



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*

June 13, 2002

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Courtney Berry, Esq.  
NYS Department of Health  
5 Penn Plaza – 6<sup>th</sup> Floor  
New York, New York 10001

T. Lawrence Tabak, Esq.  
Kern, Augustine, Conroy & Schoppmann,  
P.C.  
420 Lakeville Road  
Lake Success, New York 11042

Moshe Ostad, M.D.  
62-59 108<sup>th</sup> Street  
Forest Hills, New York 11375

**RE: In the Matter of Moshe Ostad, M.D.**  
**REISSUED VERSION**

Dear Parties:

Enclosed please find the revised Determination and Order (No. 02-42) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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**

**Moshe Ostad, 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. 02-42**

**COPY**

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

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

**Courtney Berry, Esq.  
T. Lawrence Tabak, Esq.**

After a hearing below, a BPMC Committee dismissed charges that the Respondent committed misconduct in treating a patient and by failing to comply with a record review order. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 2000), the Petitioner asks the ARB to nullify that Determination, to make findings of fact in addition to findings by the committee and to suspend the Respondent's License. After considering the hearing record and the review submissions from the parties, the ARB affirms the Committee's determination to dismiss the charges relating to patient treatment and we reject the request to make additional findings. We overturn the Committee and hold that the Respondent committed professional misconduct by failing to comply with a record review order. We suspend the Respondent's License to practice medicine in New York State (License) until such time as the Respondent complies the record review order.

### **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(3-6), 6530(15) & 6530(32) (McKinney Supp. 2002) by committing professional misconduct under the following specifications:

- practicing medicine with negligence on more than one occasion,
- practicing medicine with gross negligence,
- practicing medicine with incompetence on more than one occasion,
- practicing medicine with gross incompetence,
- failing to comply with an order under Pub. Health Law § 230(10)(a), and,
- failing to maintain accurate patient records.

The negligence, incompetence and record charges arose from the Respondent's treatment to a single person, Patient A. The record refers to the Patient by an initial to protect privacy. The failure to comply charge relates to Orders for Comprehensive Medical Record Review (Review Orders).

The Committee found that the Respondent took exception to the Review Orders [Committee Finding of Fact 10], but the Committee dismissed the failure to comply charge and all charges relating to patient treatment. The Committee concluded that three Investigative Committees took invalid actions in voting for the charges and/or the Review Orders at issue here, because no Investigative Committee convened within ninety days from the date when the Respondent received an investigative interview.

### **Review History and Issues**

The Committee rendered their Determination on January 28, 2002. This proceeding commenced on or about February 14, 2002, when the ARB received the Petitioner'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 response brief. The record closed when the ARB received the response brief on March 14, 2002.

The Petitioner asks that the ARB overturn the Committee. On the Review Orders issue, the Petitioner argues that the Committee lacked the power to dismiss charges for failure to comply with statutory timelines. The Petitioner argues that timeliness constituted a legal issue, which the Committee's Administrative Officer resolved by letting the hearing proceed. On the treatment issues, the Petitioner argues that the Committee failed to address specific allegations against the Respondent. The Petitioner asks that the ARB make specific findings and conclusions relating to the allegations that the Committee failed to address.

In reply, the Respondent contends that the Committee found properly that the Department of Health violated the Respondent's right to due process. The Respondent also notes that the Committee affirmatively addressed the medical treatment issues and found no negligence, no incompetence and no failure to comply with the Review Orders.

### **Determination**

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination to dismiss the negligence, incompetence and record charges concerning the treatment for Patient A. On the Record Orders charges, we overturn the Committee's Determination to dismiss the charges. We hold that the Respondent has failed to comply with the Review Orders and we suspend the Respondent's License until such time as the Respondent complies.

**Patient Treatment Charges:** In requesting that the ARB adopt our own Findings of Fact, the Petitioner in effect concedes that the Committee Determination provides insufficient

grounds to overturn the Committee and sustain additional charges. The Petitioner asks that the ARB draft our own Hearing Committee Determination and use that document as the basis to sustain the charges. Under N. Y. Pub. Health Law §§ 230(10)(g)(1) & 230c-(a)(4)(McKinney Supp. 2001), the Committees make findings of fact and conclusions of law. The ARB reviews those findings and conclusions to determine if the Committee made the findings and conclusions consistent with the Committee's Determination. The ARB may correct errors by Committees, Matter of Brigham v. DeBuono, 288 A.D.2d 870, 644 N.Y.S.2d 413 (3<sup>rd</sup> Dept. 1996). The ARB has exercised that authority in the past by amending or deleting some clearly erroneous Committee findings or conclusions. As we noted in a recent case, the ARB has never made a single new finding of fact in any prior case Matter of Dean Cory Mitchell, ARB # 01-120. In this case, the Petitioner requests that the ARB exceed our authority by adopting extensive additional findings of fact. We decline the request.

In reviewing the Committee's Determination, we see no clearly erroneous errors in the findings and conclusions concerning the treatment to Patient A. In addition, we see no findings or conclusions consistent with a Determination that the Respondent practiced with negligence or incompetence in treating Patient A or that the Respondent failed to maintain an accurate record for the Patient. We hold that the Committee acted consistently with their findings and conclusions by dismissing the negligence, incompetence and record charges.

**Review Orders:** Under Pub. Health Law § 230(10)(a), an Investigative Committee from BPMC initiates the charges against a Respondent. The statute provides at § 230(10)(a)(iii) that an Investigative Committee must convene within ninety days from the time a Respondent receives an opportunity for an interview with the Office for Professional Medical Conduct (OPMC). The statute provides at § 230(10)(j) that the failure to follow any timeline within

§230(10) shall be grounds for a proceeding in New York Supreme Court. That provision also provides that the Supreme Court may grant no relief in such a proceeding unless the complaining licensee can show the delay caused the licensee substantial prejudice. Nothing in § 230(10) provides a BPMC Hearing Committee authority to consider time line compliance in making a determination to dismiss charges.

In this case, the Hearing Committee dismissed the charges concerning the Review Orders, for the failure to follow the requirement that an Investigative Committee convene within the ninety days from a Respondent's investigative interview. The ARB holds that the New York Supreme Court constitutes the proper body to determine whether the failure to comply with the statutory time lines provides the grounds for dismissing or staying the Review Orders against the Respondent. We overturn the Committee's Determination to dismiss the charge concerning the Review Order due to failure to comply with the ninety day time line.

The Respondent has failed to comply with the Review Order. The Committee's Determination at Finding of Fact 10 found that the Respondent took exception to a July 20, 2000 Review Order. We hold the Committee's Finding 10 consistent with a Determination that the Respondent failed to comply with an Order under § 230(10)(a). The ARB sustains the charge that the Respondent's failure to comply with the with the Review Orders constituted professional misconduct.

In a recent case, we have held that the failure to comply with a comprehensive record review order provides sufficient grounds to suspend a licensee until the licensee complies with the review order, Matter of Jennifer Daniels ARB # 01-68. The ARB votes 5-0 to suspend the Respondent's License until such time as the Respondent complies with the Review Orders.

**ORDER**

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

1. The ARB affirms the Committee's Determination to dismiss the negligence, incompetence and record charges relating to the care for Patient A.
2. The ARB overturns the Committee's Determination that found the Review Order invalid.
3. The ARB suspends the Respondent's License until such time as the Respondent complies with the Review Order.

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