



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.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

April 24, 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Michael J. McTighe, Esq.
NYS Department of Health
Corning Tower Room 2509
Empire State Plaza
Albany, New York 12237

Barry A. Gold, Esq.
Thuillez, Ford, Gold & Johnson, LLP
90 State Street
Albany, New York 12207

Howard Zvei Arian, M.D.
1512 Morton Street
Ann Arbor, MI 48104

RE: In the Matter of Howard Zvei Arian, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 00-34) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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, appearing to read "Tyrone T. Butler". The signature is written in a cursive style with a large initial 'T'.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH
ADMINISTRATIVE REVIEW BOARD FOR PROFESSIONAL MEDICAL CONDUCT

In the Matter of

Howard Zvei Arian, M.D. (Respondent)

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

COPY

Administrative Review Board (ARB)

Determination and Order No. 00-34

**Before ARB Members Grossman, Lynch, Shapiro, Price and Briber
Administrative Law Judge James F. Horan drafted the Determination**

**For the Department of Health (Petitioner): Michael J. McTighe, Esq.
For the Respondent: Barry A. Gold, Esq.**

After a hearing below, a BPMC Committee dismissed all charges that arose from inappropriate remarks the Respondent made in an operating room, while the Respondent provided anesthesia care for a surgical patient. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 1999), the Petitioner asks the ARB to modify the Committee's Determination and to find that the Respondent's remarks constituted either gross negligence in practice or evidenced moral unfitness in practice. Upon reviewing the record and the parties' review briefs, we overturn the Committee and sustain the charge that the Respondent engaged in conduct that evidenced moral unfitness. The Respondent made inappropriate remarks that could have distracted a surgeon, while the surgeon was operating and while the Respondent should have been focusing on the patient to whom the Respondent was providing care.

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(4), 6530(7) & 6530(20) (McKinney Supp. 1999-2000) by committing professional misconduct under the following specifications:

- practicing medicine with gross negligence,
- practicing medicine while impaired by mental disability, and,
- engaging in conduct which evidences moral unfitness to practice medicine.

The charges arose from remarks the Respondent, an anesthesiologist, made to an oral surgeon while providing anesthesia care during dental surgery. The Respondent denied that his remarks constituted misconduct and this case proceeded to hearing, before the BPMC Committee that rendered the Determination now on review.

The Committee found that the Respondent provided anesthesia to a child during oral maxillofacial surgery, that Lawrence B. Marks, DDS performed. The Committee found further that:

- the Respondent appeared upset that he had to attend a dental case at night,
- the Respondent harangued Dr. Marks,
- the Respondent went into a verbal tirade when he heard Dr. Marks use the phrase "bone removal",
- the Respondent continued the remarks at the same intensity with Dr. Marks working in close proximity to the patient's mental nerve,
- risk for injury existed while Dr. Marks worked close to the patient's mental nerve
- Dr. Marks assaulted the Respondent, and,
- following the assault, the Respondent stated that he "finally got him to do what he wanted him to do".

The Committee dismissed all three charges. The Committee found no evidence in the record to demonstrate that the Respondent suffers from any mental impairment. The Committee found further that, although the Respondent made inappropriate remarks, the Respondent's conduct

failed to constitute either gross negligence or conduct that evidenced moral unfitnes. The Committee noted that the Respondent has undergone therapy for problems he experienced at the time of the incident at issue and that a report that the Petitioner utilized at the hearing (Petitioner Exhibit 9) indicated that the Respondent has benefited from therapy and needs no further therapy.

Review History and Issues

The Committee rendered their Determination on February 8, 2000. This proceeding commenced on February 22, 2000, 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 response brief. The record closed when the ARB received the response brief on March 8, 2000.

The Petitioner contends that the Committee made a Determination inconsistent with their factual findings. The Petitioner argues that the regrettable conduct by Dr. Marks fails to excuse the Respondent's misconduct. The Petitioner argues that the Respondent's statement that he "finally got him to do what he wanted him to do" showed a pre-existing malicious intent to provoke the surgeon. The Petitioner argues further that the Respondent allowed his malice to fester to the point at which the malice displaced the Respondent's concern for the patient. The Petitioner asks that the ARB sustain either the moral unfitnes or the gross negligence charge and that the ARB impose a penalty no less severe than a censure and reprimand.

The Respondent notes that the Petitioner made no request that the ARB reconsider the mental impairment charge. The Respondent also notes that Petitioner raises the allegations concerning pre-existing malice for the first time on review. The Respondent argues that no place

exists for that new claim in an appeal proceeding. The Respondent argues that his words amounted to neither gross negligence nor moral unfitness and asks the ARB to sustain the Committee's Determination.

Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination dismissing the mental impairment charge. The Petitioner raised no challenge to the dismissal on that charge. We also affirm the Committee's Determination dismissing the charge that the Respondent practiced with gross negligence. Although we believe the Respondent engaged in inappropriate conduct that fell below accepted medical standards, we agree with the Committee that the Respondent's conduct fell below the threshold for egregious conduct that qualifies as practicing with gross negligence.

We disagree with the Committee as to whether the Respondent's conduct evidenced moral unfitness. To prove that a physician engaged in conduct evidencing moral unfitness, the Petitioner must present preponderant evidence that the Respondent engaged in one or more acts that fell below the ethical or moral standards of the medical profession, rather showing that the Respondent is morally unfit to practice medicine. We hold that the Committee's Findings of Fact (FF) 5-12 demonstrate that the Respondent acted contrary to Medicine's ethical and moral standards, by failing to place his patient's interests first and by instead engaging in his verbal tirade (FF10), taunting the surgeon in a way that could make it difficult for the surgeon to do his job. The Committee found that the Respondent continued his remarks in intensity as the surgeon worked in close proximity to the patient's mental nerve, with a risk of injury to the patient (FF 10-11). After the surgeon, Dr. Marks, attacked the Respondent, the Committee found that the Respondent stated " finally got him to do what I wanted him to do" (FF 12). The outrageous

conduct by Dr. Marks that followed the taunting in no way excused the conduct by the Respondent.

The Respondent's brief took exception to an assertion by the Petitioner's counsel that the Respondent acted in this case due to a pre-existing malice towards Dr. Marks. The Respondent termed the assertion a new claim with no place in an appellate proceeding. The ARB finds that the assertion instead represented merely a comment by the Petitioner's counsel on the evidence from the hearing. As we noted above, the Committee found that after Dr. Marks attacked the Respondent, the Respondent stated " finally got him to do what I wanted him to do" (FF 12). Dr. Marks testified that the Respondent stated: "Good. I'm, glad you did that.... I've been trying to get you to do that for the last four years....Now you'll never practice again in this state" (Hearing Transcript page 29, lines 6-10). That testimony from the hearing raised the pre-existing malice issue. The ARB made our conclusion on the moral unfitness charge from the Committee's Findings, however, rather than from the assertion by the Petitioner's counsel concerning pre-existing malice.

As a penalty for the Respondent's misconduct, we vote unanimously to censure and reprimand the Respondent. We found that in the incident at issue, the Respondent violated the medical profession's ethical standards. The record showed no indications, however, that the Respondent committed any other misconduct in his career. The record also contained a Report that the Petitioner entered into evidence (Petitioner Exhibit 9) that indicated that nothing in the Respondent's behavior or judgement precluded his functioning effectively in the profession. That Report also recommended against any mandate for further therapy for the Respondent. The Committee found that the Respondent recognized the nature of his problems and benefited from resulting therapy. The ARB concludes that the Respondent addressed the problems that resulted in the incident, by entering therapy voluntarily. We see no need to mandate further treatment or to place the Respondent on probation in any form. We vote for the Censure and Reprimand,

because we agree with the statement by the Committee about admonishing the Respondent for his verbal harangue in the operating room (Committee Determination page 7).

ORDER

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

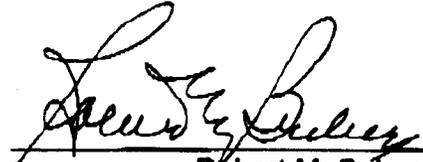
1. The ARB **AFFIRMS** the Committee's Determination dismissing the charges that the Respondent practiced with gross negligence and/or practiced while impaired.
2. The ARB **OVERTURNS** the Committee's Determination dismissing the charge that the Respondent engaged in conduct that evidenced moral unfitness in practicing medicine.
3. The ARB **SUSTAINS** the charge that the Respondent engaged in conduct evidencing moral unfitness.
4. The ARB votes unanimously to **CENSURE and REPRIMAND** the Respondent.

**Robert M. Briber
Sumner Shapiro
Winston S. Price, M.D.
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.**

In the Matter of Howard Zvei Arian, M.D.

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

Dated: April 14, 2000

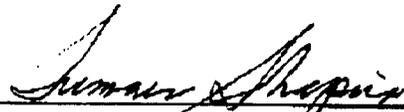


Robert M. Briber

In the Matter of Howard Zvei Arian, M.D.

Sumner Shapiro, an ARB Member concurs in the
Determination and Order in the Matter of Dr. Arian.

Dated: April 15, 2000

A handwritten signature in cursive script, reading "Sumner Shapiro", written over a horizontal line.

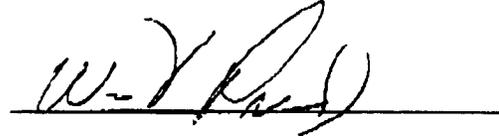
Sumner Shapiro

0700000000 0 10134820131 P.01

In the Matter of Howard Zvei Arian, M.D.

Winston S. Price, M.D., an ARB Member concurs in the Determination and Order in
the Matter of Dr. Arian.

Dated: 4/14, 2000

A handwritten signature in cursive script, appearing to read "W. S. Price", is written over a horizontal line.

Winston S. Price, M.D.

In the Matter of Howard Zvei Arian, M.D.

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

Dated: April 16, 2000

Stanley L. Grossman M.D.

Stanley L. Grossman, M.D.

In the Matter of Howard Zvei Arian, M.D.

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

Dated: April 14, 2000

Therese G. Lynch M.D.

Therese G. Lynch, M.D.



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.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

February 8, 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Michael J. McTighe, Esq.
NYS Department of Health
Corning Tower- 25th Fl.
Empire State Plaza
Albany, New York 12237

Barry A. Gold, Esq.
Thuillez, Ford, Gold & Johnson, LLP
Schneider, Harris & Harris
1015 Broadway
Woodmere, New York 11598

Howard Zvei Arian, M.D.
1512 Morton Street
Ann Arbor, MI 48104

RE: In the Matter of Howard Zvei Arian, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 00-34) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the 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.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992),

"the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

All notices of review must be served, by **certified mail**, upon the Administrative Review Board **and** the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

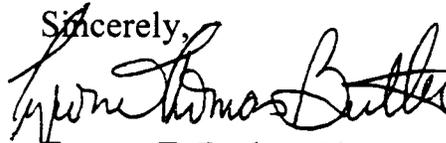
The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Hedley Park Place
433 River Street, Fifth Floor
Troy, New York 12180

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,



Tyrone T. Butler, Director
Bureau of Adjudication

TTB: mla

Enclosure

**STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT**

COPY

**IN THE MATTER
OF
HOWARD ZVEI ARIAN, M.D.**

**DETERMINATION
AND
ORDER**

ORDER #00-34

GEORGE C. SIMMONS, Ed.D., Chairperson, **WALTER GILSDORF, M.D.** and **PETER B. KANE, M.D.**, duly designated members of the State Board for Professional Medical Conduct, appointed by the Commissioner of Health of the State of New York pursuant to Section 230(1) of the Public Health Law, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. **CHRISTINE C. TRASKOS, ESQ.**, served as Administrative Officer for the Hearing Committee. The Department of Health appeared by **HENRY M. GREENBERG**, General Counsel, **MICHAEL J. McTIGHE, ESQ.**, Associate Counsel, of Counsel. The Respondent appeared by **THUILLEZ, FORD, GOLD & JOHNSON, L.L.P.**, **BARRY A. GOLD, ESQ.**, of Counsel. Evidence was received and witnesses sworn and heard and transcripts of these proceedings were made.

After consideration of the entire record, the Hearing Committee submits this Determination and Order.

STATEMENT OF CHARGES

The accompanying Statement of Charges alleged three (3) specifications of professional misconduct, including allegations of gross negligence, impairment by mental disability and moral

unfitness. The charges are more specifically set forth in the Statement of Charges dated November 12, 1999, a copy of which is attached hereto as Appendix I and made a part of this Determination and Order.

WITNESSES

For the Petitioner:

Lawrence Marks, DDS
Richard R. Reed, Sr.
Carol Snitchler, RN
Maidalee Walts

For the Respondent:

Howard Arian, M.D.

FINDINGS OF FACT

1. Respondent was authorized to practice medicine in New York State by the issuance of license number 157770 on April 2, 1984, by the New York State Education Department (Exh. 2). Respondent is currently a resident of Ann Arbor, Michigan, where he has been pursuing training in pain management (Tr. 142-144). Respondent practices anesthesiology (Tr. 143-144), and plans tentatively to relocate to Pittsburgh (Tr. 172).
2. On December 12, 1997, Lawrence B. Marks, an experienced oral maxillofacial surgeon (Tr. 11-12), performed emergency surgery on a child due to extensive infection which had spread through the soft tissues of her face into the muscles of her jaw (Tr. 13; Ex. 3).
3. Respondent, who was the designated anesthesiologist on call at St. Lukes Memorial Hospital in Utica on that day, provided anesthesia care. (Tr. 15-16; 144-145).
4. Examination of the child, including evaluation of x-rays, took about ten minutes after she was anesthetized (Tr. 17-18). The actual surgery took about 25 minutes (Tr. 18).
5. During the course of the surgery, Respondent appeared agitated and upset that he had to be there at night for a dental case. (Tr. 89 lines 13-23; Tr. 75, lines 6-7, 11-13, Tr. 76 lines 16-19).

6. The patient was awake during the early phase of her exposure to Respondent's comments (Tr. 77 lines 6-18; Tr. 95 lines 6-21; Tr. 103 line 22 - Tr. 104 line 24; Tr. 131-132).
7. At first, Dr. Marks thought Respondent was "just kidding around" (Tr. 20), but the tone of Respondent's harangue escalated in intensity as the surgery progressed (Tr. 108-109, 127).
8. The surgery included removal of small particles of bone and necessitated work in close proximity to the patient's mental nerve (Tr. 24-25).
9. When Respondent overheard Dr. Marks' use of the phrase "bone removal", the Respondent went into a verbal tirade (Tr. 28-29); Tr. 32; Tr. 40-41).
10. The intensity of Respondent's comments continued while Dr. Marks was working in close proximity to the child's mental nerve (Tr. 28 lines 19-25; Tr. 65).
11. There was risk of injury to the child while Dr. Marks worked in close proximity to the mental nerve (Tr. 53).
12. In the aftermath of Dr. Marks' assault, Respondent stated that he had "finally got him to do what he wanted him to do" (Tr. 115 lines 6-13; Tr. 123 lines 1-4; Tr. 136 lines 14-22).

CONCLUSIONS OF LAW

The following conclusions were made pursuant to the Findings of Fact listed above. All conclusions resulted from a unanimous vote of the Hearing Committee unless noted otherwise.

The Hearing Committee concluded that the following Factual Allegations should be sustained. The citations in parenthesis refer to the Findings of Fact which support each Factual Allegation:

Paragraph A: (2-4)

Paragraph A.1: (5 - 12) except with respect to provoked a physical

altercation with MARKS

Paragraph A.2:

(5-12) except with respect to conduct

CONCLUSIONS OF LAW

The following conclusions were made pursuant to the Findings of Fact listed above. All conclusions resulted from a unanimous vote of the Hearing Committee unless noted otherwise. The Hearing Committee concluded that NONE of the Specifications should be sustained.

GROSS NEGLIGENCE

NOT SUSTAINED

IMPAIRED BY MENTAL DISABILITY

NOT SUSTAINED

MORAL UNFITNESS

NOT SUSTAINED

DISCUSSION

Respondent is charged with three (3) specifications alleging professional misconduct within the meaning of Education Law Section 6530. This statute sets forth numerous forms of conduct which constitute professional misconduct, but do not provide definitions of the various types of misconduct. During the course of its deliberations on these charges, the Hearing Committee consulted a memorandum prepared by the General Counsel for the Department of Health. This document, entitled "Definitions of Professional Misconduct Under the New York Education Law",

sets forth suggested definitions for gross negligence, negligence, gross incompetence, incompetence and the fraudulent practice of medicine.

The following definitions were utilized by the Hearing Committee during its deliberations:

Gross negligence is failure to exercise the care that would be exercised by a reasonably prudent physician under the circumstances, and which failure is manifested by conduct that is egregious or conspicuously bad.

Using the above-referenced definition as a framework for its deliberations, the Hearing Committee concluded, by a preponderance of the evidence, that none (0) of the three (3) specifications of professional misconduct should be sustained. The rationale for the Committee's conclusions regarding each specification of misconduct is set forth below.

At the outset of deliberations, the Hearing Committee made a determination as to the credibility of the witnesses presented by the parties.

The Department called Lawrence Marks, DDS as a witness. Dr. Marks has practiced oral maxillofacial surgery since 1982 (Tr. 11-12). He works closely with dental residents at St. Luke's Memorial Hospital in Utica, New York (Tr. 12). The Hearing Committee found Dr. Mark's testimony to be believable about the overall incident, but he did not follow through with the details of his altercation with Respondent. They found that Dr. Marks, although admitting to making the initial physical contact, minimized his role in the incident and was often unresponsive to questions. Therefore, the Hearing Committee gave his testimony limited credibility. The Department also offered the testimony of surgical technician, Richard R. Reed, Sr. (Tr. 72). The Hearing Committee notes that Mr. Reed did his best to curtail the incident while ensuring the patient's safety. They find his testimony to be very credible. The Hearing Committee also found that the testimony of Carol Snitchler, RN brought further credibility about the details of the incident, although she did not recall if Dr. Marks had changed his gloves after the incident (Tr. 99, 125-126). The Hearing Committee further found the testimony of Maidalee Walts, an OR technician, to be credible (Tr. 129). They note that she was able to recall that Dr. Marks did put on new gloves after the altercation (Tr. 136).

Respondent took the stand on his own behalf. The Hearing Committee found Dr. Arian's testimony vague as to details of the incident and to be selective as to recall. They note that although he was often apologetic, some of his testimony was self-serving.

CHARGE A

Charge A.1 alleges that by verbally abusing Dr. Marks during the surgery on Patient A, the Respondent provoked a physical altercation with Dr. Marks in the operating room which endangered Patient A while the surgery was in progress. Charge A.2 alleges that by his words and conduct during the surgery, Respondent created distraction from medical/surgical care of Patient A, which actions endangered Patient A during the surgery. As a result, the Department charged Respondent with gross negligence, mental impairment and moral unfitness.

The Hearing Committee finds that Respondent's verbal barrage does not rise to the level of gross negligence. Although the Hearing Committee finds that Respondent's words were wholly inappropriate, Dr. Marks initiated the resulting physical contact. The Hearing Committee believes that Dr. Marks had the choice to ignore Respondent or report the incident after the surgery was completed. Dr. Marks elected to respond with physical force and pushed Respondent away from the operating table (Tr. 46-49). The Hearing Committee notes that the dental resident remained at Patient A's side throughout the altercation (Tr. 52-55,69,86). The Hearing Committee further finds that Respondent did not strike back after being hit by Dr. Marks. Under the totality of these circumstances, the Hearing Committee does not sustain the First Specification.

The Hearing Committee finds no evidence whatsoever in the record to sustain the Specification that Respondent is impaired by mental disability. The Department offered no expert testimony in support of this contention. In fact, the Hearing Committee notes that the Department's own Exhibit #9, Report of Raymond Bepko, Ph.D., indicates that Respondent is mentally competent to practice medicine. More specifically, Dr. Bepko states: "In my judgment, there is nothing in Dr. Arian's personality or behavior which precludes his functioning effectively in his profession.

Additionally, while he may benefit form further therapy for reasons unrelated to the incident in question, I do not believe such therapy should be mandated” (Ex. 9 p.2).

The Hearing Committee further finds that Respondent’s inappropriate comments during the course of Patient A’s surgery do not rise to the level of moral unfitness, thus the Third Specification is not sustained.

DETERMINATION AS TO PENALTY

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, determined by a unanimous vote that no disciplinary action should be taken with respect to Respondent's license to practice medicine in New York State. This determination was reached upon due consideration of the full spectrum of penalties available pursuant to statute, including revocation, suspension and/or probation, censure and reprimand, and the imposition of monetary penalties.

Although the Hearing Committee would admonish Respondent for his continued verbal harangue in the operating room, his actions do not rise to the level of misconduct charged by the Department. The Hearing Committee finds that the matter was further escalated by Dr. Mark’s loss of self-control that caused both he and Respondent to step away from the operating table. The Hearing Committee finds that at the hearing, Respondent owned up to his comments and expressed regret over the incident (Tr.169-170, 181). Furthermore, they find that Respondent was rather candid in discussing his therapy sessions, particularly his reactions to stressful situations (Tr.167-168) The Hearing Committee believes that Respondent has recognized the nature of the problems he was having on the date of the incident and has benefited from the resulting therapy. The report utilized by the Department indicates that further therapy is not warranted (Ex.9). Therefore, under the totality of the circumstances, the Hearing Committee finds that dismissal of all charges with no further action to be taken is the appropriate determination.

ORDER

Based upon the foregoing, **IT IS HEREBY ORDERED THAT:**

1. The First, Second and Third Specifications of Professional Misconduct, as set forth in the Statement of Charges (Petitioner's Exhibit #1) are **NOT SUSTAINED**; and
2. All Specifications of Professional Medical Misconduct against Respondent, as set forth in the Statement of Charges (Petitioner's Exhibit #1) are **DISMISSED**;
3. There shall be **NO ACTION TAKEN** with respect to Respondent's license to practice medicine in New York State.
4. This Order shall be effective upon service on the Respondent or the Respondent's attorney by personal service or by certified or registered mail.

DATED: Rochester, New York

02-03-2000



GEORGE C. SIMMONS, Ed.D
(Chairperson)

WALTER GILSDORF, M.D.
PETER B.KANE, M.D.

TO: Michael J. McTighe, Esq.
NYS Department of Health
Corning Tower- 25th Fl.
Empire State Plaza
Albany, New York 12237

Barry A. Gold, Esq.
Thuillez, Ford, Gold & Johnson, LLP
Schneider, Harris & Harris
1015 Broadway
Woodmere, New York 11598

Howard Zvei Arian, M.D.
1512 Morton Street
Ann Arbor, MI 48104

APPENDIX I

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

-----X

IN THE MATTER : AFFIDAVIT
OF : OF SERVICE
HOWARD ZVEI ARIAN, M.D. :

-----X

STATE OF MICHIGAN)
COUNTY OF) SS.:

I, Tim T. [unclear], being duly sworn, do state that:

1. I am over eighteen years of age and am not a party to the above-captioned proceeding.

2. I am employed by _____
as Personnel Services.

3. I served the Notice Of Hearing with Statement Of Charges and Summary Of Department Of Health Hearing Rules annexed thereto in the above captioned matter upon Howard Zvei Arian by going to the following address:

512 Michigan
Ann Arbor MI 48104

on 11-18, 1999, at approximately 3:30 a.m./p.m., and handing said person a true copy of the said documents.

4. A description of the person so served is as follows:
Approximate age: 40; Approximate weight: 190; Approximate height: 5'11"; Sex: M; Skin Color: olive; Hair Color: black; Other identifying characteristics: _____

misstake



10, 11, 2000
SIGNATURE

10, 11, 2000
PRINTED NAME

Sworn to before me on this

18 day of NOVEMBER 1999.

Judith A. Beal JUDITH A. BEAL
NOTARY PUBLIC

My commission expires:

6/4/2001

Judith A. Beal
Notary Public, Washington & County, WA
My Commission Expires 6/4/2001

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

-----X

IN THE MATTER : NOTICE
OF : OF
HOWARD ZVEI ARIAN, M.D. : HEARING

-----X

TO: HOWARD ZVEI ARIAN, M.D.
1512 Morton Street
Ann Arbor, MI 48104

BARRY A. GOLD, ESQ.
90 State Street
Albany, NY 12207

PLEASE TAKE NOTICE:

A hearing will be held pursuant to the provisions of N.Y. Pub. Health Law Section 230 and N.Y. State Admin. Proc. Act Sections 301-307 and 401. The hearing will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct commencing at 10:00 a.m. on the 16th day of December, 1999, at the Holiday Inn ("Presidential Room"), 1777 Burrstone Road, Utica, New York 13413 (telephone 315-797-2131), and such other adjourned dates, times and places as the committee may direct.

At the hearing, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the hearing will be made and the witnesses at the hearing will be sworn and examined. You shall appear in person at the hearing and may be represented by counsel. You have the right to produce witnesses and evidence on your behalf, to issue or have subpoenas issued on your behalf in order to require the production of witnesses and documents and

you may cross-examine witnesses and examine evidence produced against you. A summary of the Department of Health Hearing Rules is enclosed.

The hearing will proceed whether or not you appear at the hearing. Please note that requests for adjournments must be made in writing and by telephone to the Bureau of Adjudication, Hedley Park Place, 5th Floor, 433 River Street, Troy, New York 12180, (518-402-0748), upon notice to the attorney for the Department of Health whose name appears below, and at least five days prior to the scheduled hearing date. Adjournment requests are not routinely granted as scheduled dates are considered dates certain. Claims of court engagement will require detailed Affidavits of Actual Engagement. Claims of illness will require medical documentation.

Pursuant to the provisions of N.Y. Pub. Health Law Section 230(10)(c) you shall file a written answer to each of the Charges and Allegations in the Statement of Charges no later than ten days prior to the date of the hearing. Any Charge and Allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such answer. The answer shall be filed with the Bureau of Adjudication, at the address indicated above, and a copy shall be forwarded to the attorney for the Department of Health whose name appears below. Pursuant to Section 301(5) of the State Administrative Procedure Act, the Department, upon reasonable notice, will provide at no charge a qualified interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person.

At the conclusion of the hearing, the committee shall make

findings of fact, conclusions concerning the charges sustained or dismissed, and, in the event any of the charges are sustained, a determination of the penalty to be imposed or appropriate action to be taken. Such determination may be reviewed by the administrative review board for professional medical conduct.

**THESE PROCEEDINGS MAY RESULT IN A
DETERMINATION THAT YOUR LICENSE TO PRACTICE
MEDICINE IN NEW YORK STATE BE REVOKED OR
SUSPENDED, AND/OR THAT YOU BE FINED OR
SUBJECT TO THE OTHER SANCTIONS SET OUT IN NEW
YORK PUBLIC HEALTH LAW SECTION 230-a. YOU ARE
URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU
IN THIS MATTER.**

DATED: Albany, New York
November 12, 1999


PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional
Medical Conduct

Inquiries should be directed to: MICHAEL J. MCTIGHE
Senior Attorney
Bureau of Professional
Medical Conduct
Corning Tower Room 2585
Empire State Plaza
Albany, New York 12237-0029
(518) 474-5168

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

-----X

IN THE MATTER : STATEMENT
OF : OF
HOWARD ARIAN, M.D. : CHARGES

-----X

HOWARD ARIAN, M.D., the Respondent, was authorized to practice medicine in New York State by the issuance of license number 15770 in 1984 by the New York State Education Department. Respondent is currently registered with the New York State Education Department with a registration address of 1512 Morton Street, Ann Arbor, MI 48104.

FACTUAL ALLEGATIONS

A. Respondent provided anesthesiology services to a four-year old female child (hereinafter "Patient A") on or about December 12, 1997, at Saint Luke's Memorial Hospital, Utica, New York, at the time LAWRENCE MARKS, D.D.S., performed surgery on Patient A to extract teeth.

1. By verbally abusing MARKS during the surgery on Patient A the Respondent provoked a physical altercation with MARKS in the operating room which endangered Patient A while the surgery was in progress.
2. By his words and conduct during the surgery Respondent created distraction from medical/surgical care of Patient A which endangered Patient A during the surgery.

SPECIFICATIONS

FIRST SPECIFICATION

Respondent is charged with professional misconduct as defined by N.Y.Educ.Law Sec. 6530(4) by practicing the profession of medicine with gross negligence on a particular occasion as alleged in the facts of the following:

1. Paragraphs A and A-1, and/or A and A-2.

SECOND SPECIFICATION

Respondent is charged with professional misconduct as defined by N.Y.Educ.Law Sec. 6530(7) by practicing the profession of medicine while impaired by mental disability as alleged in the facts of the following:

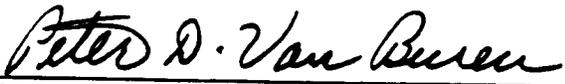
2. Paragraphs A and A-1, and/or A and A-2.

THIRD SPECIFICATION

Respondent is charged with professional misconduct as defined by N.Y.Educ.Law Sec. 6530(20) by conduct in the practice of medicine which evidences moral unfitness to practice medicine as alleged in the facts of the following:

3. Paragraphs A and A-1, and/or and A and A-2.

DATED: November 12, 1999
Albany, NY



PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional
Medical Conduct