



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

May 30, 2001

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

Sherri Anne Turner, M.D.
11302 Soward Drive
Kensington, MD 20895

RE: In the Matter of Sherri A. Turner, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 01-21) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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:cah
Enclosure

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

In the Matter of

Sherri A. Turner, M.D. (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. 01-21

COPY

**Before ARB Members Grossman, Lynch, Pellman, and Briber¹
Administrative Law Judge James F. Horan drafted the Determination**

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

**Lee A. Davis, Esq.
Pro Se**

After a hearing below, a BPMC Committee sustained charges that the Respondent committed professional misconduct, by failing to honor an obligation the Respondent assumed to aid in financing her medical training. The Committee voted to suspend the Respondent's License to practice medicine in New York State (License). In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 2001), the Respondent asks the ARB to vacate that Determination and raises six issues for review, alleging errors in the hearing. The Petitioner asks the ARB to consider revoking the Respondent's License. After reviewing the hearing record and the submissions by the parties, we affirm the Committee's Determination in full.

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(42) (McKinney Supp. 2001) by:

- failing to comply with a written agreement with the government to provide medical service,

¹ ARB Member Winston Price, M.D. took no part in the review on this case. The ARB reviewed the case with a four member quorum, see Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

- or, in lieu of such service,
- refusing to repay funds that the Respondent received to finance her professional education.

A hearing on the charges ensued before the BPMC Committee who rendered the Determination now on review. The Respondent failed to appear at that hearing and was unavailable for a telephone conference at the time of the hearing. The Committee's Administrative Officer, Judge Zylberberg, also ruled that the Respondent failed to file an answer to the charges. Judge Zylberberg did allow the Respondent to make written submissions to the Committee. In that submission [Respondent's Brief Attachment D], the Respondent discussed her medical condition and stated:

"my only desire is to eventually to return to a low key medical practice, non-clinical, which will require retraining in a different field since realistically I will not be able practice upwards of 80 hours per week on 150-200 patients."

The Respondent made a further submission [Petitioner's Brief Attachment E] in which she argued that she had in fact rendered medical services to an under-served population.

The Committee found that the Respondent received a Public Health Service Scholarship in 1977, to aid in paying her medical school tuition. As a condition to receiving that aid, the Respondent agreed to serve one year as an officer in the Public Health Service. The Respondent received further aid in 1978 from the National Health Service Corps (NHSC) Scholarship Program and agreed to another year's service. In January 5, 1981, NHSC declared the Respondent in default in honoring those agreements. In 1987, the United States District Court for the Eastern District of New York found the Respondent defaulted on those agreements and deprived the government of two years of her service as a physician in a medically under-served area of the country. The Court awarded damages tolling \$109,363.79 against the Respondent.

The Committee concluded that the Respondent failed to comply with the 1977 or 1978 agreements. The Committee sustained the charge that the Respondent violated § 6530(42). The

Committee voted to suspend the Respondent from practice until the Respondent receives a release from the debt or makes arrangements to resolve the debt. The Committee provided further that the Respondent would remain on suspension until she provides evidence of current clinical knowledge and ability at the time she re-registers. The Committee indicated that the Respondent "was guilty of procrastination" in satisfying the agreements, but found no professional negligence or incompetence in this case.

Review History and Issues

The Committee rendered their Determination on January 26, 2001. This proceeding commenced on February 12, 2001, when the ARB received the Respondent's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and the Respondent's brief and response brief. The Committee's Administrative Officer extended the period for filing briefs for thirty days, at the Respondent's request, due to the Respondent's physical disability. The record closed when the ARB received the Respondent's response brief on April 23, 2001.

The Respondent raised six issues for review.

1. No factual basis existed for a Determination that the Respondent violated § 6530(42).
2. The finding denied the Respondent equal protection, because other New York physicians who defaulted on student loan agreements have experienced no disciplinary action.
3. The Committee imposed a penalty grossly disproportionate to the underlying offense.

4. The Committee violated the Respondent's due process rights by finding her "guilty of procrastination" because the Statement of Charges contained no charge or notice concerning procrastination.
5. The Committee denied the Respondent due process, by establishing conditions in the suspension terms for verifying her medical competence, because the Statement of Charges contained no charge or notice concerning the Respondent's medical competence.
6. The Committee failed to inform the Respondent that the hearing would involve a telephonic conference and denied her a meaningful opportunity to participate.

The Respondent asks that the ARB vacate the Committee's Determination.

The Petitioner contends that the Respondent's default in answering the charges precludes the ARB from considering the Respondent's arguments on factual issues. The Petitioner argues that there have been at least three other administrative prosecutions against physicians for defaulting on student loan obligations. As to the Respondent's issue concerning the telephonic hearing, the Petitioner argues that Respondent requested to participate in the hearing by telephone through a fax transmission the day before the hearing. Attempts to reach the Respondent by telephone on the hearing day failed. As to the penalty, the Petitioner argues that the ARB should at the very least affirm the suspension. The Petitioner requests that the ARB consider revoking the Respondent's License because the Respondent intended to defraud the United States Government.

Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination that the Respondent committed professional misconduct and we affirm the Committee's Determination to place the Respondent on probation, under the conditions the Committee imposed. We find no validity in the six issues that the Respondent raised and we reject the Petitioner's request that we revoke the Respondent's License.

For her first issue, the Respondent challenged the basis for the Committee's Determination to sustain the charges. We hold that the basis for the Committee's Determination existed in the United States District Court Decision that found the Respondent in default on her obligations [Petitioner's Hearing Exhibit 5]. The Respondent challenged that Decision's validity, but neither the ARB nor the Hearing Committee may overturn or ignore the Court's Order. Neither can the Committee or the ARB forgive the Respondent's obligation to the NHSC. If the Respondent has provided medical care to an under-served population, the Respondent should provide information proving that to the NHSC. As such point as the NHSC releases the Respondent from her obligation, she will have satisfied the first condition for lifting the suspension.

In Issue 2, the Respondent argues incorrectly that the Petitioner brought an action against her and no other physicians under § 6530(42). The Respondent alleges disparate treatment. The Petitioner has, however, brought actions against other physicians for violations under §6530(42). The Petitioner's reply brief listed license numbers for three other physicians against whom the Petitioner brought such actions. The ARB has also affirmed a Hearing Committee Determination that found a physician guilty for misconduct under § 6530(42), Matter of Jacoby (ARB # 99-89). We attach Jacoby as the Appendix to this Determination.

In her next issue, the Respondent described the suspension penalty as disproportionate to the underlying misconduct. We disagree. In Jacoby, we imposed suspension as a penalty against a physician who failed to satisfy the obligations he assumed to aid in financing his medical education. We found revocation too severe a penalty in that case and we noted that, under N. Y. Educ. Law §6509-b (McKinney Supp. 2001), failure by a physician to pay child or spousal support results in an automatic License suspension. In the Respondent's case, imposing a fine would fail to provide an appropriate remedy, as the Respondent has failed as yet to satisfy the economic penalty that the District Court imposed against her several years ago. We see no benefit in this case from a fixed-time probation, as the probation could end without the Respondent having made arrangements to satisfy the repayment obligations or having received a release. We also see no benefit from retraining, as the Respondent should already appreciate the need to repay the obligations the Respondent incurred for receiving assistance in obtaining her License.

In Issue 4, the Respondent argued that the Statement of Charges provided the Respondent no notice that the Committee would find her "guilty of procrastination ". The Respondent has taken that statement by the Committee out of context. The Charges alleged that the Respondent violated § 6530(42) and the Committee found the Respondent guilty for and disciplined the Respondent for that violation. In her submissions to the Committee, the Respondent stated "If I am guilty of anything it is procrastination " [Respondent's Brief Attachment D]. The Committee adopted that language and accepted the Respondent's explanation for her default, as opposed to the Petitioner's explanation, that the Respondent intended to defraud the United States Government. We see no prejudice to the Respondent from the statement by the Committee.

In her next issue, the Respondent argued that she received no notice from the Statement of Charges that the hearing concerned her medical competence, so the Committee denied her due process by requiring her to establish her competence as the second component for lifting the suspension against her License. The Committee required that the Respondent provide evidence concerning her current clinical knowledge and ability at the time she re-registers in New York. In the Committee's Determination, they indicated that they imposed that condition due to the documentation that the Respondent submitted which indicated she had been away from practice since 1997. In the document at Attachment D in the Respondent's brief, she stated:

"my only desire is to eventually to return to a low key medical practice, non-clinical, which will require retraining in a different field since realistically I will not be able practice upwards of 80 hours per week on 150-200 patients."

We see no error by the Committee in imposing the condition, because the Respondent herself placed her abilities and training in issue.

As her final issue, the Respondent challenged whether she received a fair hearing through a telephone conference. The Respondent herself requested to attend the Hearing by telephone and attempts to reach the Respondent by phone on the hearing day failed. The Respondent received a further opportunity to submit documentation to the Committee even following the hearing. The Respondent's brief establishes that the Respondent received notice that her hearing would take place on November 6, 2000. She received the chance for participation by telephone she requested. We hold that the Respondent received sufficient notice and accommodations for the hearing.

In the final paragraph in the Respondent's brief, she requests a further delay in filing briefs and an opportunity to examine the hearing transcript. As this Determination has noted above, the Respondent already received an extension in time for filing briefs. The Respondent

fails to explain why she waited until submitting her brief to raise the transcript issue for the first time and to request an additional delay. We see no reason to grant the extension.

ORDER

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

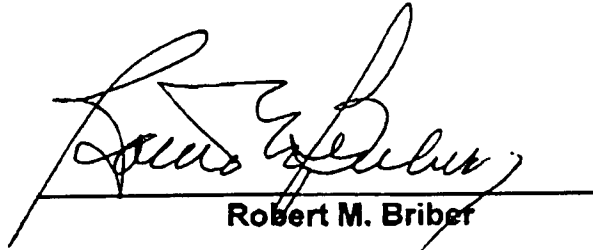
1. The ARB **AFFIRMS** the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB **AFFIRMS** the Committee's Determination to suspend the Respondent's License until such time as the Respondent satisfies or receives release from her debt and provides evidence of her current knowledge and ability to practice medicine.

Robert M. Briber
Thea Graves Pellman
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.

In the Matter of Sherri A. Turner, M.D.

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

Dated May 18, 2001



Robert M. Briber

In the Matter of Sherri A. Turner, M.D.

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

Dated: May 19, 2001

Therese G. Lynch M.D.

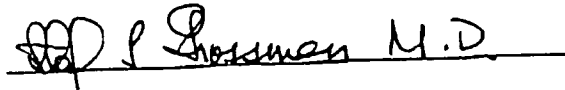
Therese G. Lynch, M.D.

In the Matter of Sherri A. Turner, M.D.

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

Matter of Dr. Turner.

Dated: May 18, 2001

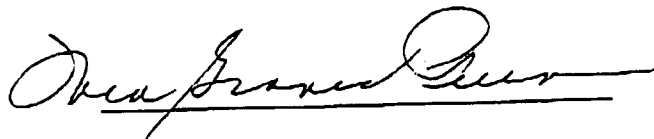
Handwritten signature of Stanley L. Grossman, M.D. in cursive script, written over a horizontal line.

Stanley L Grossman, M.D.

In the Matter of Sherri A. Turner, M.D.

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

Dated: May 21, 2001



Thea Graves Pellman

APPENDIX

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

In the Matter of

A. Alexander Jacoby, 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. 99-89

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

For the Department of Health (Petitioner): Kalimah Jenkins, Esq.
For the Respondent: Ross V. Jacoby, Esq.

After a hearing below, a BPMC Committee determined that the Respondent committed professional misconduct by failing to comply with an agreement he entered into to aid his medical education and the Committee voted to revoke the Respondent's License to practice medicine in New York State (License). In this proceeding pursuant to N.Y. Pub. Health Law §230-c (4)(a) (McKinney's Supp. 1999), the Respondent asks the ARB to nullify or modify that Determination. The Respondent alleges that a bankruptcy order discharged the debt, that the Petitioner failed to follow legal mandates, that the Committee's Administrative Officer committed errors at the hearing and that the Committee imposed an excessive penalty. After considering the record and briefs from both parties, we affirm the Committee's Determination on the charges, although we amend certain items in the Determination. We reject the Respondent's procedural challenges, but we agree that the Committee imposed an excessively harsh penalty. We overturn the Committee, we vote to suspend the Respondent's License until he pays his debt or enters an arrangement to pay the debt and we place the Respondent on probation for three years following the suspension.

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(42)(McKinney Supp. 1999) by failing to comply with an agreement he entered into to aid his medical education. The charges alleged that the Respondent failed to repay or to make arrangements to repay Two Hundred Thirteen Thousand Dollars (\$213,000.00) that the Respondent owes to Health Education Assistance Loans (a Federal Program), on loans to finance the Respondent's medical education. At hearing, the Respondent contended that a Utah Bankruptcy Court decision discharged the student loan debt. A BPMC Committee conducted the hearing into the charges and rendered the Determination now on review.

The Committee sustained the charge that the Respondent failed to comply with an agreement he entered into to aid his medical education. The Committee found that:

- the Respondent entered an agreement with the Federal Health Education Assistance Loans Agency to repay loans for his medical education in 1982,
- the agreement allowed a discharge in bankruptcy after five years from the loan's initiation,
- the Respondent received a discharge from his debts from the United States Bankruptcy Court in Utah,
- the Bankruptcy Court Order failed to discharge the Respondent's student loan debt,
- the Respondent admitted in a letter that the Bankruptcy Court Order failed to discharge his student loan debt, and,
- the United States Department of Justice (DOJ) has taken the position that the Respondent has failed to make any payments on his student loans.

The Committee found the actual debt amount the Respondent owed irrelevant. They found that the evidence clearly proved the Respondent in arrears for his entire student loan amount, plus interest. As a penalty for the misconduct, the Committee voted to revoke the Respondent's License. The Committee based the revocation on the Respondent's deliberate non-compliance with the Federal Regulation requiring that the Respondent repay the student loan debt. The Committee also found as disturbing, the Respondent's cavalier attitude about a debt affecting his License.

Review History and Issues

The Committee rendered their Determination on April 30, 1999. This proceeding commenced on May 17, 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 June 29, 1999.

The Respondent asks the ARB to either reverse the Committee's Determination on the charges or to reduce the penalty. The Respondent raised three issues on review.

1. The Petitioner failed to state a cause of action, because a.) a bankruptcy proceeding discharged the debt at issue in the charges and b.) because Health Department Investigator Christopher Morley entrapped the Respondent into writing a letter in which the Respondent admitted to still owing a debt on his medical school loans [Respondent Exhibit U].
2. The Petitioner failed to follow mandatory procedures a.) requiring that the Respondent have an opportunity for an interview to discuss the investigation into

his case, pursuant to N. Y. Pub. Health Law § 230(10)(a)(iii)(McKinney Supp. 1999) and b.) requiring that the Petitioner resolve this issue as an expedited proceeding pursuant to N. Y. Pub. Health Law § 230(10)(m)(McKinney Supp. 1999).

3. The Committee imposed an overly harsh penalty against someone with an unblemished record, who has suffered financial indigence. The Respondent argues that under N. Y. Educ. Law § 6509-b (McKinney Supp. 1999), failure by a physician to pay child or spousal support results only in License suspension.

The Respondent also alleges error by the Committee's Administrative Officer, due to her refusal to subpoena two witnesses for the Respondent, Health Department Investigator Christopher Morley and DOJ Agent Donna Lynch. Further the Respondent alleges that the Committee took testimony from a witness outside the presence of the Respondent or his attorney. The Respondent notes that the Committee's Determination, on the second page, lists as a Petitioner's Witness: "Ms. Lynch Morley, M.D." The Respondent contends that no such witness appeared at the hearing the Respondent attended.

The Petitioner's brief argues that the Respondent failed to acknowledge the serious charges against him, show remorse for his inaction in paying the debt and assure the Committee that the Respondent would make arrangements to pay the debt if the Committee allowed the Respondent to retain his License. The Petitioner argues that the ARB should allow the Committee's Determination to stand. In response to the Respondent's brief, the Petitioner:

- described possible testimony from Ms. Lynch or Mr. Morley as unnecessary,
- stated that the Department offered the Respondent a chance for an interview, but the Respondent failed to respond to the offer, and,

- surmised that the listing in the Committee's Determination for witness "Ms. Lynch Morley" resulted from an error in recording the decision.

The response brief asked the ARB once again to let the Committee's Determination stand.

Determination

The ARB has considered the record and the parties' briefs. We reject the Respondent's procedural challenges to the Committee's Determination. We sustain the Committee's Determination that the Respondent's failure to pay his student loan debt constituted professional misconduct, but we amend the Committee's Determination to correct several errors that appear in the Committee's findings and in the listing for witnesses. We overturn the Committee's Determination revoking the Respondent's License and we vote to suspend the Respondent's License and to place the Respondent on probation following the suspension.

Procedural Issues: We reject the Respondent's contention that the Petitioner failed to state a cause of action. The Respondent's argument, that the Bankruptcy Court discharged his student loan debt, merely raised a factual issue for the Committee's resolution. The Committee resolved that issue by finding the Respondent still owed the debt, despite the bankruptcy. The Committee based that finding on a letter from the United States Department of Justice (DOJ) that indicated that the Respondent continued to owe the debt [Petitioner Exhibit 6] and the Respondent's own letter admitting that the Bankruptcy Order failed to include the student loan debt [Respondent Exhibit U]. We also reject the Respondent's contention that Investigator Morley entrapped the Respondent into making the admission that appears in Exhibit U. In his testimony at the hearing, the Respondent indicated that Mr. Morley informed the Respondent that he should "negotiate something, anything" with DOJ, or the Respondent would face

restrictions on his License, if an amicable solution could not be found [Hearing Transcripts pages 103-104,141]. At no point did the Respondent testify that Mr. Morley told the Respondent to admit the debt.

The Respondent also argued that the Petitioner failed to provide the Respondent an opportunity for an interview to discuss the investigation into his case, pursuant to N. Y. Pub. Health Law § 230(10)(a)(iii)(McKinney Supp. 1999). The Petitioner responded that the Respondent received an opportunity for an interview, but failed to respond to letters from the Petitioner offering the interview. The Respondent also failed to raise that issue in his answer to the charges [Respondent Exhibit A] or at the hearing, at which time the Committee's Administrative Officer could have reviewed the claim under Matter of Gupta v. DeBuono, 229 A.D.2d 58 (Third Dept. 1997). We find no reason to annul or remand the Determination on this ground, because the Respondent received no interview due to his own failure to answer the interview offer. We also see no prejudice to the Respondent in this case from his failure to undergo an interview. Under N. Y. Pub. Health Law § 230(10)(a)(iii)(McKinney Supp. 1999), the licensee receives an opportunity for an interview so he/she can receive an explanation about the issues under investigation. The Respondent's own testimony at hearing established that Investigator Morley spoke to the Respondent on several occasions by telephone. Investigator Morley informed the Respondent that Mr. Morley was investigating the Respondent's failure to pay his student loan debt and informed the Respondent that the failure to pay constituted misconduct, that could result in action against the Respondent's License. The only charge in this proceeding involved the failure to pay the student loan debt.

The Respondent argued further that the Petitioner violated procedures that mandated that the Petitioner proceed against the Respondent in an expedited procedure pursuant to N. Y. Pub.

Health Law § 230(10)(m)(McKinney Supp. 1999). The provisions for such expedited proceedings provide that the Director of the Office for Professional Medical Conduct (Director) may resolve minor matters through such expedited procedures. Nothing in the statute requires the Director to submit any matter to an expedited proceeding, including the failure to pay a student loan debt connected to a licensee's medical education.

The Respondent also alleged error due to the refusal by the Committee's Administrative officer to call two witnesses for the Respondent: DOJ Agent Donna Lynch and Health Department Investigator Christopher Morley. The Respondent's brief described the Administrative Officer's refusal as denying the Respondent the right to examine witnesses against him. We note that the evidence the Petitioner presented at hearing consisted of documents only and that neither Ms. Lynch nor Mr. Morley signed any of those documents. The Administrative Officer refused to allow any testimony into the investigation, because she found the only issue at the hearing involved whether the Respondent had paid the student loan debt. We agree and we refuse to remand for any testimony by those persons. In making our ruling on this issue, we gave no credence to the Petitioner's unsupported contention that the State lacked the authority to subpoena Ms. Lynch, a Federal employee. We note that a January 8, 1999 Letter to Petitioner's counsel [Petitioner Exhibit 6] indicated that DOJ would have provided Ms. Lynch to testify at the hearing.

The Respondent's final procedural issue alleged that the Committee took testimony outside the hearing from a witness "Ms. Lynch Morley, M.D." and that the Respondent received no opportunity to cross-examine that witness. The Petitioner argues that the listing for that witness must have resulted from an error in recording the Determination. After reviewing the Determination and the hearing record, we agree with the Petitioner that the listing must have

resulted from an error. The only testimony in the record before the ARB came from the Respondent. The Committee's Determination contained eight findings of fact (FF). After all eight, the Committee listed in parenthesis thereafter the evidence that the Committee relied upon in making that FF. All eight FF cited to documentary evidence rather than testimony as their basis. We see nothing in the record, therefore, to indicate that the Committee received any other testimony. The name "Lynch Morley" also appears to be the combination of the last names of the two witnesses that the Committee's Administrative Officer refused to call for the Respondent. We also note that other errors drafting errors appeared in the Determination. These factors lead the ARB to conclude that the listing resulted from an excusable drafting error rather than any improper conduct by the Committee. We discuss the errors in the Determination further below.

Errors in the Committee's Determination: In addition to the error in listing the witness, the Committee's Determination also contained errors in the FF. The ARB may substitute our judgment for that of the Committee, 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), Matter of Minielly v. Comm. of Health 222 AD 2d 750, 634 NYS 2d 856 (Third Dept. 1995). We elect to substitute our judgement in this case, by correcting the errors that appear in the Committee's Determination.

First, we amend the Committee's Determination to delete the listing for witness "Ms. Lynch Morley, M.D." As we concluded above that listing resulted from a likely drafting error. Next, the Committee's FF 5 stated:

" 5. On October 18, 1989, the Utah Bankruptcy Court granted the Respondent a discharge of his debts (Pet. Ex. 5)"

That FF constitutes a factual and drafting error by the Committee. Petitioner Exhibit 5 was a 1989 Default Judgement by the United States District Court that established that the Respondent Failed to pay the student loan debt. The Respondent's discharge in bankruptcy resulted from a 1996 Order From the United States Bankruptcy Court for the District of Utah [Respondent Exhibit B]. We amend FF 5 to read:

" 5. On May 28, 1996, the United States Bankruptcy Court for Utah granted the Respondent a discharge of his debts (Resp. Ex. B)."

Finally, FF 7 states:

" 7. In a letter dated January 23, 1999, the Respondent admits that the student loan was not discharged (Resp. Ex. O)"

That FF contains a factual error and a drafting error in the reference to the evidence supporting the FF. Respondent Exhibit O is a Notice of Levy on Wages, Salary and other Income. The Respondent's Letter appears in the record as Respondent's Exhibit U and that letter bears the date January 23, 1998. We amend the FF to read:

"7. In a letter dated January 23, 1998, the Respondent admits that the student loan was not discharged (Resp. Ex. U)."

With these amendments and deletions to the Committee's Determination, we sustain the Committee's Determination that the Respondent's failure to pay the debt from his student loans constituted misconduct under N. Y. Educ. Law § 6530(42)(McKinney Supp.). We turn now to considering the appropriate sanction for the Respondent's misconduct.

Penalty: We agree with the Respondent that revocation constitutes an overly harsh penalty for the Respondent's failure to pay the student loan debt that he incurred to finance his medical education. The Respondent's misconduct reflected in no way on his ability to practice

medicine. As the Respondent pointed out in his brief, under N. Y. Educ. Law § 6509-b (McKinney Supp. 1999), failure by a physician to pay child or spousal support results in an automatic License suspension. We conclude that a similar penalty would provide the appropriate sanction in this case. The Respondent incurred a debt to obtain his medical License, but he has failed to make any payments on that debt. The Respondent should settle that debt or enter into an arrangement with DOJ to satisfy that debt, before he returns to medical practice in this State.

The ARB votes unanimously to suspend the Respondent from practice until he pays his student loan debt or until he enters into an arrangement with DOJ to satisfy the debt. We vote further to place the Respondent on probation for three years, beginning at such time as the Respondent pays the debt or enters into the arrangement. The Respondent's absence from the State or from medical practice in the State shall toll the probation, until the Respondent's return to the State and/or to practice. The full probation terms appear in the appendix to this Determination.

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 to revoke the Respondent's License to practice medicine in New York State.
3. The ARB SUSPENDS the Respondent's License to practice in New York until such time as the Respondent pays his student loan or enters into an arrangement to pay the student loan and, the ARB places the Respondent on probation for three years following the suspension. The probation shall commence running at the time the Respondent returns to 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.