sumner Shapiro**, an ARB Member concurs in the Determination and Order in the Matter of Dr. Fincher.

Dated: November 12, 1999

A handwritten signature in cursive script, appearing to read "Sumner Shapiro", written over a horizontal line.

**Sumner Shapiro**

**In the Matter of Ronald E. Fincher, M.D.**

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

Dated: 11/12, 1999

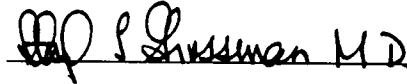
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**Winston S. Price, M.D.**

**In the Matter of Ronald E. Fincher, M.D.**

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

Dated: November 12, 1999

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Stanley L Grossman, M.D.

**In the Matter of Ronald E. Fincher, M.D.**

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

Dated: November 11, 1999

Therese G Lynch M.D.

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

# APPENDIX



## Terms of Probation

1. Respondent shall conduct himself in all ways in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his profession.
2. Respondent shall submit written notification to the New York State Department of Health, addressed to the Director, Office of Professional Medical Conduct (OPMC), 443 River Street-Fourth Floor, Troy, New York 12237; said notice is to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.
3. Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of Respondent's compliance with the terms of this Order. Respondent shall personally meet with a person designated by the Director of OPMC as requested by the Director.
4. Any civil penalty not paid by the date prescribed herein shall be subject to all provisions of law relating to debt collection by New York State. This includes but is not limited to the imposition of interest, late payment charges and collection fees; referral to the New York State Department of Taxation and Finance for collection; and non-renewal of permits or licenses [Tax Law section 171(27)]; State Finance Law section 18; CPLR section 5001; Executive Law section 32].

5. The period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director again prior to any change in that status. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon Respondent's return to practice in New York State.

6. Respondent's professional performance may be reviewed by the Director of OPMC. This review may include, but shall not be limited to, a review of office records, patient records and/or hospital charts, interviews with or periodic visits with Respondent and his/her staff at practice locations or OPMC offices.

7. Respondent shall maintain legible and complete medical records, which accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations regarding controlled substances.

8. Respondent shall comply with all terms, conditions, restrictions, limitations and penalties to which he is subject pursuant to the Order and shall assume and bear all costs related to compliance. Upon receipt of evidence of noncompliance with, or any violation of these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding and/or any such other proceeding against Respondent as may be authorized pursuant to the law.