

STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Barbara A. DeBuono, M.D., M.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

October 5, 1998

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Arthur Brown, M.D.
1928 Kings Highway
Brooklyn, NY 11229

Terrence Sheehan, Esq.
Patricia Moro, Esq.
NYS Department of Health
5 Penn Plaza - Sixth Floor
New York, NY 10001

Barbara A. Ryan, Esq.
Aaronson, Rappaport, Feinstein,
& Deutsch, LLP
757 Third Avenue
New York, NY 10017

RE: In the Matter of Arthur Brown, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 98-97) 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.

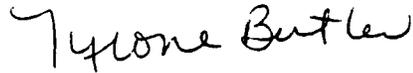
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:mla

Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH (Petitioner)

COPY

**In The Matter Of
Arthur Brown, M.D. (Respondent)**

**Administrative Review
Board (ARB)
Determination and
Order 98 - 97**

**Proceeding to review a Determination by a Hearing Committee (Committee)
from Board for Professional Medical Conduct (BPMC)**

**Before Board Members : Briber, Grossman, Lynch, Price & Shapiro.
Administrative Law Judge James F. Horan served as the Board's Administrative Officer.**

**For the Respondent: Barbara A. Ryan, Esq.
For the Petitioner: Terrence Sheehan, Esq.**

After a hearing into charges that the Respondent committed professional misconduct under several categories in providing treatment to five patients (Patients A - E), a BPMC Committee sustained the charges in part and voted to revoke the Respondent's license to practice medicine in New York State (License). In this proceeding pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1998), the Respondent asks the ARB to overturn the Committee's findings as without support from the record, or in the alternative, to overturn the revocation penalty as excessive. The Petitioner asks that the ARB increase the penalty and include a Ten Thousand Dollar (\$10,000) Fine. After reviewing the record and the submissions by the parties, the ARB votes to sustain the Committee's Determination on the charges and on the penalty and we vote to reject the Petitioner's request that we add a fine to the penalty.

Committee Determination on the Charges

The Petitioner commenced the proceeding by filing charges [Petitioner Exhibit 1] with BPMC alleging, through 21 misconduct specifications, that the Respondent violated N. Y. Educ. Law §§ 6530(2-3), 6530(5), 6530(20-21), 6530(32) & 6530(35) (McKinney Supp. 1998) in providing treatment to, preparing records for or submitting billings concerning treatment for Patients A through E. A hearing ensued pursuant to N.Y. Pub. Health Law § 230(10), N.Y.A.P.A. Articles 3 & 4 (McKinney Supp. 1998) and Title 10 NYCRR Part 51, before a BPMC Committee who subsequently rendered the Determination now on review. The Committee sustained charges that the Respondent had:

- practiced with negligence on more than one occasion and incompetence on more than

- one occasion in providing medical care to Patients A through E;
- practiced with fraud, practiced with moral unfitness and willfully filed a false report in submitting billings for the care he provided to Patients B and E;
- ordered unnecessary tests or treatment for Patients A and B; and
- maintained inadequate or inaccurate medical records for Patients A through E.

The Committee summarized their findings from the record as follows:

- the record showed unusually frequent patient visits, without support in the medical records;
- the Respondent provided an inadequate quality of care;
- the Respondent made inappropriate choices for therapy and prescriptions;
- the Respondent ordered excessive tests, without support in the medical records;
- inappropriate procedures in the Respondent's office permitted unidentified office staff to write in the medical record concerning testing, diagnosis and treatment; and,
- the Respondent knew that he submitted excessive billing codes on bills he submitted on patients' behalf, because the data in the medical record provided no support for the billings under the excessive codes.

The Committee indicated that they found the Respondent's testimony evasive and that the Respondent frequently tried to shift blame to other, unidentified office staff.

The Committee voted to revoke the Respondent's License. In addition to the numerous, serious acts of misconduct that the Respondent committed concerning Patients A through E, the Committee stated that they were aware about the Respondent's prior criminal conviction for petty larceny involving the Medicaid program and that the Respondent served a prior disciplinary probation that the Office for Professional Medical Conduct (OPMC) supervised. The Committee rendered their Determination on May 14, 1998.

Review History and Issues

This proceeding commenced on June 1, 1998 when the ARB received the Petitioner's Notice

requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and reply brief and the Petitioner's reply brief. The record closed when the Respondent submitted his reply brief on July 15, 1998. By letter on July 13, 1998, the Administrative Officer for the ARB rejected a request by a group of rabbis to appear before the ARB on the Respondent's behalf. The Administrative Officer indicated in his letter that the ARB could consider only the evidence from the hearing and the briefs by the parties.

The Respondent's brief contends that the Petitioner failed to prove the charges by preponderant evidence or, in the alternative, that the evidence failed to support revocation as a penalty. The Respondent notes that all the patient care at issue occurred during the Respondent's prior probation and that OPMC failed to advise the Respondent about any problems at that time, thus lulling the Respondent into a false sense of security. The Respondent also alleged error in waiting until after the probation ended to bring a disciplinary action, and in failing to provide adequate notice while the charts were under review. The Respondent alleges further that the failure to bring a disciplinary action as a probation violation under N. Y. Pub. Health Law § 230(19)(McKinney Supp. 1998) precludes the Petitioner from bringing this proceeding de novo pursuant to N. Y. Pub. Health Law § 230(10)(McKinney Supp. 1998). The main arguments in the Respondent's brief challenge the basis for the Committee's findings, alleging that evidence in the record provides no basis for the Committee's Determination. The brief also contends that the Committee based their findings on documentation from the medical records and the Committee made no finding challenging the Respondent's credibility. The Respondent also points out that the Committee considered the Respondent's criminal conviction and prior probation when they made their Determination.

In reply, the Petitioner argues that the ARB has no authority to weigh the evidence in a review and contends that the ARB may review evidence only to search for internal consistency between findings, the Determination and the penalty. Under the Petitioner's interpretation, the parties may re-argue only the Determination on the penalty, rather the basis for the medical findings. As to the penalty, the Petitioner asks that the ARB resolve the issue by sustaining the revocation and adding a Ten Thousand Dollar (\$10,000) Fine for the Respondent's various types of fraudulent activity.

In reply to the Petitioner, the Respondent argues that the ARB should reject the Petitioner's

request for the fine because the Petitioner failed to petition for review as the statute requires and that the Review Board should, therefore, refuse to hear the request.

Determination

All ARB Members participated in this case, considered the record and considered the parties' briefs. The ARB finds no merit in the Respondent's procedural challenges concerning failing to advise the Respondent sooner about the violations, failing to bring a probation violation action, failing to call OPMC probation staff as witnesses and relying on the Respondent's past misconduct in considering a penalty. We sustain the Committee's findings, their Determination on the charges and their Determination revoking the Respondent's License. We reject the Petitioner's request that we add a fine to the penalty.

Procedural Challenges: The Respondent argues that the failure by OPMC to advise the Respondent about problems with his records during his probation lulled him into a false sense of security and should preclude the Petitioner from bringing this action. We disagree. In Matter of Binenfeld v. N. Y. S. Dept. of Health, 226 A.D.2d 935, 640 N.Y.S.2d 924 (Third Dept. 1996) a physician sought to annul an ARB revocation order on the exact preclusion issue the Respondent raises here. The Appellate Division for the Third Judicial Department rejected that argument holding:

"... in all but rare cases, estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties."

For the same reason, we reject the Respondent's argument on preclusion in this case.

The Respondent next argued that the delay in bringing the charges, until three years after the probation ended, denied the Respondent due process. Undue delay can provide the grounds for a court or an administrative body to annul any administrative determination, if the reviewing body determines that the delay significantly and irreparably handicapped a party in mounting a defense to an administrative proceeding, Matter of Cortlandt Nursing Home v. Axelrod 66 N.Y.2d 169, cert. denied 476 U.S. 1115; Matter of Gold v. Chassin 215 A.D.2d 18, lv. denied 87 N.Y.2d 805. In this case, however, the Respondent has failed to allege any actual or significant handicap to his ability to present a defense due to passage in time from the conduct at issue to the hearing on the charges. We find no

merit on that ground.

The Respondent alleges further that the failure to bring a disciplinary action as a probation violation under N. Y. Pub. Health Law § 230(19)(McKinney Supp. 1998) precludes the Petitioner from bringing this proceeding de novo pursuant to N. Y. Pub. Health Law § 230(10)(McKinney Supp. 1998). The Respondent noted that the Probation Order from the prior probation stated that the State could bring a probation violation proceeding against the Respondent, if he violated the probation. The Respondent failed, however, to point to anything in the prior Order or a statute or a court ruling holding that the Petitioner must only bring a probation violation action for misconduct the Respondent committed during probation. Also, we note that the charges in this case go well beyond issues from the prior case against the Respondent. In addition to the record keeping violations, the Petitioner alleged the Respondent committed misconduct by providing substandard and unnecessary patient care. In addition, we see nothing in the two statutes at issue that preclude the Petitioner from bringing a de novo proceeding on these charges. In either proceeding, the Petitioner must provide the Respondent with notice about the conduct at issue Matter of Dhabuwala v. State Bd. for Prof. Med. Conduct 229 A.D.2d 752, 645 N.Y.S.2d 600 (Third Dept. 1996); Matter of Kite v. De Buono, 233 A.D.2d 783, 650 N.Y.S.2d 384 (Third Dept. 1996) and must comply with due process and statutory requirements about conducting the hearing, see N.Y.A.P.A. Articles 3 & 4 (McKinney Supp. 1998) and Title 10 NYCRR Part 51. If a Committee sustains charges in either setting, the Committee may impose a penalty under N. Y. Pub. Health Law § 230-a (McKinney Supp. 1998), and that penalty can include license revocation, even on a probation violation charge, see Matter of Kite v. DeBuono (supra).

In Matter of Kite v. DeBuono (supra), a physician challenged an ARB Order revoking his license, on the exact opposite grounds from those the Respondent cites on the current issue. In Kite, OPMC charged Dr. Kite for violating probation, but Dr. Kite argued that OPMC proceeded actually on a medical misconduct theory, pursuant to N. Y. Pub. Health Law § 230(10) (McKinney Supp. 1998). In rejecting Dr. Kite's challenge to the proceeding, the Third Department found that the charges stated clearly "Violation of Probation" and that the hearing focused clearly on Dr. Kite's failure to comply with probation terms. In the proceeding against the Respondent, the charges show clearly that the Petitioner moves pursuant to N. Y. Pub. Health Law § 230(10) (McKinney Supp. 1998) and the

misconduct specifications under N. Y. Educ. Law §§ 6530(2-3), 6530(5), 6530(20-21), 6530(32) & 6530(35) (McKinney Supp. 1998). The ARB holds that the Respondent had notice as to those charges and a chance to defend against them and that the evidence in the hearing addressed those specifications. We reject, therefore, the Respondent's challenge on that issue.

In the very next paragraph in his brief, after alleging error for failing to bring a probation violation action, the Respondent challenges the failure to produce any witness from the OPMC Probation Unit, stating:

" ... it is absurd to claim on the one hand that Dr. Brown violated his probation, and not present any testimony from that branch of the Department" [Respondent's Brief page 4].

As we have demonstrated above, the Petitioner brought this action on grounds other than probation violation and so we see no reason why the staff from the OPMC Probation Unit would have any relevant testimony to offer on whether the Respondent practiced substandard medicine or committed fraud or filed a false report. Proof on all those counts would require expert medical testimony using the Respondent's medical records, rather than testimony by the OPMC Probation Unit. Further, if the Respondent felt that the OPMC Probation Unit could have provided relevant testimony, then the Respondent should have called persons from the Unit to testify, Matter of Lawrence v. DeBuono ___ A.D.2d ___, 673 N.Y.S.2d 773 (Third Dept. 1998); Gray v. Adducci 73 N.Y.2d 741 (1988). The Respondent offered no proof in his brief that he had attempted to call any witnesses from the Unit, that persons from the Unit could provide relevant information on the charges before the Committee or that either the Petitioner, the Committee or the Committee's Administrative Officer had prevented the Respondent from calling such persons as witnesses. We reject the challenge on this ground as well.

Finally, we reject the Respondent's challenge to the Committee's decision to consider the Respondent's prior disciplinary record in reaching their Determination on the penalty. A Respondent's prior disciplinary record provides a legitimate area for consideration by a Committee when they render a penalty for professional misconduct, Matter of Brown v. N.Y.S. Dept. of Health, 235 A.D.2d 957, 652 N.Y.S.2d 860 (Third Dept. 1997).

Committee Determination on Charges: We sustain the Committee's Determination on all

charges. In challenging that Determination, the Respondent argues that the Committee erred by rejecting evidence the Respondent offered in contradicting the Petitioner's evidence. The Committee as the fact finder reviewed the expert testimony and reached their findings and conclusions accepting the Petitioner's evidence as credible. We owe the Committee deference in their judgement on credibility and we see no reason to overturn their judgement on these facts. We hold that the proof the Committee judged credible provided preponderant evidence supporting the Committee Determination on the charges.

At page 6 in his brief, the Respondent claimed that no finding by the Committee rejected the Respondent as a credible witness. This statement infers that the Committee should have, therefore, accepted the Respondent's explanations for the treatment he provided and the billings he submitted. The ARB finds that the Committee did make findings relating to the Respondent's credibility. As to the treatment for Patients B and E, the Committee found that the Respondent submitted bills to insurance carriers knowing that he listed excessive billing codes without support from data in the record. The Committee also concluded at page 16 in their Determination that the Respondent testified evasively. Such findings or conclusions provided the Committee with ample grounds to reject the Respondent's credibility.

The Respondent also tried to minimize the Committee's findings by noting that the Committee dismissed many allegations from the Statement of Charges. We conclude that the allegations that the Committee sustained still provided ample grounds for the Committee to find that the Respondent practiced with incompetence and negligence on more than one occasion in treating all the patients, practiced with fraud and with moral unfitness and filed a false report in the billings for Patients B and E, ordered excessive tests or treatments for Patients A and B and failed to maintain accurate records for all the patients.

Penalty: The Committee concluded that the Respondent provided substandard care to all five patients, that he ordered excessive tests, made inappropriate choices about therapy and prescriptions, employed inappropriate procedures in his office and billed insurance companies knowingly for excessive payments. The Respondent also had a prior criminal conviction and a prior disciplinary probation for conduct involving his medical license. The ARB holds that the Committee imposed an

appropriate penalty for the Respondent's misconduct by revoking the Respondent's License. The Respondent's fraudulent conduct, standing alone, provides the basis for revoking his License. In addition, the Respondent demonstrated a continued failure to practice medicine by acceptable standards and demonstrated a total lack of skill and knowledge in practicing medicine.

The Respondent argued that the Committee failed to consider the mitigating evidence in the record, such as to the character evidence attesting to the Respondent's skill and generosity. The ARB holds that the record contradicts any mitigating testimony attesting to the Respondent's skill. The Respondent's fraudulent conduct and his past criminal conviction contradict any testimony about his generosity. We see no benefit to any community from a physician who provides substandard care to his patients and who exposes those patients to unnecessary tests or treatments.

The Respondent also attempted to use his prior disciplinary probation as a mitigating factor, arguing that the failure to advise him about any misconduct during the probationary period lulled him into a false sense of security. The ARB views the Respondent's past disciplinary penalty as an aggravating rather than a mitigating factor. Despite practicing on probation for previous misconduct, the Respondent failed to correct the problems in his practice.

The Respondent also tried to cast this entire case as resting on record keeping deficiencies alone and asked the ARB to reduce the penalty, to practice on probation with a mentor. As we have noted above, this case involved much more than poor records. The Respondent also failed to correct previous problems with his practice after serving on probation, and the ARB sees no hope that probation will correct the Respondent's deficiencies after this proceeding. We also see no hope that mentoring or other retraining can correct the deficits in the Respondent's knowledge and skills. The Respondent demonstrated global rather than focal deficits in knowledge. He failed to make proper diagnoses, prescribed medication incorrectly, prescribed improper treatments, provided treatments incorrectly and exposed patients to unnecessary tests or treatments. The Respondent also presents as an inappropriate candidate for retraining, due to his attempts to shift blame to others for the misconduct in this case, rather than to accept responsibility for his deficiencies. Further, while retraining will provide some benefit to a physician for a focal deficit in knowledge or skill, retraining can provide no benefit to a physician who lacks integrity. The Respondent's fraudulent conduct proves

that he lacks integrity.

The ARB rejects the Petitioner's request that we impose a fine against the Respondent in addition to revoking his License. We find that the penalty that the Committee imposed and that we have sustained will provide a sufficient sanction for the Respondent' misconduct.

ORDER

NOW, based upon this Determination, the Review Board renders the following **ORDER**:

1. The ARB **SUSTAINS** the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB **REJECTS** the Petitioner's request that we add a fine to the sanction against the Respondent.
3. The ARB **SUSTAINS** the Committee's Determination revoking the Respondent's License to practice medicine in New York State.

Robert M. Briber

Sumner Shapiro

Winston S. Price, M.D.

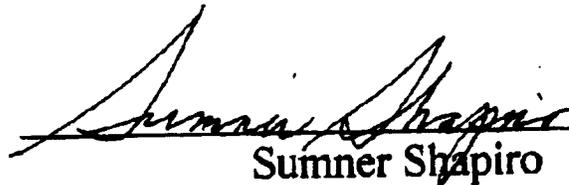
Stanley L. Grossman, M.D.

Therese G. Lynch, M.D.

In The Matter Of Arthur Brown, M.D.

Sumner Shapiro, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Brown.

DATED: September 4, 1998


Sumner Shapiro

In The Matter Of Arthur Brown, M.D.

**Robert M. Briber, a member of the Administrative Review Board for Professional Medical
Conduct, concurs in the Determination and Order in the Matter of Dr. Brown.**

Dated : 9/8 , 1998



Robert M. Briber

In The Matter Of Arthur Brown, M.D.

Therese G. Lynch, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Brown.

Dated : Sept 10, 1998



Therese G. Lynch, M.D.

In The Matter Of Arthur Brown, M.D.

Winston S. Price, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Brown.

Dated: 9/12, 1998



Winston S. Price, M.D.

