



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

PUBL

September 7, 2004

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Robert Bogan, Esq.
Paul Robert Mahar, Esq.
NYS Department of Health
433 River Street – Suite 303
Troy, New York 12180

Robert Jude O'Brien, M.D.
4100 Duval Road, Suite 103
Austin, Texas 78759

Robert Jude O'Brien, M.D.
119-01 West Cow Path Road
Austin, Texas 78727

Robert Jude O'Brien, M.D.
160 Geronimo Cove
Kyle, Texas 78640

RE: In the Matter of Robert Jude O'Brien, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 04-111) 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.

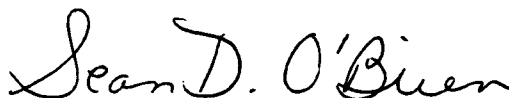
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified 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 that reads "Sean D. O'Brien". The signature is written in a cursive style with a large initial "S" and "D".

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

Robert Jude O'Brien, M.D. (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. 04-111

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:**

**Paul Robert Maher, Esq.
Pro Se**

The Respondent holds a medical license in Texas, in addition to his license to practice medicine in New York (License). In this proceeding pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney 2004), the ARB considers the sanction to impose against the Respondent's License after the State of Texas disciplined the Respondent for misconduct in practice. After a hearing here before a BPMC Committee, the Committee voted to place the Respondent on five years probation, after determining that the Respondent practices with a mental condition that impairs his practice. Both parties sought review from that Determination and both seek modifications in the sanction the Committee imposed. After reviewing the record and the parties' review submissions, the ARB modifies the Committee's Determination by suspending the Respondent's License until he completes probation under the Texas disciplinary order, we place the Respondent on probation for five years thereafter and we place a permanent condition on the Respondent's License to require him to practice with a chaperone in a female patient's presence.

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)(b) & (9)(d) (McKinney Supp. 2003) by committing professional misconduct because:

- the duly authorized professional disciplinary agency from another state, Texas, found the Respondent guilty for professional misconduct [§6530(9)(b)] and/or took disciplinary action against the Respondent's medical license in that state [§6530(9)(d)], for,
- conduct that would constitute professional misconduct, if the Respondent had committed such conduct in New York.

The Petitioner's Statement of Charges [Petitioner Exhibit 1] alleged that the Respondent's misconduct in Texas would constitute misconduct if committed in New York, under the following categories:

- practicing medicine while impaired by a mental disability, a violation under N. Y. Educ. Law §§ 6530(7) (McKinney Supp. 2004);
- suffering from a psychiatric condition that impairs the ability to practice medicine, a violation under N. Y. Educ. Law §§ 6530(8) (McKinney Supp. 2004); and,
- engaging in conduct that evidences moral unfitness, a violation under N.Y. Educ. Law § 6530(20)(McKinney Supp. 2004).

An expedited hearing (Direct Referral Proceeding) ensued pursuant to N.Y. Pub. Health Law §230(10)(p)(McKinney 2004), 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, In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The evidence at the Direct Referral Hearing showed that, in June 2003, the Respondent entered into an Agreed Order (First Order) with the Texas State Board of Medical Examiners (Texas Board) that suspended the Respondent's Texas License until such time as the Respondent could satisfy the Texas Board that the Respondent was able physically, mentally and otherwise to practice medicine competently. The First Order resulted from the Respondent self-reporting that he suffered from a psychiatric condition, paraphilia, that manifests in his case as voyeurism. The Respondent took photographs and videos of female patients unclothed or undressing. In December 2003, the Respondent entered into another Agreed Order (Second Order), in which the Texas Board withdrew the suspension and placed the Respondent on probation for five years, with extensive conditions, including a prohibition on direct patient care or contact.

The Committee found that the Respondent's conduct in Texas would constitute misconduct in New York as practicing the profession while impaired, suffering from a psychiatric condition that impairs practice and engaging in conduct that evidences moral unfitness. The Committee determined that the Respondent's impairment and the disciplinary action by the Texas Board made the Respondent liable for disciplinary action against his License pursuant to Educ. Law §§6530(9)(b) & (9)(d). The Committee voted 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 found mitigating factors in the Respondent's action in self-reporting and seeking treatment voluntarily and in the Respondent's candid hearing testimony regarding his problem. The Committee also noted that the Second Order found that the Respondent completed intensive, in-patient psychiatric evaluation and treatment in the

Behavioral Medicine Institute (Institute) in Atlanta from December 1998 to February 1999. The Second Order also stated that the Respondent remained in treatment through the Order's issuance, completed an evaluation at the Institute in August 2003 and cooperated with the Texas Board's investigation. The Committee found that these mitigating factors made revocation or suspension unnecessary. The Committee found an extensive New York probation an appropriate sanction, if the Respondent chooses to return to New York to practice.

Review History and Issues

The Committee rendered their Determination on May 21, 2004. This proceeding commenced on June 3 and June 7, 2004, when the ARB received the Petitioner's and then the Respondent's Notices requesting 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 briefs on July 6, 2004.

The Petitioner requests that the ARB overturn the Committee's Determination and revoke the Respondent's License. The Petitioner argues that the Respondent deserves a severe penalty for violating patient trust by photographing or videotaping patients. The Petitioner contends that the Committee imposed a sanction inadequate to protect New York's citizens.

The Respondent requests that the ARB amend the Committee's Order, to remove the word "paraphilia" in the two places in which it appears, and replace it with the words "psychiatric condition." The Respondent argues that leaving the Determination unchanged would make the Respondent's continued practice impossible.

ARB Authority

In reviewing a Committee's Determination pursuant to Pub. Health Law § 230-c(4)(b), the ARB determines whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law, and, whether the Penalty is appropriate and within the scope of penalties which Pub. Health Law §230-a permits. The ARB may substitute our judgment 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); 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); and in determining credibility, Matter of Minielly v. Comm. of Health, 222 A.D.2d 750, 634 N.Y.S.2d 856 (3rd Dept. 1995). In determining the appropriate penalty in a case, the ARB may consider both aggravating and mitigating circumstances, as well as considering the protection of society, rehabilitation and deterrence, Matter of Brigham v. DeBuono, 228 A.D.2d 870, 644 N.Y.S.2d 413 (1996). The ARB may choose to substitute our judgment and impose a more severe sanction than the Committee, on our own motion, even if no party requests that we grant such relief, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996).

Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination that the Respondent committed professional misconduct. Neither party challenged the Committee's Determination on the charges. We reject the Respondent's request that we amend the Determination to remove the word "paraphilia." We modify the Committee's

Determination to suspend the Respondent's License, to place him on probation with a monitor thereafter and to place a permanent condition on the Respondent's License requiring him to practice with a chaperone.

We agree with the Committee that the Respondent engaged in serious misconduct and we also agree with the Committee that New York can craft a penalty to protect our citizens without revoking the Respondent's License. The ARB concludes, however, that we should take steps in addition to those the Committee ordered to insure patient protection.

The Committee found the Respondent straightforward in testifying about his condition at the Direct Referral Hearing. With that testimony in mind, the ARB found it disconcerting that the Respondent's brief requested that we amend the Committee's Determination to remove reference to paraphilia. The ARB will impose terms below for monitors and chaperones. The monitors and chaperones must know the nature of the Respondent's condition in order for the monitors and chaperones to perform their functions effectively. We refuse to amend the wording in the Committee's Determination.

The Committee's Order, paragraph 1, provided that the Respondent's probation in New York should commence only after the Respondent has provided proof that the Respondent has complied with the probation terms under the Texas Board's Second Order. The Committee's Order leaves unclear whether the Respondent must complete the probation under the Second Order or merely prove compliance at the point at which the Respondent leaves Texas. If the Committee had intended that the Respondent complete the Second Order probation, then the Committee should have suspended the Respondent's License until such completion. The ARB concludes that the Respondent should complete the probation terms successfully under the Second Order, including any extension or modification. We suspend the Respondent's License

until he complies completely and successfully with the Second Order and any extension or modification of the Second Order.

We agree with the Committee that the Respondent should serve five years on practice probation, if he chooses to return to practice in New York. We adopt the terms probation terms that the Committee imposed in their Order at Paragraphs 2A-2H. We add an additional Paragraph I to require that the Respondent practice with a monitor during the probation. The Respondent will select the monitor, subject to approval by the Director of the Office for Professional Medical Conduct (OPMC) and subject to the provisions in Paragraph I. That Paragraph shall read:

" I. The Respondent shall practice medicine only when monitored by a licensed physician, proposed by Respondent and subject to the written approval of the Director of OPMC.

- 1. The Respondent shall make available to the monitor any and all records or access to the practice requested by the monitor, including on-site observation. The practice monitor shall visit Respondent's medical practice at each and every location, on a random unannounced basis at least quarterly and shall examine a selection of records maintained by Respondent, including patient records, prescribing information and office records. The review will determine whether the Respondent's medical practice is conducted in accordance with the generally accepted standards of professional medical care. Any perceived deviation of accepted standards of medical care or refusal to cooperate with the monitor shall be reported within 24 hours to OPMC.*
- 2. The Respondent shall be solely responsible for all expenses associated with monitoring, including fees, if any, to the monitoring physician.*
- 3. The Respondent shall cause the practice monitor to report quarterly, in writing, to the Director of OPMC.*
- 4. Respondent shall maintain medical malpractice insurance coverage with limits no less than \$2 million per occurrence and \$6 million per policy year, in accordance with Section 230(18)(b) of the Public Health Law. Proof of coverage shall be submitted to the Director of OPMC prior to Respondent's practice after the effective date of this Order.*

The Respondent could arrange for the monitoring in cooperation with the Committee on Physician's Health (CPH), if CPH will accept him. The monitor shall receive a copy of this Determination.

Finally, we place a permanent condition on the Respondent's License to require that he examine, treat or interact in person with a female patient only with a chaperone present. The chaperone shall be a female licensed or registered health care professional or other health care worker, shall not be a family member, personal friend, or be in a professional relationship with the Respondent which could pose a conflict with the chaperone's responsibilities. The chaperone shall be proposed by Respondent and subject to the written approval of the Director of OPMC. Such written approval shall provide the terms under which the chaperone shall operate, such as acknowledgements for the chaperone's signature and any reporting requirements. The chaperone shall receive a copy of this Determination.

The Texas Board's Second Order places extensive restrictions on the Respondent, including a ban on patient care. If the Respondent completes the probation successfully under the Second Order, he will receive the opportunity to return to providing direct patient care if he comes to New York to practice. The practice monitor under the New York probation will assure that the Respondent has retained his patient care skills during the time away from patient care under the Second Order and the New York suspension. The chaperone will provide permanent protection for patients.

ORDER

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

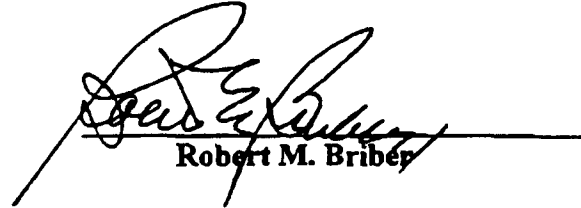
1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB modifies the sanction the Committee imposed in their Determination.
3. The ARB suspends the Respondent's License until such time as the Respondent completes and satisfies the probation terms under the Texas Board's Second Order, and any extension and/or modification in such Order.
4. Following the suspension, at such time as the Respondent chooses to return to New York, the Respondent shall serve five years on probation under the terms from our Determination.
5. The ARB places a permanent condition on the Respondent's License to prohibit the Respondent from any personal contact or interaction with a female patient, except with a chaperone present.

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 Robert Judge O'Brien, M.D.

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

Dated: September 1, 2004



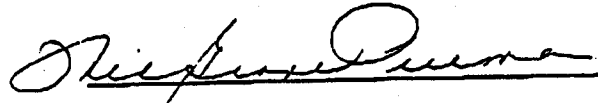
Robert M. Briber

In the Matter of Robert Jude O'Brien, M.D.

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

Matter of Dr. O'Brien.

Dated: Sept 3, 2004



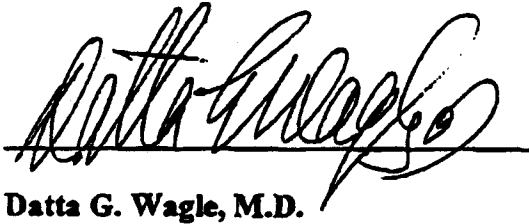
Thea Graves Pellman

In the Matter of Robert Jude O'Brien, M.D.

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

Matter of Dr. O'Brien.

Dated: 9/3/, 2004


Datta G. Wagle, M.D.

In the Matter of Robert Jude O'Brien, M.D.

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

Matter of Dr. O'Brien.

Dated: 09/03, 2004

Stanley L. Grossman, M.D.

Stanley L. Grossman, M.D.

In the Matter of Robert Jude O'Brien, M.D.

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

Dated: Sept 2, 2004

Therese G Lynch M.D.

Therese G. Lynch, M.D.