



# 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*

**PUBLIC**

March 18, 2004

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

Diane Abeloff, 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.**

Dear Parties:

Enclosed please find the Determination and Order (No. 02-42R) 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.

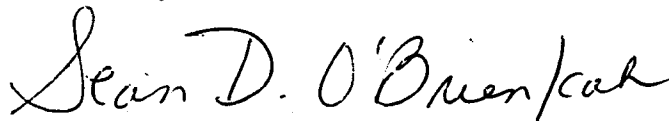
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified 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 cursive script that reads "Sean D. O'Brien/cah".

Sean D. O'Brien, Director  
Bureau of Adjudication

SDO: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 Following Remand  
No. 02-42R**

**COPY**

**Before ARB Members Grossman, Lynch, Pellman, Wagle 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.**

In this case pursuant to N. Y. Pub Health Law § 230-c (McKinney Supp. 2004), the ARB considers the penalty to impose against the Respondent's New York medical license (License) due to the Respondent's failure to comply with a comprehensive medical record review order (Review Order). After an initial administrative review and a motion to reconsider in this case, the ARB voted to suspend the Respondent's License until such time as the Respondent complied with the Review Order. The New York Supreme Court Appellate Division for the Third Department, however, found that indefinite suspension impermissible and remitted the case for the ARB to impose an appropriate penalty<sup>1</sup>. After reviewing the Remittur Order and additional submissions from the parties, the ARB votes 5-0 to suspend the Respondent's License for two years, to stay the suspension and to place the Respondent on probation for two years. The Probation Terms include the requirement that the Respondent comply with the Review Order within ninety days.

<sup>1</sup> Matter of Ostad v. New York State Dept. of Health, 309 AD2d 989, 766 N.Y.S.2d 441 (3<sup>rd</sup> Dept. 2003).

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 providing substandard medical care to one patient and by failing to comply with a Review Order under Pub. Health Law § 230(10)(a). In answer to the Review Order charges, the Respondent argued that the Petitioner's failure to comply with the provisions from N.Y. Pub Health Law § 230 excused the Respondent from compliance, 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].

After a BPMC Hearing, the Hearing Committee dismissed the patient care charges. As to the charge concerning the Review Order, the Committee found that the Respondent took exception to the Review Order [Committee Finding of Fact 10], but the Committee dismissed the failure to comply charge. 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.

The Petitioner then requested administrative review on both the patient care charges and the Review Order charge. As relevant to this proceeding, the Petitioner argued that timeliness constituted a legal issue, which the Committee's Administrative Officer resolved by letting the hearing proceed. 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 nor response brief addressed the Enforcement Issue.

On the initial review, the ARB overturned the Committee's Determination to dismiss the Review Order charge. 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. We held that 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. We held 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 Order against the Respondent. We overturned the Committee's Determination to dismiss the charge concerning the Review Order.

Following the ARB Determination on the review, the Respondent submitted a motion to reconsider the Determination. The reconsideration motion argued that the Respondent also based his defense at hearing on the Enforcement Defense, that Pub. Health Law §230(10)(o) requires the OPMC Director to 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 Defense. After considering those briefs, the ARB voted to grant the motion to reconsider concerning the Enforcement Issue.

The ARB decided against remanding to the Committee on the Enforcement Issue, because the Committee found the Review Order invalid on the Timeliness Issue, which would make the Review Order unenforceable under the Committee's view.

On the Enforcement Issue, the ARB voted to reject the Respondent contention that an action in Supreme Court constitutes the only means to enforce the Review Order. We held that Pub. Health Law §230(10)(o) provides that the OPMC 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 patient care charges. The ARB saw 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 patient care charges. We again voted to suspend the Respondent's License until such time as he complied with the Review Order.

The Respondent then sought review by New York Supreme Court Appellate Division for the Third Department, under N.Y. Civ. Prac. Law and Rules Article 78. In Matter of Ostad v. New York State Dept. of Health (supra), the Appellate Division rejected both the Enforcement and the Timeliness defenses. The Court ruled that refusal to comply with a Review Order constituted misconduct under Educ. Law § 6530(15). The Court, however, found the indefinite suspension an impermissible penalty under Pub. Health Law § 230-a(2). The Court remitted for the ARB to impose an appropriate penalty.

Following the Remittur Order, the ARB offered the parties the chance to submit any additional arguments. In a November 25, 2003 letter, the Respondent informed the ARB that he was ready to comply with the Review Order and asked that the ARB impose no further sanction.

By letter on December 2, 2003, the Petitioner asked that the ARB suspend the Respondent's License for three years, with two years stayed and probation.

Upon reviewing the Remittur Order and the parties' additional submissions, the ARB votes 5-0 to suspend the Respondent's License for two years, to stay the suspension and to place the Respondent on probation for two years, under the terms that appear in the Appendix to this Determination. We find the Respondent's willingness to obey the CMR Order now to constitute a mitigating circumstance and for that reason we vote against placing the Respondent on actual suspension. We conclude, however, that the penalty against the Respondent must contain some mechanism to assure that the Respondent's willingness will translate to actual compliance. In addition to the standard probation terms, we require that the Respondent comply with the Review Order within ninety days from the date this Determination becomes effective.

### **ORDER**

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

The ARB suspends the Respondent's License for two years, stays the suspension and places the Respondent on probation for two years under the terms that appear in the Appendix to this Determination.

Robert M. Briber  
Thea Graves Pellman  
Datta G. Wagle, 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: March 15, 2004**



**Robert M. Briber**

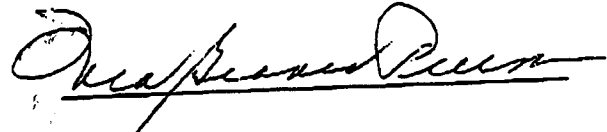


In the Matter of Moshe Ostad, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Ostad.

Dated: March 16, 2004



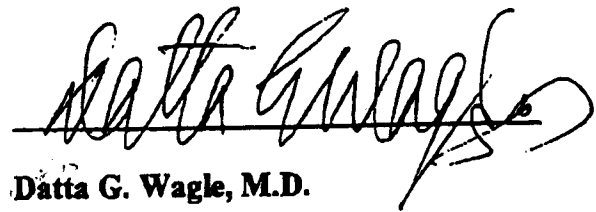
Thea Graves Pellman

**In the Matter of Moshe Ostad, M.D.**

**Datta G. Wagle, M.D., an ARB Member concurs in the Determination and Order in the**

**Matter of Dr. Ostad.**

**Dated: 3/16/, 2004**

  
**Datta G. Wagle, 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: 03/17/04, 2004

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: March 17, 2004

Therese G. Lynch, M.D.

Therese G. Lynch, M.D.

## APPENDIX

### Terms of Probation

1. Respondent shall conduct himself in all ways in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his profession.
2. Respondent shall submit written notification to the New York State Department of Health addressed to the Director, Office of Professional Medical Conduct (OPMC), 433 River St., 4th Floor, Troy, New York 12180; said notice is to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.
3. Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of Respondent's compliance with the terms of this Order. Respondent shall personally meet with a person designated by the Director of OPMC as requested by the Director.
4. The period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director again prior to any change in that status. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon Respondent's return to practice in New York State.
5. Respondent's professional performance may be reviewed by the Director of OPMC. This review may include, but shall not be limited to, a review of office records, patient records and/or hospital charts, interviews with or periodic visits with Respondent and his staff at practice locations or OPMC offices.
6. Respondent shall maintain legible and complete medical records, which accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations regarding controlled substances.

7. Respondent shall comply with the Comprehensive Medical Records Review Order within ninety days from the effective date of the Administrative Review Board's Determination and Order in this case.
  
8. Respondent shall comply with all terms, conditions, restrictions, limitations and penalties to which he or she is subject pursuant to the Order and shall assume and bear all costs related to compliance. **Upon receipt of evidence of noncompliance with, or any violation of these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding and/or any such other proceeding against Respondent as may be authorized pursuant to the law.**