



STATE OF NEW YORK DEPARTMENT OF HEALTH

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Antonia C. Novello, M.D., M.P.H., Dr.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

PUBLIC
March 30, 2004

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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Conduct
433 River Street, Suite 303
Troy, New York 12180

RE: In the Matter of Robert P. Weinberg, D. O.

Dear Parties:

Enclosed please find the Determination and Order (No. 03-173) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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

Robert P. Weinberg, D.O. (Respondent)

Administrative Review Board (ARB)

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

Determination and Order No. 03-173

COPY

**Before ARB Members Grossman, Lynch, Pellman and Briber¹
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 held a medical license in Massachusetts in addition to a license in New York. This case arose due to a disciplinary proceeding in Massachusetts and certain information the Respondent provided about that proceeding. After a hearing below (Hearing), a BPMC Committee determined that the Respondent's professional misconduct in Massachusetts made the Respondent liable for disciplinary action against his New York medical license (License). The Committee also found that the Respondent lied in applications for a hospital appointment in New York. After the Committee voted to revoke the Respondent's License, Respondent requested this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney 2004) to ask that the ARB overturn the Committee's Determination and order a new hearing. Upon reviewing the Hearing record and the parties' review submissions, the ARB denies the request for a new hearing and we affirm the Committee's Determination on the charges and the Committee's Determination to revoke the Respondent's License.

¹ ARB Member Datta Wagle, M.D., recused himself from participating in this case, because he sat as a member on this Hearing Committee prior to the time he joined the ARB. 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(2) & 6530(20)(McKinney Supp. 2004) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently, and,
- engaging in conduct that evidences moral unfitness.

These charges alleged that the Respondent made knowingly false answers on applications for medical staff appointment. A hearing on those charges occurred before a BPMC Committee, pursuant to Pub. Health Law § 230(10)(e). The Petitioner filed additional charges with BPMC alleging that the Respondent violated N. Y. Educ. Law §§ 6530(9)(b) & (9)(d) (McKinney Supp. 2004) by committing professional misconduct because:

- the duly authorized professional disciplinary agency from another state, Massachusetts, 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 Massachusetts action involved a consensual sexual relationship between the Respondent and a patient (Patient A). The Petitioner's Statement of Charges [Petitioner Exhibit 1] alleged that the Respondent's misconduct in Massachusetts would constitute misconduct if committed in New York, under the following specifications,

- practicing the profession with negligence on more than one occasion, a violation under N.Y. Educ. Law § 6530(3)(McKinney Supp. 2004),
- practicing the profession with gross negligence, a violation under N.Y. Educ. Law § 6530(4)(McKinney Supp. 2004),
- exercising undue influence on a patient, a violation under N.Y. Educ. Law §6530(17)(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 the same BPMC Committee, concurrently with the hearing on the other charges. 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 record before the Committee indicated that the Massachusetts Board of Registration in Medicine (Massachusetts Board) filed disciplinary charges against the Respondent in February 1999. The Committee found that in 2000 and 2001 the Respondent applied for locum tenans appointment at Jones Memorial Hospital in Wellsville, New York (Applications). In both Applications, the Respondent answered "No" to a question about whether there were any disciplinary charges against the Respondent pending before any State License Board. In testimony at the BPMC hearing, the Respondent admitted that he answered falsely on the Applications, because he had lost out on jobs at five other facilities by informing the other Facilities about the pending charges in Massachusetts [Hearing Transcript pages 17, 28]. The Respondent indicated that he answered falsely to get the job at Jones Memorial. The Committee found that the false answers constituted fraud in practice and evidenced moral unfitness in practice.

The Committee found further that the Massachusetts Board issued an October 2002 Order revoking the Respondent's Massachusetts medical license for engaging in sexual activity with a current patient [Hearing Exhibit 12]. The Massachusetts Board based it's Order in part on a Stipulation of facts which the Respondent signed [Hearing Exhibit 11]. The BPMC Committee concluded that the Respondent's conduct in Massachusetts would constitute misconduct in New York as negligence on more than one occasion, gross negligence, exercising undue influence on a patient and engaging in conduct that evidences moral unfitness. The Committee found the Respondent's conduct toward Patient A egregious due to the Patient's psychiatric history. The

Committee held that the Respondent's conduct made the Respondent liable to disciplinary action pursuant to Educ. Law §§ 6530(9)(b) & 6530(9)(d).

The Committee voted to revoke the Respondent's License. The Committee concluded that the Respondent engaged in unethical, harmful, immoral and boundary violating sexual behavior with Patient A and then tried to hide that behavior from a potential employer.

Review History and Issues

The Committee rendered their Determination on June 30, 2003. This proceeding commenced on July 14, 2003, when the ARB received the Respondent's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and the Petitioner's response brief. The record closed when the ARB received the response brief on September 12, 2003.

The Respondent argues that the Massachusetts Board proceeding and the BPMC Hearing denied him due process. The Respondent raised eight issues for review.

1. The Committee Administrative Officer's ruling to exclude the Respondent's Hearing Exhibits A and B denied the Respondent the opportunity to submit written arguments and evidence, as provided under N.Y.A.P.A. § 301(4)(McKinney Supp 2004), and denied the Respondent the opportunity to introduce mitigating factors into evidence.
2. The Health Department General Counsel's Memorandum providing certain misconduct definitions constituted an ex-parte communication in violations of A.P.A. § 307(2).
3. The Petitioner failed to offer expert testimony under the mandate in Pub. Health Law § 230(a)(10)(ii).

4. The Committee relied on evidence "off-the-record" and thus denied the Respondent the opportunity for meaningful judicial review.
5. The Petitioner presented no de novo evidence at the BPMC Hearing, but relied on the "off-the-record" evidence from the Massachusetts proceeding.
6. The record fails to establish jurisdiction because the evidence fails to establish that Patient A was in fact the Respondent's patient.
7. The Committee's Determination that the Respondent committed misconduct a.) represents a modification without notice of "Rule 44 of the NY Public Health Law", and, b.) fails to cite any precedent, regulation or law which the Respondent violated.
8. The Respondent's false answers on the Applications were not under oath and the false answers preserved the Respondent's statutory right to confidentiality concerning disciplinary proceedings.

The Respondent asks that the ARB overturn the Committee's Determination and remand this matter for a new hearing.

In reply, the Petitioner argues that the ARB lacks the authority to overrule the Massachusetts Board and that the Respondent admitted at the BPMC Hearing that the Respondent gave false answers on the Applications. The Petitioner contends that the Respondent continues to deny wrongdoing and continues to avoid recognizing the seriousness of his misdeeds. The Petitioner asks the ARB to uphold the Administrative Officer's rulings and the Committee's Determination.

Determination

The ARB has considered the record and the parties' briefs. The ARB denies the Respondent's request to remand for further proceedings, we uphold the Committee's Determination that the Respondent committed professional misconduct and we uphold the Committee's Determination to revoke the Respondent's License.

Issue 1: We reject the Respondent's contention that the Committee's Administrative Officer erred by excluding the Respondent's proposed Exhibits A and B. The Respondent's hearing counsel, Professor Flym, indicated that Exhibits A and B constituted a brief and exhibits that Professor Flym submitted to the Supreme Judicial Court of Massachusetts. The brief argued that the Massachusetts Board lacked the authority to revoke the Respondent's Massachusetts License [Hearing Transcript pages 50-52]. The Respondent argued that by excluding Exhibits A and B, the Administrative Officer limited the Respondent's rights to written arguments and mitigating evidence.

Although A.P.A. § 301(4) and Pub. Health Law § 230(10)(c)(4) allow a respondent to submit written arguments and evidence, A.P.A. § 306(1) authorizes an Administrative Officer to exclude irrelevant evidence. The Administrative Officer warned the parties at the Hearing's commencement that he could curtail irrelevant evidence [Hearing Transcript page 7]. Evidence on the Massachusetts Board's legal authority constitutes irrelevant evidence in a Direct Referral proceeding. In such a Proceeding, a Committee may rely on the Massachusetts' Board's facially valid Order and any challenge to the Massachusetts Order lies before the Massachusetts Courts rather than before the Committee, Herberman v. Novello, 280 A.D.2d 814, 720 N.Y.S.2d 626 (3rd Dept. 2001). The Direct Referral Proceeding constitutes an inappropriate forum to re-litigate the Massachusetts Board Order when a respondent received the chance to contest the prior

proceeding, Choi v. State, 74 N.Y.2d 933 (1974), or when a respondent chose to forego a proceeding and to stipulate to extensive, detailed factual findings Ikramuddin v. DeBuono, 256 A.D.2d 1039, 683 N.Y.S.2d 319 (3rd Dept. 1998).

The Respondent received the opportunity on the record to inform the Committee about the pending judicial challenge to the Massachusetts Board's Order [Hearing Transcript pages 51-52]. The Committee lacked the authority to invalidate the Massachusetts Board's authority, however, so the brief and exhibits supporting the brief represented irrelevant evidence before the Committee, either on the charges or in mitigation. The Respondent received the chance to offer mitigating evidence through his testimony.

Issue 2: At the hearing, the Committee's Administrative Officer indicated that the General Counsel for the Health Department prepared a memorandum (Memorandum) containing the definitions for certain of the misconduct specifications that appear in Educ. Law § 6530 [Hearing Transcript page 6]. The Administrative Officer indicated that a copy of the Memorandum was available for the Respondent at the Hearing's commencement [Hearing Transcript page 6]. The Respondent's brief argued that the Respondent only received a copy after the ARB proceeding began. The Respondent argues that the Memorandum constituted an ex parte communication that violated the ban at A.P.A. § 307(2).

We find no validity to the Respondent's argument. Under A.P.A. § 307(2), no party may communicate directly or indirectly to a decision-maker on an issue of law or fact, except upon notice and opportunity for all parties to participate. No violation to the ex parte ban occurred at the Hearing, because the Administrative Officer offered a copy of the Memorandum to the Respondent's Counsel [Hearing Transcript page 9], but the Respondent's Counsel stated that he didn't really need to look at the Memorandum [Hearing Transcript Page 11]. The Respondent,

therefore, received notice and the opportunity to inspect the Memorandum at hearing, but the Respondent declined the opportunity.

Issue 3: The Respondent argued next that 1.) the Petitioner failed to comply with the provision in Pub. Health Law § 230(10)(a)(ii) that requires expert testimony at BPMC hearings and that 2.) without expert testimony, the Petitioner failed to establish the appropriate standard of care.

First, we reject the argument that any provision in the Pub. Health Law required an expert witness to testify at the Hearing. In a proceeding under Pub. Health Law § 230(10)(e), an investigation committee reviews the case first. Under Pub. Health Law § 230(10)(a)(ii), such an investigation committee shall consult a medical expert on issues of clinical practice. That statute addresses the investigation only and makes no requirements about expert witnesses at hearing. Further, in this case, the Petitioner brought the charges involving the Massachusetts proceeding as a Direct Referral Proceeding under Pub. Health Law §230(10)(p), rather than under the full hearing procedures under § 230(10)(e). The Petitioner did bring the fraud charges under the procedures in Pub. Health Law § 230(10)(e), but making false answers on the Applications involved no clinical practice issues.

Second, we reject the Respondent's contention that only expert testimony could establish the appropriate care standard in the charges at issue in this case. Both BPMC and the Courts have established already that physicians who engage in sexual relationships with patients and who make false answers on employment applications evidence moral unfitness in medical practice, Barad v. State Board for Professional Medical Conduct, 282 A.D.2d 893, 724 N.Y.S.2d 87 (3rd Dept. 2001); Saldana v. DeBuono, 256 A.D.2d 935, 681 N.Y.S.2d 874 (3rd Dept. 1998).

Issue 4: The Respondent argued that the Committee relied on testimony and evidence "off-the-record" by basing the Committee's Determination on the Massachusetts Board Order against the Respondent [Hearing Exhibit 12]. We find no validity to that argument.

At hearing, the Respondent received the opportunity to object to all the Petitioner's Exhibits. The Respondent made no objection to any Exhibit, including Exhibit 12, so the Respondent has waived any objection to the Committee relying on Exhibit 12 to make the Committee's findings. The Respondent's Counsel stated at the hearing that there was no dispute on the facts, that the file was what is was and that the record spoke for itself [Hearing Transcript page 10].

The Respondent's contentions about testimony and evidence "off-the-record" may refer to the lack of a hearing in Massachusetts. The Massachusetts Board Order indicated that no hearing took place because the Respondent entered into Stipulations and an agreed documentary record [Hearing Exhibits 11 and 12]. The Stipulations formed the basis for the Massachusetts Board's Order. A BPMC Committee may rely on the factual findings in another state's disciplinary order, that such other state based on an extensive, specific stipulation by a respondent Ikramuddin v. DeBuono (supra). The Respondent made extensive and specific stipulations in Massachusetts [Hearing Exhibit 11] and those stipulations provided the grounds for the Massachusetts Order and for the Committee's Determination on the Direct Referral Charges.

Issue 5: The Respondent's Issue 5 argued that the Petitioner presented no de novo evidence at the Hearing concerning the Direct Referral charges. We agree that the Committee relied on the Massachusetts Order in making their findings on the Direct Referral charges. As we have noted above, a committee may rely on another state's factual findings in a Direct Referral Proceeding, Ikramuddin v. DeBuono (supra).

Issue 6: The Respondent then argued jurisdiction and contended that no proof established that Patient A was indeed the Respondent's patient. The Respondent once again challenged Exhibit 12 as a basis for any finding by the Committee.

The ARB finds no validity to the Respondent's argument. The Respondent entered a Stipulation with the Massachusetts Board in which the Respondent admitted that 1.) he engaged in a sexual relationship with Patient A between 1992 and 1995, that 2.) the Respondent saw the Patient professionally at the Boston Evening Medical Center during that time and that 3.) the Respondent prescribed medications, including psychotropic drugs, to Patient A during that time [Hearing Exhibit 11, paragraphs 21-23, 25-26, 31, 35]. Further, the Respondent admitted under oath at the Hearing that he breached the medical code of ethics by becoming sexually involved with a patient [Hearing Transcript page 28]. We refuse to accept the Respondent's attempts to repudiate his earlier stipulations and his testimony under oath. We hold that the record establishes conclusively and by preponderant evidence that the Respondent engaged in sexual conduct with a patient.

Issue 7: The Respondent argued that the Committee abused its discretion by prohibiting contact between a physician and patient. The Respondent claims that "Rule 44 of the NY Public Health Law" specifically prohibits only sexual activity between a patient and psychiatrist, rather than between a patient and a family practice physician or emergency medicine physician. The Respondent also alleged that the Committee failed to cite any precedent, regulation or law that the Respondent violated. We reject these arguments.

The Committee's Determination set out clearly the Educ. Law provisions that the Committee found that the Respondent violated. The provisions included Educ. Law § 6530(20), which defines misconduct to include engaging in conduct that evidences moral unfitness. In

Miller v. Commissioner of Health, 270 A.D.2d 584, 703 N.Y.S2d 830 (3rd Dept. 2000), the Appellate Division upheld a determination by the ARB that a non-psychiatrist physician engaged in conduct that evidenced moral unfitness by engaging in a consensual relationship with a patient. In that case, Dr. Miller had challenged the ARB Determination by arguing that Educ. Law § 6530(44)² showed the Legislature's intent to limit misconduct for consensual sexual relations to psychiatrists only. The Court rejected that argument. The Court held that although the Legislature made a specific prohibition against consensual sexual relationships relating to psychiatrists, the Court found no approval by the Legislature for such relationships by other physicians. The Court found that the Legislature empowered BMC to judge the propriety of sexual conduct between physicians and patients and the Court upheld the BMC determination that such conduct evidenced moral unfitness. The Third Department has also upheld a moral unfitness finding against a physician in a case in which the physician engaged in a sexual relationship with a vulnerable patient, Barad v. State Board for Professional Medical Conduct (supra). The Committee in this case found the Respondent's behavior toward Patient A highly improper due to the Respondent's extensive knowledge about the Patient's history and her emotional frailty [Committee Determination page 9].

Issue 8: In the final issue in his brief, the Respondent argued that Massachusetts and New York both provide for confidentiality in physician disciplinary proceedings and that confidentiality grants a physician the right not to disclose information about disciplinary proceedings. The Respondent argued that his false answers on the Applications simply preserved his statutory right to confidentiality. The Respondent argued that forcing him to disclose

² We assume that the Respondent's reference to "Rule 44 of the NY Public Health Law" actually refers to Educ. Law § 6530(44).

information about disciplinary proceedings would be in effect require him to waive his statutory right to confidentiality.

Although provisions in the Pub. Health Law do provide confidentiality from public disclosure about certain information involving disciplinary proceedings, Pub. Health Law §2805-k requires a physician must waive confidentiality concerning any information that a medical facility requests, when that facility considers a physician for employment or staff privileges. Specifically, Pub. Health Law § 2805-k(1)(c) requires a physician to disclose information about any pending professional disciplinary proceeding when that physician applies for employment or privileges at a medical facility. In addition under the Educ. Law, a physician commits misconduct by practicing fraudulently [Educ. Law § 6530(2)] and engaging in conduct that evidences moral unfitness [Educ. Law § 6530(20)]. Providing false information knowingly on an application for employment at a medical facility constitutes both practicing fraudulently and engaging in conduct that evidences moral unfitness, Saldana v. DeBuono (supra).

We also find no credibility in the Respondent's argument that he gave false answers on the Applications to protect confidentiality. At the Hearing, under oath, the Respondent stated that he gave the false answers on the Applications in order to get the job at Jones Memorial [Hearing Transcript pages 17-18, 27-28]. The Respondent also acknowledged that he believed it was wrong to supply the false answers [Hearing Transcript pages 27-28].

Penalty: The Respondent's brief asked that we overturn the Committee and grant a new hearing. We have rejected each Issue the Respondent raised, so we see no grounds to grant a new hearing. In addition to affirming the Committee's Determination on the charges, we affirm the Committee's Determination to revoke the Respondent's License. By his own stipulations and by his testimony at the Hearing, the Respondent admitted to engaging in a sexual relationship with a

frail patient. By engaging in that relationship the Respondent betrayed the trust that the public places in the medical profession in general and, much worse, he betrayed the trust that Patient A placed in the Respondent specifically. License revocation constitutes the appropriate penalty for a physician who violates the trust placed in him by engaging in a sexual relationship with a patient, Morrison v. Debuono, 255 A.D.2d 710, 680 N.Y.S.2d 703 (3rd Dept. 1998). The Respondent also testified that he lied on the Applications. A pattern of providing knowing, false answers on applications for employment at medical facilities, standing alone, also provides the grounds on which to revoke a physician's license, Glassman v. Dept. Of Health, 208 A.D.2d 1060, 617 N.Y.S.2d 413 (3rd Dept. 1994).

ORDER

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

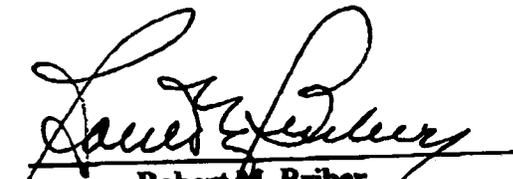
1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB affirms the Committee's Determination to revoke the Respondent's License.

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

In the Matter of Robert P. Weinberg, D.O.

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

Dated: March 23, 2004


Robert M. Briber

In the Matter of Robert P. Weinberg, D.O.

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

Dated: Mar. 22, 2004



Thea Graves Pellman

In the Matter of Robert P. Weinberg, D.O.

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

Dated: 03/30/04, 2004

Stanley L. Grossman, M.D.

Stanley L. Grossman, M.D.

In the Matter of Robert P. Weinberg, D.O.

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

Dated: March 22, 2004



Therese G. Lynch, M.D.