



STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Barbara A. DeBuono, M.D., M.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

June 8, 1998

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Nasser Ghaed, M.D.
4605 South Chelsea Lane
Bethesda, MD 20814

William Lynch, Esq.
NYS Department of Health
Corning Tower Room 2509
Empire State Plaza
Albany, New York 12237

James M. Conboy, Esq.
Eugene Daniel Napierski, Esq.
Carter, Conboy, Case, Blackmore,
Napierski & Maloney, P.C.
20 Corporate Woods Boulevard
Albany, New York 12211-2350

RE: In the Matter of Nasser Ghaed, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No.98-52) 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.

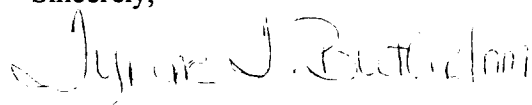
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

COPY

**In The Matter Of
Nasser Ghaed, M.D. (Respondent)**

**Administrative Review
Board (ARB)
Determination and
Order 98 - 52**

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

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

**For the Respondent: James M. Conboy & Eugene Daniel Napiersky, Esqs.
For the Petitioner: William Lynch, Esq.**

The issue in this review centers on the appropriate sanction to impose against the Respondent's New York Medical License (License), following his Maryland criminal conviction for assaulting a spouse with intent to murder. After a hearing into the charge that the Respondent's Maryland conviction constituted professional misconduct in New York, a BPMC Committee sustained the charge, suspended the Respondent's License for three years, stayed the suspension and placed the Respondent on three years probation. The probation terms required that the Respondent remain under and comply with psychiatric or psychological treatment and the Committee's Order included a provision for removing the stay on the suspension immediately, if evidence indicates the Respondent has violated probation. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney Supp. 1998), the Petitioner asks the ARB to overturn the Committee's Determination and to revoke or suspend the Respondent's License, due to the Maryland crime's egregious nature. After considering the hearing record and the parties' briefs, the ARB sustains the Committee's Determination, except that we modify the provision in the Committee's Order, that could remove the stay on the suspension automatically. We find that provision violates the procedures under N. Y. Pub. Health Law § 230(19)(McKinney Supp. 1998), that guarantee a Respondent a hearing to prove probation violation charges.

COMMITTEE DETERMINATION ON CHARGES

The Petitioner filed charges with BPMC alleging that the Respondent violated N. Y. Educ. Law § 6530(9)(a)(iii) (McKinney Supp. 1998), that defines physician professional misconduct to include an act :

- that a physician commits in another state,
- that results in a criminal conviction in that state, and,
- that would constitute a crime under New York Law, if the physician committed the act here.

The charges alleged that the Respondent entered a guilty plea in Montgomery County Criminal Circuit Court, on March 26, 1997, to assaulting a spouse with intent to murder, a Maryland felony. The Petitioner alleged further that the Respondent's criminal conduct, if committed in New York, would constitute reckless endangerment in the first degree, a class D felony. The Petitioner brought the charges pursuant to N.Y. Pub. Health Law § 230(10)(p)(McKinney Supp. 1998), that establishes an expedited hearing for charges arising from a prior criminal conviction in New York or another jurisdiction. The statute limits the expedited proceeding to determining the nature and severity for the penalty to impose against the licensee for the criminal act, In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The expedited proceeding ensued before the BPMC Committee who rendered the Determination that the Board now reviews. The Committee found that the Respondent entered the guilty plea in Maryland that resulted in a suspended ten year prison sentence and five years probation, with terms requiring the Respondent to continue in psychiatric or psychological treatment. After determining that the Maryland acts would constitute a crime under New York Law, the Committee sustained the misconduct charge, suspended the Respondent's License for three years, stayed the suspension and placed the Respondent on probation for three years, under the terms the Committee enumerated in Appendix II to their Determination. Paragraph 3 in the Committee's Order [Committee Determination page 9] provided authority for the Director of the Office for Professional Medical Conduct (Director) to lift the stay on the suspension immediately, if the Director received evidence that the Respondent had failed to comply with the probation terms or the terms in the Committee's Order.

The Committee found the Respondent's criminal conduct serious, but noted several mitigating factors in the case, such as:

- the Trial Judge's determination to spare the Respondent from imprisonment;

- the Trial Judge's finding that the Respondent posed no threat or danger to others;
- the Trial Prosecutor and Probation Department's recommendation's against jail time,
- the Respondent's distinguished military service to the United States, including service in Operation Desert Storm;
- the Respondent's treatment for depression and for Gulf War Syndrome;
- the severe stress the Respondent suffered at the time he committed the crime, from his marriage's break-up and family members' deaths; and,
- no evidence in the record to challenge the Respondent's current moral, physical and mental capacity to practice medicine.

The Committee concluded that the Respondent has taught and practiced medicine competently at all times before and since his criminal conviction and concluded that a severe penalty, such as revocation, would serve no legitimate state interest, other than as additional punishment. The Committee rendered their Determination on March 19, 1998.

REVIEW HISTORY AND ISSUES

The Petitioner commenced this proceeding on March 31, 1998 when the ARB received the Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and reply brief and the Petitioner's brief and reply brief. The record closed when the ARB received the Respondent's reply brief on May 7, 1998.

Petitioner's Issues: The Petitioner asks that the ARB modify the Committee's penalty and revoke the Respondent's License, or in the alternative, that the ARB suspend the Respondent's License. The Petitioner's brief raised four points:

- A. The Committee's Penalty provided an insufficient sanction for Assault With Intent To Murder.
- B. The Committee inferred circumstances surrounding the Respondent's guilty plea improperly.
- C. The Committee placed undue weight on the recommendation that the Respondent

serve no jail time.

D. The Respondent failed to offer sufficient proof that he can resume medical practice.

Respondent's Issues: The Respondent argues that revocation constitutes the appropriate penalty for a physician unfit to practice medicine, when no mitigating circumstances appear in the record, citing Matter of Gonzalez v. N.Y.S. Dept. of Health, 232 A.D.2d 886, 648 N.Y.S.2d 827 (Third Dept. 1996); Matter of Kite v. DeBuono, 233 A.D.2d 783, 650 N.Y.S.2d 384 (Third Dept. 1996); Matter of Lombardo v. DeBuono, 233 A.D.2d 789, 650 N.Y.S.2d 423 (Third Dept. 1996). The Respondent notes that his case involved no issues with patient care, that the criminal conduct involved mitigating factors and that ample evidence in the record proves the Respondent's mental fitness and high qualifications to practice medicine.

In reply to the Petitioner's brief, the Respondent argues that:

1. The evidence supports the Committee's Determination.
2. The Committee may consider mitigating evidence.
3. The Petitioner bore the burden to establish any charges by preponderant evidence.
4. The Committee's Determination sets no standard for conduct by the medical profession.

The Respondent argues that the Respondent's criminal conduct resulted from a severe depressive disorder, that the Committee's probation terms establish proper controls to assure monitoring for the Respondent's future mental condition and that no evidence calls into question the Respondent's current mental and physical ability to practice medicine.

REVIEW BOARD DETERMINATION

The ARB has considered the record and the parties' briefs. All ARB members participated in this case. We sustain the Committee's Determination on the charges. Neither party disputed those findings. We sustain the Committee's penalty, but we modify paragraph 3 in their Order.

The evidence demonstrates that the Respondent committed the crime in Maryland while suffering from severe depression. We agree with the Maryland Court and the Committee that the

evidence demonstrates that the Respondent constitutes no danger to his patients, as long as the Respondent complies with the probation terms that the Court and the Committee imposed. No evidence in the record indicated that the Respondent's mental condition had ever resulted in or threatened harm to any patient in New York. We agree with the Petitioner and the Committee that the Respondent's actions constituted a serious crime. The ARB has rejected License revocation previously, however, as a penalty against licensees, who committed serious crimes unrelated to medical practice, when mitigating evidence in the record demonstrated that the licensees constituted no ongoing threat to patients (Matter of Pirodsky ARB # 92-59B, Matter of Howard ARB # 97-246). In addition to demonstrating that this Respondent poses no threat to his patients, if he remains in treatment, the mitigating evidence in this record also demonstrates that the Respondent has provided distinguished service as a physician.

The ARB amends the Committee's Determination, to strike the final sentence in paragraph 3, in the Committee's Order. That sentence would allow the OPMC Director to immediately remove the stay the Committee placed against the License suspension, if the Director received evidence that the Respondent has violated the Committee's probation terms or terms from the Committee's Order. Although neither party challenged that provision, on our own motion, the ARB may substitute our judgement for the Committee's, in deciding upon an appropriate penalty, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). The ARB exercises that authority here, because we conclude that the sentence in question would provide the Director with authority that would violate provisions under N.Y. Pub. Health Law §230(19) (McKinney Supp. 1998), that require probation violation hearings. That statute provides that, at the time the Director determines that a licensee has violated probation, the licensee has the right to a hearing to determine whether a violation occurred and to impose an appropriate penalty, if the evidence indicates that a violation occurred. The ARB concludes that the sentence from the Committee's Order now at issue, would violate N.Y. Pub. Health Law § 230(19)(McKinney Supp. 1998), by allowing the Director to impose a penalty against the Respondent, without a hearing to determine whether the Respondent actually committed any violation. We vote 5-0, therefore, to strike the sentence at issue from the Committee's Order. We find the remaining provisions from the probation terms and the Committee's Order appropriate.

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 to suspend the Respondent's License for three years, to stay the suspension and to place the Respondent on probation, under the terms that appear in the Appendix II to the Committee's Determination.

3. The ARB **MODIFIES** the Committee's Determination, by striking the second sentence from Paragraph 3 in the Committee's Order, that appears at Page 9 in the Committee's Determination.

Robert M. Briber

Sumner Shapiro

Winston S. Price, M.D.

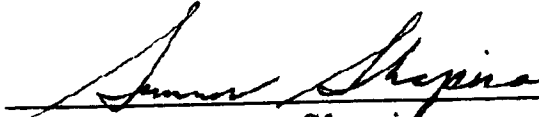
Edward C. Sinnott, M.D.

William A. Stewart, M.D.

In The Matter Of Nasser Ghaed, 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. Ghaed.

DATED: June 4, 1998



Sumner Shapiro

In The Matter Of Nasser Ghaed, M.D.

Winston S. Price, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Ghaed.

Dated: 6/1, 1998

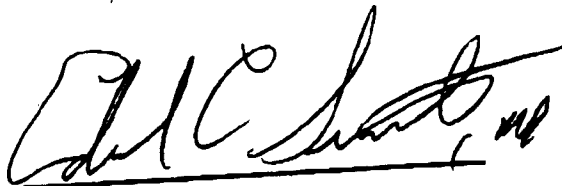


Winston S. Price, M.D.

In The Matter Of Nasser Ghaed, M.D.

Edward C. Sinnott, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Ghaed.

Dated : June 2, 1998

A handwritten signature in black ink, appearing to read 'Ed C. Sinnott, MD', written over a horizontal line.

Edward C. Sinnott, M.D.

In The Matter Of Nasser Ghaed, M.D.

William A. Stewart, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Ghaed.

Dated : 3 June, 1998

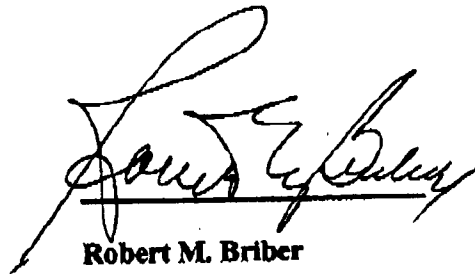


William A. Stewart, M.D.

In The Matter Of Nasser Ghaed, 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. Ghaed.

Dated : 6/13 , 1998



Robert M. Briber