



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
September 12, 2002

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

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

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

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

Dear Parties:

Enclosed please find the Determination and Order (No. 02-42A) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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 "Tyfone T. Butler". The signature is written in a cursive style with a large initial 'T'.

Tyfone T. Butler, Director
Bureau of Adjudication

TTB:djh
Enclosure

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

In the Matter of

Moshe Ostad, M.D. (Respondent)

**A proceeding to review a Determination by a
Committee (Committee) from the Board for
Professional Medical Conduct (BPMC)**

COPY

Administrative Review Board (ARB)

**Amended Determination and Order
No. 02-42A**

**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 comprehensive record review order (Review Order). In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 2002), the Petitioner asked 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 affirmed the Committee's determination to dismiss the charges relating to patient treatment and we rejected the request to make additional findings. We overturned the Committee and held that the Respondent committed professional misconduct by failing to comply with the Review Order. After initial deliberations in this case, we suspended the Respondent's License to practice medicine in New York State (License) until such time as the Respondent complies the record Review Order. Following the Respondent's motion for reconsideration, we considered an additional defense that the Respondent raised at hearing. Upon reconsideration, we vote 4-1 to affirm our Determination to suspend the Respondent until such time as the Respondent complies with the 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 the Review Order. In answer to the charges on the Review Order, the Respondent argued that the Petitioner failed to comply with the provisions from N.Y. Pub Health Law § 230, because 1.) the Petitioner failed to convene an investigative committee to issue the Review Order within ninety days from an investigative interview (Timeliness Issue) and 2.) the Petitioner must seek enforcement on the Review Order from the New York Supreme Court (Enforcement Issue), rather than through a disciplinary hearing [Hearing Transcript pages 35-36].

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 Order at issue here, because no Investigative Committee convened within ninety days from the date when the Respondent received an investigative interview. As the Committee dismissed the failure to comply charges on the Timeliness Issue, the Committee never reached the Enforcement Issue.

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 on initial review closed when the ARB received the response brief on March 14, 2002.

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

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

Neither party's review brief or response brief addressed the Enforcement Issue.

Determination On Review

On the initial review, the ARB considered the record and the parties' briefs. We affirmed the Committee's Determination to dismiss the negligence, incompetence and record charges

concerning the treatment for Patient A. On the Review Order charges, we overturned the Committee's Determination to dismiss the charges. We held that the Respondent failed to comply with the Review Order and we suspended 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 conceded that the Committee Determination provided insufficient grounds to overturn the Committee and sustain additional charges. The Petitioner asked that the ARB draft our own Hearing Committee Determination and use that document as the basis to sustain the charges. We declined the request. 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 (3rd 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 requested that the ARB exceed our authority by adopting extensive additional findings of fact.

In reviewing the Committee's Determination, we saw no clearly erroneous errors in the findings and conclusions concerning the treatment to Patient A. In addition, we saw 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 held that the Committee acted consistently with their findings and conclusions by dismissing the negligence, incompetence and record charges.

Timeliness Issue: 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 held that the New York Supreme Court constituted 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 overturned the Committee's Determination to dismiss the charge concerning the Review Order.

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 held the Committee's Finding 10 consistent with a Determination that the Respondent failed to comply with an Order under § 230(10)(a). The ARB sustained the charge

that the Respondent's failure to comply with the with the Review Orders constituted professional misconduct.

In a recent case, the ARB 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. After our Determination on the review and our initial deliberations in the matter, the ARB voted 5-0 to suspend the Respondent's License until such time as the Respondent complied with the Review Order.

Motion To Reconsider

Following the ARB Determination on the review, the Respondent submitted a June 20, 2002 motion to reconsider the Determination. The reconsideration motion argued that the Respondent based his defense at hearing on the Enforcement Issue, that Pub. Health Law §230(10)(o) requires the Director of the Office of Professional Medical Conduct (Director) seek enforcement on Review Orders exclusively in Supreme Court. By letter on July 1, 2002, the Administrative Officer for the ARB informed the parties that the ARB would accept additional briefs on the motion and on the Enforcement Issue. The parties submitted those briefs on July 22, 2002.

The Petitioner's brief argued that no ground existed to warrant reconsideration. The Petitioner also disagreed that judicial enforcement constituted the only remedy to enforce the Review Order. The Petitioner argued that the Director may also bring a misconduct action under Educ. Law § 6530(15) to enforce the Review Order.

Determination on the Motion

The ARB votes 5-0 to grant the motion to reconsider concerning the Enforcement Issue. As we did in this case, the ARB may substitute our judgement for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 A.D.2d 86, 606 N.Y.S.2d 381 (3rd Dept. 1993); and in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 NYS 2d 759 (3rd Dept. 1994). In cases in which we substitute our judgement, the ARB must assure that we have considered all the defenses that the parties have raised below. In this case, we should have considered the Enforcement Issue during our initial deliberations, or should have remanded the case to the Committee for their determination on the Enforcement Issue. The ARB may reopen a Determination on motion by a party, Matter of Berges v. Chassin, 216 A.D.2d 698, 627 A.D.2d 855 (1995). We hold that this case warrants reconsideration on the Enforcement Issue.

The ARB will consider the Enforcement Issue rather than remanding to the Committee. The Committee found the Review Order invalid on the Timeliness Issue, which would make the Review Order unenforceable under the Committee's view.

The ARB votes 4-1 to reject the Respondent contention that an action in Supreme Court constitutes the only means to enforce the Review Order. The majority holds that Pub. Health Law §230(10)(o) provides that the Director may (rather than must) seek judicial enforcement of the Review Order. Under Educ. Law § 6530(15), the failure to comply with an order also constitutes misconduct and the Director may bring a disciplinary action against the Respondent for the failure to comply. In this case, the Director chose to bring non-compliance charges and coupled that action with the negligence charges concerning Patient A. The majority sees no

reason for the Director to bring a separate action in Supreme Court on the Review Order and a separate disciplinary action on only the negligence charges.

The dissenting member agrees with the Petitioner that the Director should seek enforcement on the Review Order before an independent body, such as a Justice of the Supreme Court. The dissenting member felt that the Committee addressed the medical treatment issues involving Patient A and found no negligence or incompetence. To the dissenting member, the Committee's Determination indicates that the Review Order was arbitrary and capricious in this case, because no basis existed to look for a possible pattern of negligent or incompetent behavior.

By a 4-1, vote the ARB affirms our prior Determination to suspend the Respondent's License until such time as the Respondent complies with the Review Order.

ORDER

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

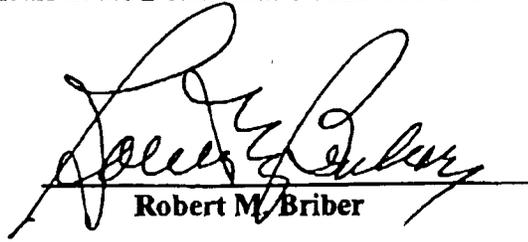
1. The ARB affirms the Committee's Determination to dismiss the negligence, incompetence and record charges relating to the care for Patient A.
2. The ARB overturns the Committee's Determination that found the Review Order invalid.
3. The ARB suspends the Respondent's License until such time as the Respondent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

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

In the Matter of Moshe Ostad, M.D.

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

Dated: August 7, 2002



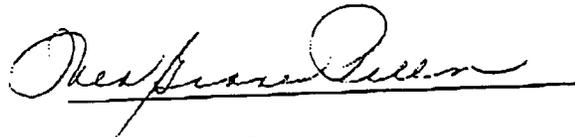
Robert M. Briber

FROM : Thea Graves Pellman

In the Matter of Moshe Ostad, M.D.

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

Dated: 9/10, 2002

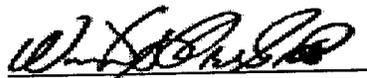


Thea Graves Pellman

In the Matter of Moshe Ostad, M.D.

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

Dated: August 18, 2002

A handwritten signature in black ink, appearing to read "Winston S. Price", written over a horizontal line.

Winston S. Price, M.D.

In the Matter of Moshe Ostad, M.D.

Stanley L. Grossman, an ARB Member affirms that he participated in this case and that the Determination and Order reflects the majority's decision in the Matter of Dr. Ostad.

Dated: August 9, 2002

Stanley L. Grossman M.D.

Stanley L Grossman, M.D.

In the Matter of Moshe Ostad, M.D.

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

Dated: Aug. 7, 2002

Therese G. Lynch M.D.

Therese G. Lynch, M.D.