



STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

PUBLIC

Dennis P. Whalen
Executive Deputy Commissioner

April 28, 1999

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Anthony Benigno, Esq.
Bureau of Professional Medical Conduct
NYS Department of Health
Corning Tower – Room 2509
Empire State Plaza
Albany, NY 12237

Musheer Hussain, M.D.
4789 South Holley Road
Holley, NY 14470

Michael Harren, Esq.
Chamberlain, D'Amanda, Oppenheimer & Greenfield
1600 Crossroads Building
Two State Street
Rochester, NY 14614

RE: In the Matter of Musheer Hussain, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 99-18) 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.

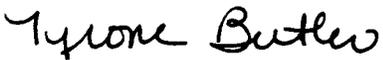
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

COPY

In the Matter of

Musheer Hussain, MD. (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. 99-18

Before ARB Members Grossman, Shapiro, Price and Briber¹
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner):
For the Respondent:

Anthony M. Benigno, Esq.
Michael Harren, Esq.

After a hearing below, a BPMC Committee found the Respondent violated probation and ordered that the Respondent serve an additional two years on probation as a penalty. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 1999), both the Respondent and Petitioner ask that the ARB modify that Committee's Determination. The Respondent asks the ARB to overturn the Committee in full, because the Respondent lacked the intent to violate probation. The Petitioner asks that we increase the penalty by suspending the Respondent's License for two years. After considering the record and the parties' submissions, we sustain the Committee's Determination in full. We hold that proving a probation violation requires only a showing that a Respondent committed the violation, rather than a showing that the Respondent committed the violation intentionally. Further, we hold that a Committee may, however, consider intent as a factor in assessing a penalty and may consider a Respondent's good faith, but unsuccessful attempts to satisfy probation, as a mitigating factor.

¹ ARB Member Therese Lynch, M.D. recused herself from participating in this case, because she served on the investigative Committee that voted this case to hearing, prior to the time she joined the ARB. The ARB proceeded to review the case with a four member quorum, see Matter of Wolkoff v. Chassin, 89 N.Y.2d 250(1996).

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(29)(McKinney Supp. 1999) by violating a probation term. After a hearing pursuant to N. Y. Pub. Health Law § 230 (McKinney Supp. 1999), the Committee who conducted the hearing rendered a Determination sustaining the charges.

The Committee found that the Respondent entered into a Consent Order with BPMC on January 15, 1997. In the Consent Order, the Respondent admitted to committing negligence on more than one occasion. The penalty under the Consent Order included twenty-four months on probation, with a condition requiring that a licensed physician monitor the Respondent's practice at each practice location. The terms required the Respondent to submit the practice monitor's name for approval by the Office for Professional Medical Conduct (OPMC) by February 19, 1997. The Committee determined that the Respondent submitted the name in a timely fashion and that OPMC approved the monitor on March 12, 1997.

The Respondent's practice included his employment at the Olean Correctional Facility (OCF). Subsequent to the monitor's approval, the Respondent requested that the New York State Department of Correctional Services (DOCS) allow on-site monitoring and DOCS refused. In May, 1997, OPMC informed the Respondent that he was violating probation through his continued employment at OCF. The Respondent requested a modification in the probation later that month, which OPMC denied in January 1998. At that time, OPMC again informed the Respondent that he violated probation by continuing his employment at OCF. The Respondent requested that DOCS allow his practice monitor access to OCF patient records, that DOCS allow

the OCF Medical Director to serve as practice monitor and that OCF grant the Respondent a leave of absence. Either DOCS or OCF rejected each request. The Respondent also filed a union grievance with DOCS.

The Committee concluded that the terms for the Respondent's probation included a requirement that the Respondent practice with a monitor and that the Respondent had practiced at OCF without a monitor from the probation period's inception until he resigned his employment at OCF in October, 1998. The Committee, therefore, sustained the charge that the Respondent violated probation as to his practice at OCF only. The Committee concluded further that the Respondent made a good faith effort to comply with the probation, by having the approved physician monitor his practice at OCF, by attempting to obtain a modification in the probation terms and by requesting a leave of absence from OCF. The Committee determined, however, that at some point the Respondent gained unequivocal knowledge that his continued practice at OCF constituted a probation violation, yet he continued practicing at OCF.

The Committee voted to place the Respondent on two years additional probation from the date the Committee's Order became effective. The Committee indicated that they viewed the Respondent's probation violation as non-egregious and non-contemptuous, but as a violation nonetheless.

Review History and Issues

The Committee rendered their Determination on January 25, 1999. This proceeding commenced on February 8, 1999 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 brief and response brief. The record closed when the ARB received the response brief on March 17, 1999.

The Respondent's brief raised two issues for review: 1.) the Committee's Determination failed to support a finding that the Respondent willfully violated probation, a finding necessary to substantiate the charge, and, 2.) even assuming a technical probation violation, the Committee imposed an inappropriate penalty. The Respondent asked that the ARB either dismiss the charge entirely or reduce the penalty to something less severe than probation and monitoring.

In response to the Respondent, the Petitioner argues that no need exists under the relevant statute to prove intent in order to prove a probation violation and that the Respondent's brief contained information from beyond the record below. Contrary to the Respondent's contention that the Committee imposed an overly harsh penalty, the Petitioner argues that the ARB should increase the penalty to include an actual period on suspension. The Petitioner contends that the Respondent has already proved he makes a poor candidate for probation and argues that the Respondent's refusal to comply with prior probation terms compromises BPMC's ability to protect the public.

Determination

The ARB who members participated in this case have considered the record below and the parties' briefs. We affirm the Committee Determination that the Respondent violated probation and we affirm the Committee Determination to place the Respondent on probation for two additional years.

We disagree with the Respondent's contention that the Petitioner must prove intent or willful misconduct by the Respondent in order to prove a probation violation. The definitions for

physician professional conduct under N. Y. Educ. Law § 6530(McKinney Supp.) include the following sub-section:

"29. Violating any term of probation or condition or limitation imposed on the licensee pursuant to section two hundred thirty of the public health law;"

Nothing in that sub-section referring to probation violations indicates that proving a violation requires a showing that the licensee acted willfully or intentionally. Among the other forty six sub-sections defining misconduct, four include words such as willfully or knowingly in the definitions for those misconduct categories, see N. Y. Educ. Law §§ 6530(13), 6530(21), 6530(31) & 6530(42)(McKinney Supp.). We hold that proving a probation violation requires no showing that the Respondent acted intentionally or willfully.

The Committee determined that the Respondent violated probation by continuing to practice at OCF, without a monitor, even after OPMC advised the Respondent that his continued practice at OCF constituted a probation violation. We affirm the Committee's Determination that such conduct constituted professional misconduct. The Respondent entered a Consent Agreement in which he agreed to practice with a monitor as a condition for settling the disciplinary action against him. The Respondent failed to abide by those conditions.

We affirm the Committee's Determination placing the Respondent on probation for two more years as an appropriate penalty for the Respondent's misconduct. The Respondent's work at OCF constituted his main practice and BPMC determined that the Respondent should practice with a monitor for two years to assure that he could practice according to accepted standards, following the misconduct that the Respondent admitted. The Respondent has yet to satisfy the conditions requiring two years practice under a monitor's supervision. We hold that the Committee acted appropriately by requiring the Respondent to comply with the probation terms to which he agreed originally.

We reject the Petitioner's argument that the ARB must impose a more severe sanction to punish the Respondent for the violation. We agree with the Committee that the problem with DOCS and the Respondent's attempts to comply with probation provided mitigating circumstances in this case. We also agree that the violation in no way resulted from any contempt on the Respondent's part.

The ARB considered imposing a fine in addition to the additional term on probation. Two ARB Members voted to impose a \$500.00 fine and two ARB Members voted against imposing any fine. Under N. Y. Pub. Health Law § 230-c (4)(c)(McKinney Supp. 1999), at least three ARB Members must concur for the ARB to render a Determination. The tie vote means, therefore, that the vote to impose a fine failed.

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 violated probation.
2. The ARB **AFFIRMS** the Committee's Determination placing the Respondent on probation for an additional two years.

**Robert M. Briber
Sumner Shapiro
Winston S. Price, M.D.
Stanley L. Grossman, M.D.**

In the Matter of Musheer Hussain, M.D.

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

Dated: 4/23, 1999

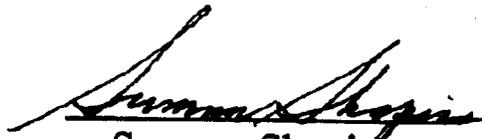
A handwritten signature in black ink, appearing to read 'W. S. Price', is written over a horizontal line.

Winston S. Price, M.D.

In the Matter of Musheer Hussain, M.D.

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

Dated: April 7, 1999


Sumner Shapiro

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

In the Matter of

Musheer Hussain, MD. (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. 99-18

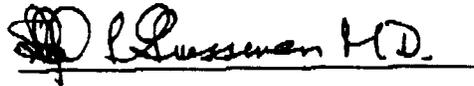
Before ARB Members Grossman, Shapiro, Price and Briber

In the Matter of Musheer Hussain, M.D.

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

Matter of Dr. Hussain.

Dated: April 6, 1999



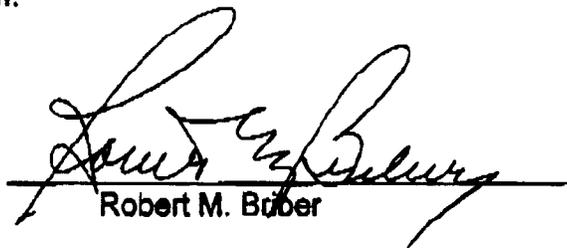
Stanley L. Grossman, M.D.

¹ ARB Member Therese Lynch, M.D. recused herself from participating in this case, because she served on the investigative Committee that voted this case to hearing, prior to the time she joined the ARB. The ARB proceeded to review the case with a four member quorum, see Matter of Wolkoff v. Chassin, 89 N.Y.2d 250(1996).

In the Matter of Musheer Hussain, M.D.

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

Dated April 16, 1999


Robert M. Briber