



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 20, 2006

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Alan Vanderwalde, M.D.
19 Spruce Hill Lane
Goshen, New York 10924

Wilfred T. Friedman, Esq.
Friedman and Mahdavian
The Bar Building
36 West 44th Street, Suite 816
New York, New York 10036

Robert Bogan, Esq.
NYS Department of Health
Hedley Building
433 River Street- Suite 303
Troy, New York 12180

RE: In the Matter of Alan Vanderwalde, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 05-288) 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.

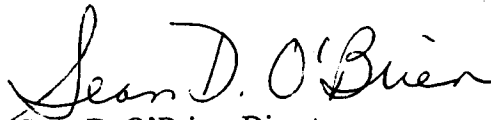
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified 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". The signature is written in black ink and is positioned above the printed name and title.

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

Alan Vanderwalde, 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. 05-288

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):

Robert Bogan, Esq.

For the Respondent:

Wilfred T. Friedman, Esq.

After a hearing below, a BPMC Committee voted to censure and reprimand the Respondent, following the Respondent's criminal conviction for possession of heroin. In this proceeding pursuant to N.Y. Pub. Health Law (PHL) § 230-c (4)(a)(McKinney 2006), the Petitioner asks the ARB to modify that Determination and revoke the Respondent's license to practice medicine in New York State (License). After considering the hearing record and the parties' review submissions, the ARB rejects the Petitioner's request to revoke the Respondent's License, but we overturn the Committee's Determination to censure and reprimand the Respondent. We vote to suspend the Respondent's License for three years, stay the suspension in full and order that the Respondent to perform three hundred hours of medically related community service, under the conditions that the ARB imposes in this Determination.

Committee Determination on the Charges

The Committee conducted an expedited hearing (Direct Referral Proceeding), pursuant to PHL § 230(10)(p), into charges that the Respondent violated N. Y. Educ. Law (EL) §6530(9)(a)(i) (McKinney Supp. 2006) by engaging in conduct that resulted in the Respondent's

conviction for a crime under New York Law. In the Direct Referral Proceeding, if the evidence establishes the criminal conviction, 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 at the hearing demonstrated that the Respondent was convicted on April 14, 2005 of misdemeanor Possession of a Controlled Substance in the 7th Degree. The Respondent received a sentence of three years on probation, with the imposition of a fee and surcharge totaling \$160.00. In September 2003, the Respondent voluntarily surrendered his License, following the arrest that eventually resulted in the Respondent's 2005 conviction. Under PHL §230(13)(a), a licensee may surrender a license voluntarily due to temporary incapacity, with the possibility for the licensee to eventually regain the license following a proceeding before a BPMC Restoration Committee. The Respondent's License remained under voluntary surrender at the time of the hearing below.

The Committee found that the Respondent's criminal conviction made the Respondent liable for disciplinary action against his License pursuant to EL §6530(9)(a)(i). The Committee voted to censure and reprimand the Respondent. The Committee rejected revocation as a penalty for a misdemeanor conviction. The Committee also rejected suspension and probation as penalties. The Committee concluded that a suspension would be meaningless due to the Respondent's current License surrender. The Committee concluded further that the Respondent could regain his License only if a BPMC Restoration Committee restored the License and the Committee noted that any Restoration Committee would place conditions on any Restoration that would be the same as probation terms.

Review History and Issues

The Committee rendered their Determination on December 16, 2005. This proceeding commenced on December 21, 2005, 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 reply brief. The record closed when the ARB received the reply brief on February 6, 2006.

The Petitioner argues that censure and reprimand constitutes a severely inadequate penalty. The Petitioner argues that the Respondent himself gave evidence to demonstrate the level of his misconduct, by testifying at hearing that:

- his arrest came in the parking lot of a hospital at which he worked, while the Respondent was attempting to buy heroin [Hearing Transcript page 15];
- he was dependent on heroin and used eight bags, or one gram, per day [Hearing Transcript page 15];
- he used prescription pain killers for years before he started using heroin [Hearing Transcript page 16]; and,
- he was unaware whether he caused any patient harm, because there were times he wasn't all there and wasn't devoting his full efforts to patient care [Hearing Transcript page 17].

The Petitioner asked that the ARB revoke the Respondent's License, or in the alternative, that the ARB suspend the Respondent's License for five years, stay the suspension and place the Respondent on probation for five years under the proposed terms that appear at pages 3-5 in the Petitioner's review brief. The Petitioner also argues that the License Surrender and Restoration process is confidential and that the ARB should impose a penalty against the Respondent in this public proceeding to make clear to the public and medical community that heroin use will not be tolerated.

The Respondent contends that the Committee considered carefully the penalty the Committee imposed and the Respondent contends that no grounds exist to alter that penalty. The

Respondent indicates that in the months between his 2003 arrest and his 2005 conviction, he completed drug court, received regular treatment, attended twelve step meetings and submitted to randomly monitored, observed and forensically valid urine screens. All screens proved negative. As to the Petitioner's argument about public attention, the Respondent argues that the Respondent's well-publicized arrest drew the attention of physicians and the public to the illegality of purchasing and abusing heroin. The Respondent also argues that the conditions that the Petitioner requested as proposed probation terms already apply against the Respondent under his surrender and will apply under any restoration order. The Respondent contends that the Petitioner's review brief ignores the Respondent's efforts at rehabilitation and his sustained recovery.

ARB Authority

Under PHL §§ 230(10)(i), 230-c(1) and 230-c(4)(b), the ARB may review Determinations by Hearing Committees to determine 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 PHL §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). The ARB may choose to substitute our judgment and impose a more severe sanction than the Committee on our own motion, even

without one party requesting the sanction that the ARB finds appropriate, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). 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 statute provides no rules as to the form for briefs, but the statute limits the review to only the record below and the briefs [PHL § 230-c(4)(a)], so the ARB will consider no evidence from outside the hearing record, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3rd Dept. 1997).

A party aggrieved by an administrative decision holds no inherent right to an administrative appeal from that decision, and that party may seek administrative review only pursuant to statute or agency rules, Rooney v. New York State Department of Civil Service, 124 Misc. 2d 866, 477 N.Y.S.2d 939 (Westchester Co. Sup. Ct. 1984). The provisions in PHL §230-c provide the only rules on ARB reviews.

Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination that the Respondent's criminal conviction made the Respondent liable for disciplinary action against his License. Neither party challenged the Committee's Determination on that issue. We overturn the Committee's Determination because we find a censure and reprimand constitutes an inappropriate penalty for the Respondent's criminal conduct, which also amounted to professional misconduct.

The Respondent's arrest occurred while purchasing heroin in a hospital parking lot. The Respondent used heroin while practicing medicine and placed his patients at risk, due his heroin abuse. The Respondent surrendered his License. The Surrender occurred, however, only following his arrest, rather than because the Respondent decided on his own to take action prior to causing patient harm or causing permanent injury to himself.

The ARB agrees with the Committee that revocation would constitute an overly harsh penalty in this case. We vote 5-0 to suspend the Respondent's License for three years. We stay that suspension in full due to the time the Respondent has spent away from practice under the surrender. We reject the Respondent's request that we place the Respondent on probation, because we agree with the Respondent that any restoration order will contain the same terms that would appear in a probation order. We order that, at such time as the Respondent regains his License, that the Respondent complete three hundred hours community service, medical in nature, by performing one hundred hours community service per year for three years following License restoration. We conclude that the community service provides the appropriate sanction for the Respondent's misconduct in exposing patients to possible risk by continuing to practice while he abused heroin.

ORDER

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

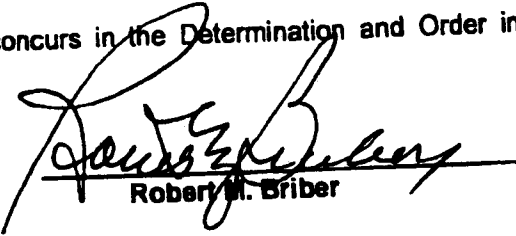
1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB overturns the Committee's Determination to censure and reprimand the Respondent.
3. At such time as the Respondent regains his License, the ARB suspends the Respondent's License for three years, stays the suspension in full and directs the Respondent to complete one hundred hours of community service, medical in nature, per year for three years.

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 Alan Vanderwalde, M.D.

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

Dated: March 15, 2006



Robert M. Briber

In the Matter of Alan Vanderwalde, M.D.

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

Dated: March 19, 2006



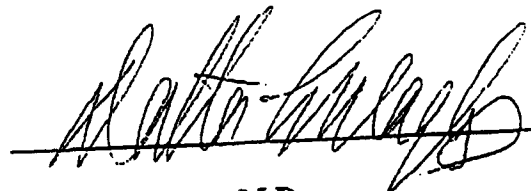
Thea Graves Pellman

In the Matter of Alan Vanderwalde, M.D.

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

Matter of Dr. Vanderwalde.

Dated: 3/16/, 2006

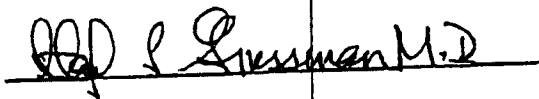


Datta G. Wagle, M.D.

In the Matter of Alan Vanderwalde, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the Matter of Dr. Vanderwalde.

Dated: March 16, 2006

A handwritten signature in black ink, appearing to read "Stanley L. Grossman M.D.", is written over a horizontal line.

Stanley L. Grossman, M.D.

In the Matter of Alan Vanderwalde, M.D.

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

Dated: March 15, 2006

Therese G. Lynch M.D.

Therese G. Lynch, M.D.