



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

March 2, 2004

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Robert Bogan, Esq.
Paul Robert Maher, Esq.
NYS Department of Health
Hedley Park Place
433 River Street - 4th Floor
Troy, New York 12180

Mark A. Goldberg, Esq.
225 Broadway - Suite 1400
New York, New York 10007

Bernard Member, M.D.
1235 South Anna Drive
Rockville, Virginia 23146

Bernard Member, M.D.
c/o Bella Member
35 Seacoast Terrace #33J
Brooklyn, New York 11224

PUBLIC

RE: In the Matter of Bernard Member, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 03-183) 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.

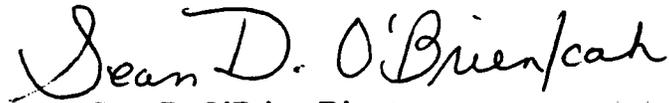
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified 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 "Sean D. O'Brien/cah". The signature is written in a cursive style with a large initial "S" and "D".

Sean D. O'Brien, Director
Bureau of Adjudication

SDO:cah
Enclosure

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

In the Matter of

Bernard Member, 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. 03-183

COPY

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

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

**Paul Rober Mahar, Esq.
Nathan L. Dembin, Esq.**

After a hearing below, a BPMC Committee found the Respondent liable for disciplinary action against his license to practice medicine in New York (License), following his conviction for unlawfully prescribing a Controlled Substance in Virginia. The Committee voted to censure and reprimand the Respondent. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney 2003), the Respondent asks the ARB to nullify that Determination and argues that the Respondent's conduct in Virginia fails to amount to criminal conduct in New York. The Petitioner asks the ARB to overturn the Committee's Determination on penalty and to revoke the Respondent's License. After reviewing the hearing record and the review submissions by the parties, the ARB affirms the Committee's Determination in full.

¹ ARB Member Datta Wagle, M.D., was unable to participate in this case. The ARB proceeded to consider the case with a four member quorum, see Matter of Wolkoff v. Chassin, 89 NY2d 250 (1996).

Committee Determination on the Charges

The Petitioner commenced the proceeding by filing charges with BPMC alleging that the Respondent committed professional misconduct under the definition in N. Y. Educ. Law §6530(9)(iii) (McKinney Supp. 2004), by engaging in conduct that resulted in a criminal conviction in another state, that would also constitute criminal conduct under New York Law. The Petitioner charged further that the Respondent's conduct that resulted in the criminal conviction also made the Respondent liable for disciplinary action against his New York medical license (License) under N. Y. Educ. Law §§ 6530(9)(b) & (9)(d) (McKinney Supp. 2004). The Respondent argued that those statutes applied in the Respondent's case because:

- the duly authorized professional disciplinary agency from another state, Virginia, found the Respondent guilty for professional misconduct [§6530(9)(b)] and/or took disciplinary action against the Respondent's medical license in that state [§6530(9)(d)], for, conduct that would constitute professional misconduct, if the Respondent had committed such conduct in New York.

An expedited hearing (Direct Referral Proceeding) ensued pursuant to N.Y. Pub. Health Law §230(10)(p)(McKinney 2004), before a BPMC Committee, which rendered the Determination now on review. In the Direct Referral Proceeding, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The evidence before the BPMC Hearing Committee demonstrated the Respondent's conviction for distributing a Schedule II controlled substance, a felony, in the Circuit Court for Spotsylvania County, Virginia in July 2002. The Court fined the Respondent \$2,500.00 and suspended his operator's license for six months. In August 2003, the Virginia Board of Medicine (Virginia Board) suspended the Respondent's Virginia medical license due to the criminal conviction. The evidence indicated that the Respondent had given Fentanyl patches to his

receptionist/ex-wife, without creating a medical record or monitoring his ex-wife's use of the Fentanyl. The ex-wife wanted a new pain medication for future menstrual periods.

The Respondent's Virginia conviction came under Section 18.2-248 of the Code of Virginia, which makes it unlawful to give or distribute a controlled substance except as authorized under the Virginia Drug Control Act. In the Direct Referral Hearing, the Petitioner argued that the Respondent's Virginia conduct would constitute a crime in New York under N.Y. Penal Law § 220.39, which makes it unlawful to dispose or give another a controlled substance in violation of New York's Controlled Substances Act. The Respondent admitted his criminal conviction, but argued that his Virginia conduct would not constitute criminal conduct in New York, because the applicable Virginia and New York statutes differ. The Respondent argued that the Virginia Code contained a provision on "accommodation" that the Penal Law lacks and the Respondent argued that the Penal Law exempts from violation any dispensing "in good faith".

The Committee found the Virginia and New York statutes contained similar provisions and that the Respondent's Virginia conduct would constitute criminal conduct in New York. The Committee, therefore, found the Respondent liable for disciplinary action against his License. The Committee voted to censure and reprimand the Respondent. The Committee rejected a more severe sanction upon concluding that the Respondent made no profit from his conduct and received a severe sanction for his conduct in the Virginia felony conviction and the indefinite license suspension by the Virginia Board. The Committee noted that the record contained impressive information about the quality of care that the Respondent provided to his patients. The Committee also found the Respondent unlikely to repeat his crime.

Review History and Issues

The Committee rendered their Determination on July 18, 2003. This proceeding commenced on July 30, 2003, when the ARB received the Respondent's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the

Petitioner's brief and the Respondent's response brief. The record closed when the ARB received the response brief on September 25, 2003.

The Petitioner requests that the ARB overturn the Committee and revoke the Respondent's License. The Petitioner argues that New York should impose no less onerous a sanction than Virginia imposed. The Petitioner notes that Virginia suspended the Respondent's medical license indefinitely, but that BPMP lacks the authority to order an indefinite suspension under Pub. Health Law § 230-a. The Petitioner also argues that Virginia prosecution failed to focus upon unlawful possession of controlled substances or about the Respondent's failure to conform to Federal regulations.

In reply, the Respondent contends that the Petitioner's request for revocation relies on unsubstantiated and unfounded arguments. The Respondent points out that the Petitioner made no argument at hearing that revocation constituted the only appropriate penalty in this case. The Respondent argues that this case involved only a single incident, with no pattern of abuse or improper dispensing, and that the Respondent received a severe penalty in Virginia. The Respondent also repeats the argument from hearing that the Respondent acted in good faith and that the conduct in Virginia would fail to constitute criminal conduct in New York.

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 Determination to censure and reprimand the Respondent.

We agree with the Committee that the Respondent's criminal conduct in Virginia would constitute a crime in New York. The Respondent's arguments in his ARB brief on "good faith" dispensing repeated arguments that the Respondent raised before the Committee. We accept the analysis by the Committee that appears at pages 5-10 in the Committee's Determination and we hold that the Respondent's criminal conviction in Virginia provides the grounds for disciplinary action against his License under N.Y. Educ. Law § 6530(9)(iii).

We also agree with the Committee that censure and reprimand constitutes the appropriate penalty in this case. This case involves a single incident. The record reveals no pattern of abuse and the record shows that the Respondent has provided fine care to his patients. We agree with the Committee that the Respondent has received a severe penalty in Virginia and that the Respondent presents no risk to repeat the criminal conduct. We also reject the Petitioner's attempt to introduce issues into the case from beyond the Virginia criminal conviction and the Virginia Board's decision. The Petitioner's brief argued that Virginia prosecution failed to focus upon unlawful possession of controlled substances or upon the Respondent's failure to conform to Federal regulations. If the Virginia prosecution failed to focus on those issues, then why does the Petitioner raise them here? The Statement of Charges [Hearing Exhibit 1] mentioned only the Virginia criminal conviction and the Virginia Board decision as the basis for this action. The ARB would deny a Respondent due process if we considered uncharged conduct in rendering a decision on a penalty, Matter of Dhabuwala v. State Bd. for Prof. Med. Cond., 225 A.D.2d 209, 651 N.Y.S.2d 249 (3rd Dept. 1996).

ORDER

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

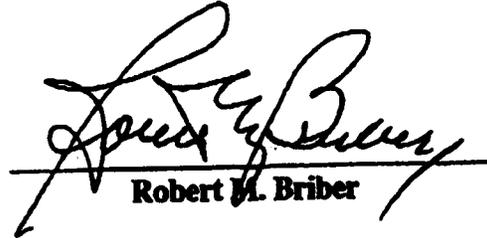
1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB affirms the Committee's Determination to censure and reprimand the Respondent.

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

In the Matter of Bernard Member, M.D.

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

Dated: February 19, 2004



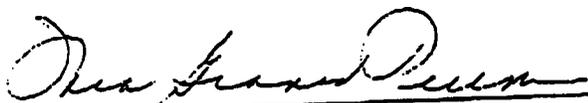
Robert M. Briber

In the Matter of Bernard Member, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Member.

Dated: Feb 19, 2004



Thea Graves Pellman

In the Matter of Bernard Member, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Member.

Dated: February 22, 2004

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Stanley L. Grossman, M.D.

In the Matter of Bernard Member, M.D. . .

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

Dated: Feb 18, 2004

Therese G Lynch M.D

Therese G. Lynch, M.D.