



# 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*

December 31, 1999

Dennis P. Whalen  
*Executive Deputy Commissioner*

## **CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Mr. Joseph Cahill, Esq.  
New York State Department of Health  
Corning Tower – Room 2509  
Empire State Plaza  
Albany, New York 12237-0032

Naveed Noor-Khan, M.D.  
3975 North Everett Avenue  
Bemus Point, New York 14712

Michael Lennon, Esq.  
The Cosgrove Firm  
1000 Main-Seneca Building  
237 Main Street  
Buffalo, New York 14203

**RE: In the Matter of Naveed Noor-Khan, M.D.**

Dear

Enclosed please find the Determination and Order (No. 99-235) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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**

**Naveed Noor-Khan, 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. 99-235**

**COPY**

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

**For the Department of Health (Petitioner): Joseph H. Cahill, Esq.  
For the Respondent: Edward C. Cosgrove and Micheal J. Lennon, Esqs.**

In this proceeding, we determine the penalty to assess against the Respondent for his inappropriate physical contact upon and his inappropriate comments to three female patients. After a hearing below, a BPMC Committee voted to suspend the Respondent's License to practice medicine in New York (License) for three years and to order the Respondent to submit to an evaluation for possible mental impairment. Both parties subsequently challenged the Committee's Determination on penalty, pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1999). The Petitioner asks the ARB to overturn the Committee by revoking the Respondents License, while the Respondent asks that the ARB stay any suspension and place the Respondent on probation. After reviewing the record and the submissions by the parties, the ARB votes 4-1 to overturn the Committee and to revoke the Respondent's License. We hold that the Respondent violated the trust that his three patients placed in him and abused those patients for his own gratification. The Respondent thus proved his unfitness to practice medicine in New York.

### Committee Determination on the Charges

This proceeding began when the Commissioner of Health issued an Order suspending the Respondent's License summarily, pursuant to N. Y. Pub. Health Law § 230(12) (McKinney Supp. 1999), upon the Commissioner's Determination that the Respondent's continued practice constituted an imminent danger to the public health of the people of New York (Summary Suspension). A BPMC Committee then conducted a hearing to determine whether to recommend that the Commissioner continue the Summary Suspension in effect or modify or vacate the Summary Suspension, pending a final Determination on charges that the Respondent committed professional misconduct. That BPMC Committee also conducted a hearing into charges that the Respondent violated N. Y. Educ. Law §§ 6530(2), 6530(20) & 6530(31)(McKinney Supp. 1999) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- engaging in conduct that evidences moral unfitness, and,
- physically or verbally harassing, abusing or intimidating a patient.

The charges concerned the Respondent's conduct toward three patients: A through C. The record refers to the Patients by initials to protect privacy. The Committee considered those charges pursuant to N. Y. Pub. Health Law §230(10)(e)(McKinney Supp. 1999) and rendered an interim order on the Summary Suspension and a final Determination on the charges. The ARB will review the final Determination on the charges only, as we lack the authority to review interim orders on Summary Suspensions [see N. Y. Pub. Health Law § 230-c (1)(McKinney Supp. 1999)].

The Committee determined that the Respondent engaged in inappropriate physical contact and made inappropriate remarks to all three Patients, during physical examinations. They found that, while examining Patient A, on September 3, 1998, the Respondent:

- removed the Patient's bra without obtaining her consent,
- fondled the Patient's breasts,
- told the Patient to relax and think about sex if she wanted to, and,
- asked the Patient repeatedly what she was thinking about.

They found further that during examinations on Patient B, on August 18, 1997 and October 21, 1997, the Respondent:

- ordered the Patient to undress while the Respondent remained in the examining room on both occasions,
- pushed his body against the Patient's back, with the Patient disrobed, and felt the Patient's hips and lower back,
- massaged the Patient's unclothed back and buttocks, to the extent that the back and buttocks jiggled,
- asked the Patient whether her husband ever massaged her, and asked the Patient whether the massage made her feel any better.

They also found that, following the examinations on Patient B, the Respondent's employer placed a memo in the Respondent's file warning him that a female chaperon must be present for all pelvic or breast examinations on female patients and that the Respondent must offer a gown to all female patients. Finally, the Committee found that, during examinations on Patient C on April 8 and April 29, 1998, the Respondent:

- removed the Patient's bra without permission,

- placed his hands on the Patient's breasts,
- asked the Patient about her sexual activity, and,
- remained in the room while the Patient dressed.

The Committee stated that the Respondent made practically no challenge to any factual issue in the case.

The Committee concluded that the Respondent acted inappropriately and practiced below accepted medical standards by remaining in the examining room while all three Patients dressed and/or disrobed. As to the treatment for Patient B, the Committee concluded that no justifiable reason existed to press his body against the Patient's back or to massage the Patient's back and buttocks to the extent that the back and buttocks jiggled. As to the treatment for Patient C, the Committee concluded that the Respondent acted inappropriately and practiced below accepted standards by:

- performing the April 8, 1998 breast exam on Patient C from behind,
- leaning into the front of the Patient's body, and,
- examining the breasts with one hand on each breast simultaneously.

As to the breast exams on Patient C on April 8 and April 29, 1998, the Committee concluded that no legitimate medical reason existed for the exams because the Patient had received a prior recent exam that revealed no abnormalities. As to the examination on Patient A, the Committee concluded that the Respondent performed an inappropriate examination, that fell below accepted medical standards, by placing one hand on each breast and fondling rather than palpating the breasts. The Committee also found that the Petitioner's expert Ian Frankfort, M.D. testified that the Respondent committed boundary violations, acted for his own gratification and violated his fiduciary obligation to the Patients [Committee Finding of Fact 86]. The Committee found that

the Respondent's expert Peter J. Fagan, Ph.D., testified that the Respondent derived satisfaction from his conduct toward the Patients from "being in control" [Finding of Fact 93]. The Committee also found that the Respondent stated to his treating psychiatrist, Brian S. Joseph, M.D., concerning the Patients, that "I victimize them" [Finding of Fact 103]. The Committee sustained charges that the Respondent harassed Patients A, B and C and the Committee sustained charges that the Respondent's conduct toward the Patients evidenced moral unfitness. The Committee dismissed charges that the Respondent's conduct constituted fraud in practicing medicine.

The Committee voted to suspend the Respondent's License for three years and to order the Respondent to undergo an evaluation for possible mental impairment, pursuant to N. Y. Pub. Health Law § 230(7)(McKinney Supp. 1999). The Committee also provided for an ancillary proceeding following the evaluation, at which the parties could comment on the evaluation. The Committee would then consider whether the suspension would provide the appropriate penalty to protect the public or, if not, consider what penalty would protect the public. In ordering that the Respondent undergo the evaluation, the Committee rejected opinions by Drs. Fagan and Joseph that the Respondent suffered from no mental disorder. The Committee found those opinions tainted, noted that Dr. Fagan spent less than one hour with the Respondent and noted that Dr. Joseph lacked experience with patients similar to the Respondent. In imposing the suspension, the Committee found several mitigating factors in the record, such as the stressful practice situation in which the Respondent found himself.

Although the Committee rejected the testimony by Drs. Fagan and Joseph in assessing the Respondent's possible impairment, the Committee accepted the opinions by those experts in assessing whether the Respondent posed an imminent danger to the public. The Committee voted

to overturn the Summary Suspension under N. Y. Pub. Health Law § 230(12)(McKinney Supp. 1999) on July 9, 1999 and to allow the Respondent to return to practice, with a chaperone, until the Committee rendered their Determination on the charges.

### **Review History and Issues**

The Committee rendered their Determination on the charges on September 13, 1999. This proceeding commenced on September 27, 1999, when the ARB received the Petitioner's Notice requesting a Review. 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 Petitioner response brief on November 9, 1999.

The Petitioner contends that the Committee imposed an inappropriate penalty for the Respondent's misconduct. The Petitioner states that the Respondent committed abuse against three separate patients in five separate incidents and that the Respondent continued his conduct despite warnings that he was acting improperly. The Petitioner asks that the ARB reject the stress in the Respondent's life as a mitigating factor in assessing penalty. The Respondent also asks that the ARB consider the following aggravating factors in this case:

- the abuse took place during purported medical exams,
- the Respondent persisted in the conduct over a one-year period, with multiple patients, and
- the Respondent abused a poor and under served population.



In their brief, the Petitioner cites to Determinations in which the ARB revoked other physician's licenses for abusing patients sexually. The Petitioner argues that this case presents similar circumstances and asks the ARB to revoke the Respondent's License.

The Respondent contends that the Committee acted inappropriately by suspending the Respondent's License for three years and by convening an ancillary proceeding to consider possible impairment pursuant to N. Y. Pub. Health Law § 230(7)(McKinney Supp. 1999). The Respondent argues that the Committee lacks the authority to order an ancillary proceeding and the Respondent argues that the Committee's Determination that the Respondent may suffer an impairment contradicts the Committee's Determination in their interim order on the Summary Suspension, that found that the Respondent presented no danger. The Respondent also argued that the Committee substituted their judgement for the Respondent's expert witnesses. The Respondent asks the ARB to overturn the Committee's Determination, suspend the Respondent's License for one year, stay the suspension and place the Respondent on probation, with continual monitoring.

### **Determination**

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination to sustain the moral unfitness and the harassment charges. We also affirm the Committee's Determination to dismiss the fraud charges. We vote to overturn the Committee's Determination to order an evaluation and to conduct an ancillary proceeding following the evaluation. We vote 4-1 to overrule the Committee's Determination suspending the Respondent and, by that same margin, we vote to revoke the Respondent's License.

**The Evaluation:** Under N. Y. Pub. Health Law § 230(7)(McKinney Supp. 1999):

*"A committee on professional conduct, on notice to the licensee and after affording the licensee, the office of professional medical conduct, and their attorneys an opportunity to be heard, shall have the authority to direct a licensee to submit to a medical or psychiatric examination when the committee has reason to believe the licensee may be impaired by alcohol, drugs, physical disability or mental disability. The committee, with the advice of the licensee and the office of professional medical conduct, shall designate the physician who will conduct the examination. The results of the examination shall be provided by the examining physician to the committee, the licensee, and the office of professional medical conduct. The licensee may also obtain a physician to conduct an examination the results of which shall be provided to the committee and the office of professional medical conduct."*

The ARB has ruled previously that an evaluation pursuant to that statute should occur intra-hearing, so that the Committee may consider the results from the evaluation in determining a penalty, see Matter of Duhamel, ARB 99-21. This Committee erred by ordering the evaluation as part of an ancillary proceeding, following an initial Determination to suspend the Respondent's License.

The ARB may remand a case to a Committee for further proceedings pursuant to N. Y. Pub. Health Law § 230-c (4)(b)(McKinney Supp. 1999). We could remand this case to reconvene the hearing below, for an intra-hearing evaluation prior to the Committee's final Determination on a penalty. We vote 4-1 against remanding, however, because we conclude that the facts in this case demonstrate that only one penalty would protect the public and provide the appropriate sanction for the Respondent's misconduct. The ARB may substitute our judgment for that of the Committee in determining guilt and in determining a penalty, 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). The majority elects to substitute our judgement in this case.

**Penalty:** The Respondent abused three Patients for his own gratification, during five medical examinations, over a one-year period. The Respondent admitted to Dr. Joseph that he victimized the Patients. We have held previously that revocation provides the appropriate penalty for a physician who commits sexual misconduct with his patients and the Courts have sustained

those determinations, Matter of Rudell v. Commissioner of Health, 194 A.D.2d 48, 604 N.Y.S.2d 646 (Third Dept. 1993), Matter of Finelli v. Chassin, 206 A.D.2d 717, 614 N.Y.S.2d 634 (Third Dept. 1994). In reaching this Determination, we disagree with the Committee that the stress in the Respondent's life or the opinions by Drs. Fagan and Joseph constituted mitigating factors in assessing a penalty.

The Committee found that both Drs. Fagan and Joseph believed the Respondent unlikely to repeat his misconduct. The ARB finds that opinion lacks credibility, as the Respondent has already repeated his misconduct. The Respondent repeated the misconduct with Patients A and C, after receiving a warning at his office concerning his conduct towards Patient B. The Respondent committed the misconduct against Patient A after also learning that Patient C had filed a complaint against him with the Health Department. We doubt that this disciplinary proceeding has provided the Respondent any greater insight into his misconduct. We note that the Respondent only commenced treatment with Dr. Joseph in December 1998 [Committee Finding of Fact 101], after the final incident with Patient A and after he had learned that there were complaints against him. Also, the Respondent's treatment with Dr. Fagan consisted of only a one-hour session. We question whether the Respondent entered treatment merely in preparation for this disciplinary proceeding. The Respondent also gave the treating professionals contradictory information. He told Dr. Fagan that he experienced no arousal during his encounters with the Patients [Committee Finding 93], while the Respondent told Dr. Joseph that he experienced some arousal during the breast examinations [Committee Finding 103]. Neither treating professional could explain the reason for the Respondent's behavior [Committee Finding 104].

We reject the Committee's attempt to explain the Respondent's conduct due to the stress from his practice or his personal life. Due to his licensure, the Respondent occupied a position of trust with his Patients. Only due to that trust, did the Patients comply with the Respondent's

instructions to disrobe and allow the Respondent to have physical contact with the Patients. The Respondent violated that trust. We conclude that the Respondent presents a risk to repeat that conduct if he remains in medical practice in this state.

The dissenting member, Mr. Shapiro, accepts the Committee's judgement that the Respondent is redeemable.

### **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.
2. The ARB **OVERTURNS** the Committee's Determination as to penalty to impose against the Respondent's License.
3. The ARB votes 4-1 to **REVOKE** the Respondent's License.

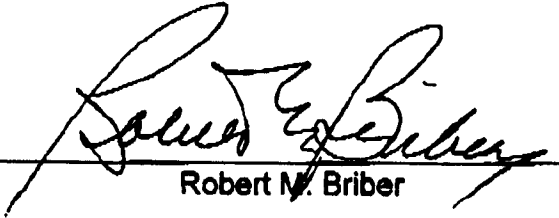
**Robert M. Briber  
Sumner Shapiro  
Winston S. Price, M.D.  
Stanley L. Grossman, M.D.  
Therese G. Lynch, M.D.**



**In the Matter of Naveed Noor-Khan, M.D.**

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

Dated: 12/22/99



Robert M. Briber

**In the Matter of Naveed Noor-Khan, M.D.**

**Sumner Shapiro**, an ARB Member affirms that he participated in this case and that this Determination and Order reflects the majority's decision in the Matter of Dr. Noor-Khan.

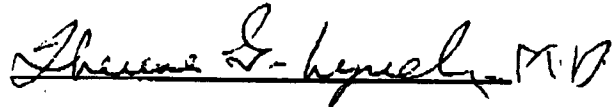
**Dated:** December 24, 1999

  
Sumner Shapiro

**In the Matter of Naveed Noor-Khan, M.D.**

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

**Dated: Dec - 22, 1999**

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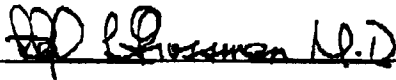
**Therese G. Lynch, M.D.**



In the Matter of Naveed Noor-Khan, M.D.

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

Dated: December 26, 1999

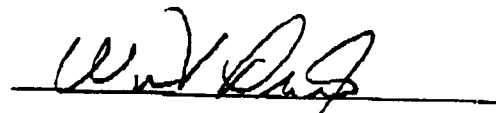
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Stanley L. Grossman, M.D.

**In the Matter of Naveed Noor-Khan, M.D.**

**Winston S. Price, M.D.**, an ARB Member concurs in the Determination and Order in the Matter of Dr. Noor-Khan.

Dated: 12/28, 1999

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