



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

September 16, 2002

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Sidney Chen, M.D.
1554 Northern Boulevard, 5F
Manhasset, New York 11030

William Wood, Esq.
Wood & Scher
14 Harwood Court, Suite 512
Scarsdale, New York 10583

Roy Nemerson, Esq.
NYS Department of Health
Bureau of Professional
Medical Conduct
5 Penn Plaza, Sixth Floor
New York, New York 10001

RE: In the Matter of Sidney Chen, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 02-128) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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:djh
Enclosure

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

COPY

In the Matter of

Sidney Chen, M.D. (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. 02-128

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

**For the Department of Health (Petitioner):
For the Respondent:**

**Roy Nemerson, Esq.
William L. Wood, Esq.**

After a hearing below, a BPMC Committee found that the Respondent practiced medicine with negligence on more than one occasion and ordered unnecessary tests in performing surgery on three patients. The Committee voted to suspend the Respondent's License to practice medicine in New York State (License), stayed the suspension and placed the Respondent on probation for two years. In this proceeding pursuant to N.Y. Pub. Health Law §230-c (4)(a)(McKinney 2002), the Petitioner asks the ARB to modify that Determination, by placing the Respondent on actual suspension and/or modifying and adding probation terms. After reviewing the record in this case and the submissions from the parties, we place the Respondent on actual suspension for two years and on probation for five years following the suspension. We also modify the probation terms that relate to practice monitoring.

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(3), 6530(5) & 6530(35) (McKinney Supp. 2002) by committing professional misconduct under the following specifications:

- practicing with negligence on more than one occasion,
- practicing with incompetence on more than one occasion, and,
- ordering excessive tests, treatment or use of treatment facilities unwarranted by patient condition.

The charges related to the care that the Respondent, a surgeon, rendered to three patients, A-C. The charges referred to the Patients by initials to protect patient privacy. A hearing on the charges followed before the Committee that rendered the Determination now on review.

The Committee dismissed the incompetence charge and sustained the charges that the Respondent practiced with negligence on more than one occasion in treating Patients A-C and ordered unwarranted tests and procedures for Patients A and C. The Committee found that the Respondent failed to meet minimal care standards in caring for Patients A-C, to determine whether those Patients suffered from cancer and to determine the course for treatment for those Patients. The Committee held that the Respondent cut corners in treatments without performing necessary diagnostic tests. The Committee found the Respondent over-confident in his ability to assess conditions and the Committee concluded that the Respondent utilized poor clinical judgement in failing to confirm diagnoses before proceeding with case management. In the care for Patients A and C, the Committee found that the Respondent ordered unwarranted treatments by performing lymph node samples on the Patients without a diagnosis of malignancy in the cases.

In making their findings, the Committee relied upon expert testimony from the Petitioner's expert witness, William Hoskins, M.D. The Respondent testified on his own behalf and presented no other expert witness. The Committee found the Respondent's testimony inconsistent, vague and indirect.

The Committee voted to suspend the Respondent's License for two years, to stay the suspension and to place the Respondent on probation for two years. The Committee stated that they found the Respondent's clinical judgement unacceptable. The Committee set the probation terms to compel the Respondent to stop taking short cuts in meeting acceptable practice standards. The probation terms included a monitor on gynecologic oncology surgery.

Review History and Issues

The Committee rendered their Determination on May 2, 2002. This proceeding commenced on May 22, 2002, 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 June 26, 2002.

The Petitioner's brief asked that the ARB modify the sanction against the Respondent, to impose an actual period on suspension, and/or to modify the probation terms. The Petitioner asked that the ARB impose a full monitor on the Respondent's practice. The Petitioner argued that the penalty the Committee imposed would fail to remedy the Respondent's dishonesty and bad judgement.

In reply, the Respondent argues that the Petitioner misstated the Committee's Determination by reporting that the Committee found the Respondent guilty for bad judgement or dishonesty. The Respondent also asks that the ARB defer to the Committee's judgement on the proper penalty and the Respondent calls it unfair to judge his career on only three cases.

Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination that the Respondent practiced with negligence on more than one occasion and ordered unnecessary tests. Neither party challenged the Committee's Determination on the charges. We also affirm the Committee's Determination to suspend the Respondent's License and

to place the Respondent on probation. We overturn the Committee's Determination to stay the suspension, we extend the period for the probation and we modify the probation terms.

The Respondent's brief opposed any increase in penalty and alleged that the Petitioner misstated the Committee's Determination by insinuating that the Committee criticized the Respondent for dishonesty and bad judgement. We agree with the Respondent that the Petitioner's claims about dishonesty can provide no basis on which the ARB may increase the penalty. The Petitioner made no charges regarding dishonesty, such as fraud or filing false reports, and the ARB may impose no penalty based on uncharged conduct, Matter of Dhabuwala v. State Board for Professional Medical Conduct, 225 A.D.2d 209, 651 N.Y.S.2d 249 (3rd Dept. 1996). The Committee did, however, hold that the Respondent "utilized poor judgement in his decision making by failing to confirm diagnoses before proceeding with the management of a case" [Committee Determination, page 14]. We agree with the Committee that the Respondent utilized poor judgement in the decisions he made in the cases at issue here.

The Respondent also argued that three cases provided an unfair standard by which to judge the Respondent's career. We disagree. In all three cases at issue in this proceeding, the Respondent used the same poor judgement and willingness to cut corners. In all three cases, the Respondent operated on the Patients to determine whether the Patients suffered from cancer. The Respondent's failure to follow accepted medical procedures placed all three Patients at risk. In the cases of Patients A and C, the Patients underwent unnecessary tests or treatments. In Patient B's case, the Respondent failed to order a warranted test, a pap smear. These cases present a disturbing pattern. The ARB concludes that we must impose a severe penalty in this case to make the Respondent realize that he must abandon short cuts and practice by acceptable standards.

Finally, the Respondent argued that the ARB should defer to the Committee's assessment about the appropriate penalty in this case. Again, we disagree. The ARB defers to the Committee as the fact finder in their judgement on credibility and on their findings of fact. In reviewing a penalty, however, the ARB may substitute our judgement for that of the Committee Matter of Bogdan v. Med. Conduct Bd. 195 A.D.2d 86, 606 N.Y.S.2d 381 (3rd Dept. 1993). We may choose to substitute our judgement whenever we conclude that the Committee has imposed an inappropriate sanction, 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). We choose to exercise our authority and substitute our judgement in this case.

We conclude that the Respondent's misconduct warrants actual time on suspension to compel the Respondent to change his conduct and to impress upon the Respondent that further misconduct could result in his permanent removal from medical practice. We overturn the Committee's Determination to stay the two-year suspension that the Committee placed on the Respondent's License. The ARB suspends the Respondent's License for two years, with no stay on the penalty. We also vote to increase the time the Respondent shall serve on probation, following the suspension, from two years to five years. We conclude that the longer probation period will ensure that the Respondent changes his practice and complies with accepted medical practice. We also modify one probation term that the Committee imposed.

At Term 7 [Committee Determination, Appendix I], the Committee set the terms for a monitor on the Respondent for practicing gynecologic oncology surgery. We conclude that the practice monitor should apply to any surgery that the Respondent should perform, because the

Respondent's failure to practice by accepted standards and his reliance on short cuts reflects on the Respondent's overall practice as a surgeon, rather than his practice only in gynecologic oncology surgery. We modify the opening paragraph in Term 7 to read:

"Respondent shall practice surgery only when monitored in his surgical practice by a licensed physician, with board certification in gynecologic surgery (practice monitor). Prior to his performance of any surgery, Respondent shall present to his practice monitor, for review and approval, a written work-up, description of intended surgical procedures, treatment plan and plan of management. Respondent shall perform no surgery without such review and approval by the practice monitor. The review will determine whether Respondent's proposed treatment is in accordance with the generally accepted standards of professional medical care."

The ARB affirms the remaining probation terms that the Committee ordered.

ORDER

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

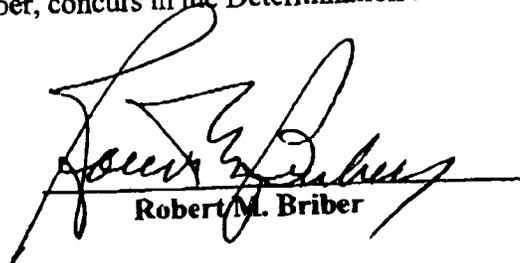
1. The ARB affirms the Committee's Determination that the Respondent practiced with negligence on more than one occasion and ordered unnecessary tests.
2. The ARB affirms the Committee's Determination to suspend the Respondent's License for two years, but we overturn the Committee's Determination to stay the suspension.
3. The ARB affirms the Committee's Determination to place the Respondent on probation, but we modify the Committee's Determination to place the Respondent on probation for two years. The ARB places the Respondent on probation for five years.
4. The ARB also modifies Term 7 in the probation, as we discussed in our Determination.

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

In the Matter of Sidney Chen, M.D.

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

Dated: September 12, 2002



Robert M. Briber

In the Matter of Sidney Chen, M.D.

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

Dated: 8/21, 2002



Thea Graves Pellman

In the Matter of Sidney Chen, M.D.

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

Dated: August 27 2002

Therese G. Lynch, M.D.

Therese G. Lynch, M.D.

In the Matter of Sidney Chen, M.D.

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

Dated: August 21, 2002

Stanley L. Grossman M.D.

Stanley L Grossman, M.D.

In the Matter of Sidney Chen, M.D.

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

Dated: August 22, 2002

A handwritten signature in black ink, appearing to read "Winston S. Price", written over a horizontal line.

Winston S. Price, M.D.