



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

October 10, 2002

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Robert Bogan, Esq.
& Robert Maher, Esq.
NYS Department of Health
Hedley Park Place - 4th Floor
Troy, New York 12180

Stevens L. Ingraham, Esq.
Harris Beach LLP
99 Garnsey Road
Pittsford, New York 14534

Clifford Robert Jacobson, M.D.
5261 West Lake Road
Geneseo, New York 14454

Clifford Robert Jacobson, M.D.
1655 Elmwood Avenue
Suite 230
Rochester, New York 14620

RE: In the Matter of Clifford Robert Jacobson, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 02-195) 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.

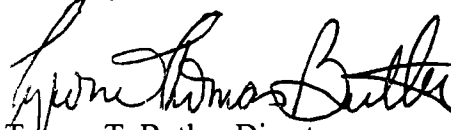
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified 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,



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

**Clifford Robert Jacobson, M.D.
(Respondent)**

Administrative Review Board (ARB)

Determination and Order No. 02-195

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

COPY

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

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

**Paul Robert Mahar, Esq.
Stevens L. Ingraham, Esq.**

After a hearing below, a BPMC Committee determined that the Respondent committed professional misconduct, due to his Federal criminal conviction for mail fraud. The Committee voted to suspend the Respondent's New York medical license (License), to stay the suspension and to place the Respondent on probation for five years, under terms that appear in the Committee's Order. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney 2002), the Petitioner asks the ARB to modify that Determination by revoking the Respondent's License. After reviewing the record and the parties' review submissions, the ARB rejects the request that we revoke the Respondent's record. We vote 3-1, however, to modify the Committee's Determination by suspending the Respondent's License for five years and staying the suspension in full. We affirm the Committee's Determination to place the Respondent on probation for five years under the terms that appear in the Committee's Order.

¹ ARB Member Therese Lynch, M.D., recused herself from participating in the case. The ARB proceeded to consider the case with a four member quorum, see Matter of Wolkoff v. Chassin, 89 NY2d 250 (1996).

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(9)(a)(ii) (McKinney Supp. 2002) by committing professional misconduct by engaging in conduct that resulted in a conviction under Federal Law. An expedited hearing (Direct Referral Proceeding) ensued pursuant to N.Y. Pub. Health Law §230(10)(p)(McKinney 2002), before a BPMC Committee, which rendered the Determination now on review. In the Direct Referral Proceeding, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, see In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The evidence before the Committee revealed that the Respondent entered a guilty plea in the United States District Court for the Western District of New York to violating Title 18 U.S.C. § 1341, by committing mail fraud, a felony. The Felony Information to which the Respondent entered the plea alleged that the Respondent devised a scheme and artifice for obtaining money from Medicare, Medicaid and private insurance by inflating the amount of time the Respondent spent with patients and thereby obtaining money by false and fraudulent pretenses. The District Court sentenced the Respondent to six months home confinement, five years on probation, a \$50,000.00 fine, 250 hours community service for each year on probation, a \$100.00 assessment on the guilty plea and restitution amounting to \$786,585.72.

The Committee determined that the Federal conviction made the Respondent liable for disciplinary action against his License pursuant to N. Y. Educ. Law §§ 6530(9)(a)(ii). The Committee voted to suspend the Respondent's License for five years, to stay the suspension and to place the Respondent on probation for five years, under the terms that appear in the Committee's Order. The Committee found the Respondent's misconduct serious, but also found several factors existed that would make revocation too severe a penalty in this case. The Committee noted that the Respondent paid an extremely heavy price for criminal conviction, including the right to bill Federal programs for his services and an adverse impact on his employment at a Veterans Administration hospital. The Committee also found glowing

testimonials in the record for high quality care the Respondent rendered and community service the Respondent performed. The Committee rejected arguments by the Respondent that attributed the over billing to the Respondent's mental condition and that attempted to downplay the billing violations.

Review History and Issues

The Committee rendered their Determination on June 14, 2002. This proceeding commenced on June 24, 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 brief. The record closed when the ARB received the Respondent's brief on July 26, 2002.

The Petitioner asks that the ARB overturn the Committee's Determination and revoke the Respondent's License. The Petitioner argues that the Respondent showed no remorse for his conduct, lied to the Committee and hurt the poor by taking more money from the Medicaid system than the Respondent deserved. As to the Respondent's defense that his conduct resulted from his mental condition, the Petitioner argued that if the Respondent's mental condition affected his ability to practice he should not have been practicing. Also, the Petitioner argued that the rebuttal witness the Petitioner presented, Cynthia Pangallo, proved that Respondent committed misconduct in addition to the conduct at issue in the Federal criminal conviction.

The Respondent argues that he showed remorse by cooperating with authorities before taking the guilty plea. The Respondent contends that he initiated his own psychotherapy, established accounts for restitution, initiated community service and otherwise took steps to rehabilitate himself. On the issue whether the Respondent's mental condition affected his conduct, the Respondent argued that the Committee placed little weight on the mental condition,

so no need existed for the ARB to consider the testimony by the Petitioner's rebuttal witness, Ms. Pangallo. The Respondent also argued that Ms. Pangallo's testimony related to events outside the Statement of Charges and that the Respondent received no opportunity to prepare a defense to the issues that Ms. Pangallo raised in her testimony.

Determination

The ARB has considered the record and the parties' briefs. On our own motion, we correct an error in the Committee's Determination. Next, we affirm the Committee's Determination that the Respondent committed professional misconduct due to the Federal criminal conviction and we reject the attempt by both parties to re-litigate or raises issues beyond the conviction. Finally, we modify the Committee's Determination to suspend the Respondent's License for five years, stay the suspension and place the Respondent on probation for five years.

In the Committee's Determination on page 2, the Committee listed no witnesses for the Petitioner. The Petitioner did, in fact, produce one witness, Ms. Pangallo. We amend the Committee's Determination to reflect that Ms. Pangallo testified for the Petitioner.

As to the Respondent's conduct, the Statement of Charges alleged misconduct on one ground, the Respondent's Federal criminal conviction that constituted misconduct under N. Y. Educ. Law § 6530(9)(a)(iii). The Committee found that the Respondent entered a plea to devising a scheme and artifice for obtaining money and property by false and fraudulent pretenses and representations. The Committee rejected the Respondent's attempt at hearing to blame fraudulent billings on his mental condition. The ARB agrees with the Committee. The Respondent entered a plea to fraudulent conduct and an attempt to blame his conduct on his condition constituted an attempt to repudiate the Respondent's guilty plea. In answer to the

Respondent's argument about his mental condition, the Petitioner presented rebuttal testimony alleging further misconduct beyond the conduct at issue in the charges. The ARB agrees again with the Committee's Determination that gave no consideration to that rebuttal testimony. The ARB would deny a respondent due process by grounding a sanction on uncharged conduct, Matter of Dhabuwala v. State Bd. for Prof. Med. Cond., 225 A.D.2d 209, 651 N.Y.S.2d 249 (3rd Dept. 1996).

The ARB votes 3-1 to reject the Petitioner's request that we overturn the Committee and revoke the Respondent's License. The majority agrees with the Committee that the Respondent committed serious misconduct and we agree further that the Federal Court's sentence has already provided a heavy sanction. The ARB agrees further with the Committee that we must still take action against the Respondent's License to ensure that the Respondent commits no further conduct. The majority modifies the Committee's Determination by suspending the Respondent's License for five years and staying the suspension. We affirm the Committee's Determination to place the Respondent on probation for five years, under the terms that appear in the Committee's Order.

ORDER

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

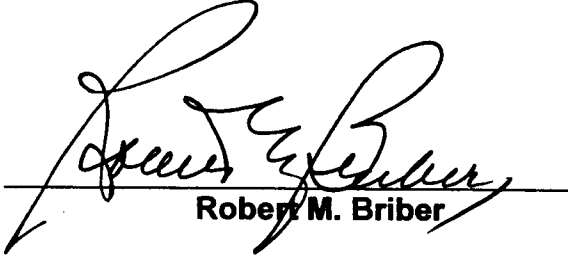
1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB modifies the Committee's Determination on penalty.
3. The ARB votes 3-1 to suspend the Respondent's License for five years, to stay the suspension and to place the Respondent on probation for five years, under the Terms that appear in the Committee's Order.

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

In the Matter of Clifford Jacobson, M.D.

Robert M. Briber, an ARB Member, affirms that he took part in the consideration of this case and that this Determination and Order reflects the decision by the majority in the Matter of Dr. Jacobson.

Dated: September 24, 2002

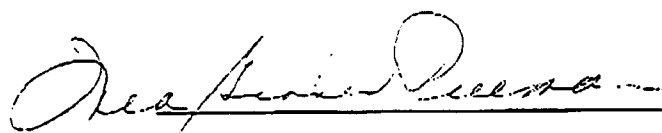


Robert M. Briber

In the Matter of James A. Papa, M.D.

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

Dated: 10/7/02, 2002

A handwritten signature in cursive script, appearing to read 'Thea Graves Pellman', written over a horizontal line.

Thea Graves Pellman

In the Matter of Clifford Jacobson, M.D.

Winston S. Price, M.D., an ARB Member affirms that he took part in the consideration of this case and that this Determination and Order reflects the decision by the majority in the Matter of Dr. Jacobson.

Dated: Oct 10, 2002

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

Winston S. Price, M.D.

In the Matter of Clifford Jacobson, M.D.

Stanley L. Grossman, an ARB Member affirms that he took part in the consideration of this case and that this Determination and Order reflects the decision by the majority in the Matter of Dr. Jacobson.

Dated: September 27, 2002

Stanley L. Grossman M.D.

Stanley L Grossman, M.D.