



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

July 20, 2001

Dennis P. Whalen
Executive Deputy Commissioner

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Kevin P. Donovan, Esq.
NYS Department of Health
ESP – Corning Tower – Room 2509
Albany, New York 12237

Jennifer Daniels, M.D.
3100 South Salina Street
Syracuse, New York 13205

RE: In the Matter of Jennifer Daniels, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 01-68) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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 that reads "Tyrone T. Butler". The signature is written in a cursive style with a large, prominent initial 'T'.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:cah
Enclosure

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

COPY

In the Matter of

Jennifer Daniels, 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. 01-68

**Before ARB Members Grossman, Lynch, Pellman, and Briber¹
Administrative Law Judge James F. Horan drafted the Determination**

**For the Department of Health (Petitioner): Kevin P. Donovan, Esq.
For the Respondent: Pro Se**

After a hearing below, a BPMC Committee determined that the Respondent committed professional misconduct by failing to comply with an order for a comprehensive patient record review (Review Order). The Committee voted to suspend the Respondent's License to practice medicine in New York State until sixty days past the time when the Respondent complies with the Review Order. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 2001), the Respondent asks the ARB to nullify that Determination or to remand for further proceedings. The Respondent challenges the underlying Review Order, rulings at the hearing and the penalty the Committee imposed. After considering the hearing record and the submissions by the parties, we affirm the Committee's Determination in full. The Respondent has failed to comply with the Review Order and the Respondent should remain on suspension until such compliance.

¹ ARB Member Winston Price, M.D. was unavailable to take part in the review on this case. The ARB reviewed the case with a four member quorum, see Matter of Wolkoff v. Chassin, 89 N.Y.2d 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(15) (McKinney Supp. 2001) by failing to comply with an order for a comprehensive review of patient and/or office records. The Review Order resulted from a single patient care complaint. The Respondent objected to the Review Order on grounds that she rendered effective care in the case at issue in the complaint and that the Review would invade her other patients' privacy and burden her medical practice. A hearing ensued before the Committee that rendered the Determination now on review.

The Committee found that two BPMC investigative committees recommended comprehensive reviews on the Respondent's records to the Director of the Office of Professional Medical Conduct (OPMC). The Respondent failed to comply with those orders and has informed OPMC Staff that she will not comply with such orders [Committee Findings of Fact (FF) 3, 6, 8, 10, 13]. The Committee found that OPMC possessed the authority to issue the Review Order and that the Respondent bore the obligation to comply with the Order as a condition for holding her license. The Committee also noted that the New York State Supreme Court for Onondaga County has upheld the Review Order following a court challenge by the Respondent. The Committee voted to suspend the Respondent's License until sixty days past the date on which she complies with the Review Order. The Committee considered but rejected imposing a fine.

Review History and Issues

The Committee rendered their Determination on March 16, 2001. This proceeding commenced on April 2, 2001, 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 response brief and the Petitioner's brief and response brief. The record closed when the ARB received the Petitioner's response brief on May 8, 2001. Both parties submitted documents to the ARB following the submission of the briefs and response briefs. The

ARB gave no consideration to those documents because N.Y. Pub. Health Law § 230-c (4)(a) permits the parties to submit briefs and response briefs only.

The Respondent argues that she received no opportunity to present a meaningful defense at the hearing. She raises seven issues for review.

1. The Bureau of Adjudication failed to issue a hearing officer's report and proposed order pursuant to Title 10 NYCRR §§ 51.12, 51.13 & 51.14.
2. The Respondent failed to receive a meaningful hearing because no meaningful basis exists for issuing the Review Order and the OPMC Director has failed to establish the relevance for the specific records that the Review will involve.
3. Newly discovered evidence warrants a remand and the Committee's Administrative Officer abused her discretion in refusing to admit exculpatory evidence at the hearing.
4. The Respondent maintained an accurate medical record for the Patient KM, the patient at issue in the complaint that formed the basis for the investigation into the Respondent's practice.
5. The Administrative Officer's rulings demonstrated a bias against alternative medicine and violated the 1994 Alternative Medical Practices Act (Laws of 1994, Chapter 55).
6. The Administrative Officer's rulings violated the Respondent's rights as a woman and an African-American and violated Title VI, § 601 of the Civil Rights Act of 1964.
7. The Committee imposed an excessive sanction.

The Respondent asks that the ARB annul the Committee's Determination, or in the alternative, dismiss the charge in the interests of justice, or in the alternative, remand to the Committee for further proceedings.

In response to the Respondent's brief, the Petitioner argues that the Respondent's brief attempts to re-litigate the issues that the Respondent raised in a Supreme Court proceeding challenging the Review Order. The Petitioner raised the following arguments:

- the Respondent requests relief beyond the ARB's authority;
- the Committee imposed an appropriate penalty;
- the Respondent relies on Title 10 NYCRR §§ 51.12-51.14 mistakenly, as the legislation creating the ARB process (Laws of 1991, Chapter 606) superseded those regulations;
- the Supreme Court Order sustaining the Review Order bars the Respondent from re-litigating the Order's validity before the ARB;
- the Respondent raised factually incorrect assertions about newly discovered evidence;
- the Respondent raised discrimination claims without merit;
- the Respondent's lost reputation resulted from the Respondent's own actions in disclosing the OPMC investigation to her patients; and,
- the Respondent fails to specify what mitigating evidence she sought to introduce.

In the Petitioner's main brief to the ARB, the Petitioner asks the ARB to determine that the Committee's findings support both misconduct specifications that the Petitioner charged against the Respondent [Notice of Hearing, Petitioner Hearing Exhibit 1].

In the Respondent's response to the Petitioner's main brief, the Respondent in effect repeats at Reply Issues 1 & 2, the arguments on newly discovered and mitigating evidence that the Respondent raised at Issue 3 in her main brief. At Reply Issue 5, the Respondent repeated the arguments on civil rights violations that she raised at Point 6 in the main brief. At Reply Issue 3, the Respondent argued, on information and belief, that the Petitioner's counsel relied on perjured

testimony by Patient KM in an affidavit in the Respondent's Supreme Court challenge to the Review Order. The Respondent appears to be asking the ARB to impose disciplinary sanctions against the Petitioner's counsel. The Respondent's Reply Issue 4 makes allegations about conduct by the Petitioner's counsel in a prior OPMC investigation.

Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination that the Respondent committed professional misconduct and we affirm the Committee's Determination to suspend the Respondent's License. This case involved one charge, that the Respondent failed to comply with the Review Order. The Committee determined that the Respondent failed to comply [FF 3, 6, 8, 10, 13]. Such failure constituted professional misconduct under N. Y. Educ. Law §6530(15). The findings by the Committee provided the grounds for sustaining the misconduct specification that the Petitioner charged [Petitioner Hearing Exhibit 1]. The Respondent's brief and response brief dealt widely with issues beyond the hearing charge and with requests for relief beyond the ARB's authority under N.Y. Pub. Health Law § 230-c.

Issue 1 in the Respondent's main brief challenged the Bureau of Adjudication's failure to issue a hearing officer's report and a proposed order under Title 10 NYCRR §§ 51.12-51.14. Those regulations applied to the OPMC process before the ARB's creation in 1991 (Laws of 1991, Chapter 606). Those regulations apparently remain on the books even though N.Y. Pub. Health Law §§ 230(10)(g-i) & 230-c now control the post hearing process in BPMC proceedings. The Respondent's brief argued that she raised her objections under Title 10 NYCRR §§ 51.12-51.14 notwithstanding the provisions under N.Y. Pub. Health Law §

230(10)(i). The provisions under N.Y. Pub. Health Law §§ 230(10)(g-i) & 230-c control the ARB process, however, and those statutory provisions supersede the regulations at §§ 51.12-51.14. A challenge to the Committee's Determination under §§ 51.12-51.14, therefore, has no relevance in an ARB review.

The Respondent's Issue 2 argued that the OPMC Director failed to establish relevance for the specific records that the comprehensive review will involve. The Committee found that the Director possessed the authority to issue the Review Order and the Supreme Court has now affirmed the Review Order following the Respondent's challenge. We affirm the Committee's Determination that the Director acted within proper authority in issuing the Review Order.

In Issue 3 in the Respondent's main brief and in Reply Issues 1 & 2 in the Respondent's response brief, the Respondent raised arguments about newly discovered evidence and exculpatory evidence. As to the November 6, 2000 affidavit that the Respondent classified as newly discovered evidence, the Petitioner argued that the Respondent had that evidence available before the Supreme Court challenge and before the hearing below. We see no grounds on which to remand this matter for the Committee to consider that affidavit. As to exculpatory evidence, the Respondent argued that the Committee's Administrative Officer erred by refusing to receive evidence that Patient KM failed to follow the treatment regimen that the Respondent ordered. The Committee's Administrative Officer ruled that evidence irrelevant because the charge against the Respondent dealt with non-compliance under the Review Order rather than with medical care. As we noted above, we agree that the charges involved non-compliance only and we see no error by the Administrative Officer's ruling.

In Issue 4, the Respondent argued that she maintained an accurate record for Patient KM, and at Issue 5, she raised an argument concerning alternative medical practice. Both those

arguments address care issues beyond the scope of the no-compliance charge and we find no validity to either charge for this review.

Issue 6 in the Respondent's main brief and Reply Issue 5 in the Respondent's response brief alleged violations of the Civil Rights Act. Reply Issue 3 argued for attorney disciplinary sanctions. The ARB's authority under the provisions in N.Y. Pub. Health Law §230-c applies only to reviewing, overturning or remanding BPMC Committee Determinations. We possess no authority to enforce the Civil Rights Law or to impose attorney disciplinary sanctions as would the New York Courts. In the arguments concerning the Civil Rights Act, the Respondent argues that it is well settled that the ARB may annul decisions that result from subjective decision making without safeguards against the exercise of arbitrary power or simple unfairness. As the source for that assertion, the Respondent cites the New York Court of Appeals decisions in Matter of Nicholas v. Khan, 47 N.Y.2d 24 (1979) and Matter of Levine v. Whalen, 39 N.Y.2d 510 (1976). Neither of these cases, however, stand as authority that the ARB may annul decisions on the grounds the Respondent cites. Neither case even mentions the ARB, as the cases pre-date the ARB's legislative creation 1991. The Respondent should direct her civil rights and disciplinary complaints to the courts.

In Reply Issue 4 in the Respondent's response brief, she mentions a prior OPMC investigation in which a court excluded certain information from the investigation because OPMC received the information without proper court orders. The ARB holds that such case has no relevance in this matter. The Supreme Court has already upheld the Review Order in this case following the Respondent's challenge.

The Respondent's Issue 7 raises a matter clearly within the ARB's review authority, the penalty against the Respondent. The Respondent calls the penalty overly harsh. In their response,

the Petitioner asks that the ARB affirm that penalty or revoke the Respondent's License. The ARB rejects both parties' requests for modifications in the penalty and we affirm the Committee's suspension order. We see no reasonable alternative to suspending the Respondent's License. The OPMC Director acted within authority in issuing the Review Order. The Respondent has failed to comply with the Review Order and she has informed OPMC that she will continue such non-compliance [FF 6, 13]. The Respondent continues in non-compliance following the Supreme Court decision sustaining the Review Order. If we placed the Respondent on a limited-time probation, the Respondent could merely serve out the probation and continue in non-compliance. The Committee considered and rejected imposing a fine. To allow the Respondent to remain in practice without a sanction would allow the Respondent to escape her obligation as a physician to comply with legal directives in the disciplinary process. The Respondent herself will decide how long the suspension must last.

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's refusal to comply with the comprehensive patient record review order constituted professional misconduct under N. Y. Educ. Law §6530(15).

2. The ARB **AFFIRMS** the Committee's Determination to suspend the Respondent's License to practice medicine in New York State until sixty days after the Respondent complies with the comprehensive review order.

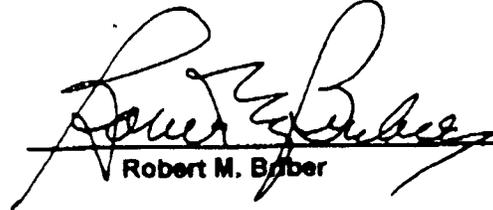
Robert M. Briber
Thea Graves Pellman
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.

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In the Matter of Jennifer Daniels, M.D.

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

Dated: July 19, 2001



Robert M. Briber

In the Matter of Jennifer Daniels, M.D.

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

Dated: July 5, 2001



Stanley L Grossman, M.D.

In the Matter of Jennifer Daniels, M.D.

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

Dated: July 4, 2001

Therese G. Lynch M.D.

Therese G. Lynch, M.D.

In the Matter of Jennifer Daniels, M.D.

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

Dated: 7/3, 2001



Thea Graves Pellman