



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

PUBLIC

May 16, 2003

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Frank J. Appelgate, M.D.
276 Parkside Drive
Suffern, New York 10901

Frank J. Appelgate, M.D.
610 E. 189th Street
Bronx, New York 10458

Frank J. Appelgate, M.D.
233 Lafayette Avenue
Suffern, New York 10901

Robert Bogan, Esq.
Paul Robert Mahar, Esq.
NYS Department of Health
433 River Street, Suite 303
Troy, New York 12180

Neil Grimaldi, Esq.
2860 Buhre Avenue
Bronx, New York 10461

RE: In the Matter of Frank J. Appelgate, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 03-01) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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 "Tyone T. Butler". The signature is written in a cursive style with a large initial "T".

Tyone T. Butler, Director
Bureau of Adjudication

TTB:cah
Enclosure

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

In the Matter of

Frank J. Appelgate, 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. 03-01

COPY

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

For the Department of Health (Petitioner):

Paul Robert Maher, Esq.

For the Respondent:

Neil Grimaldi, Esq.

After a hearing below, a BPMC Committee determined that the Respondent's New York Criminal conviction constituted professional misconduct. The Committee voted to suspend the Respondent's License to practice medicine in New York State (License), to stay the suspension, under condition, and to place the Respondent on probation. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney 2003), the Petitioner asks the ARB to modify the Committee's Determination and revoke the Respondent's license. After reviewing the Committee's Determination, the hearing record and review submissions from both parties, we overturn the Committee and vote to revoke the Respondent's License.

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(9)(a)(i) (McKinney Supp. 2003) due to the Respondent's criminal conviction for a crime under New York Law. The proceeding commenced by a Summary Order from the Commissioner of Health, pursuant to N.Y. Pub. Health Law §

230(12)(b). The Order suspended the Respondent's License summarily, upon the Commissioner's Determination that the Respondent was convicted for acts constituting felonies. An expedited hearing (Direct Referral Proceeding) ensued pursuant to N.Y. Pub. Health Law §230(10)(p)(McKinney Supp. 2003), before a BPMC Committee, which rendered the Determination which the ARB now reviews. In such a Direct Referral Proceeding, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, see In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996). The ARB review addresses the Committee's Determination on the charges and penalty only, as the ARB lacks the authority to review Summary Orders [see Pub. Health Law § 230-c (1)].

The evidence before the Committee showed that the Respondent entered a guilty plea in New York State Supreme Court, Bronx County, to:

- eleven counts of criminal sale of a prescription for a controlled substance, a Class C Felony,
- one count of criminal sale of a controlled substance, a Class C Felony, and,
- two counts of criminal solicitation in the fourth degree, a Class A Misdemeanor.

In entering the plea on September 27, 2001, the Respondent testified under oath that the Respondent prescribed the controlled substance, Percocet, with the knowledge that the prescription and drug would not be used for a legitimate medical purpose [Petitioner's Hearing Exhibit C, page 7]. The Court sentenced the Respondent to six months incarceration and five years probation. The Appellate Division for the First Department modified the criminal sentence subsequently by vacating the incarceration.

The Committee determined that the criminal conviction constituted misconduct under Educ. Law §§ 6530(9)(a)(i). The Committee found that the Respondent sold controlled

substances to three undercover investigators who posed as patients at the Respondent's office.

The Committee indicated that they rejected the Respondent's hearing presentation, which tried to present the facts behind the criminal conviction as an honest mistake and which asserted that sufficient medical reason existed for writing the prescriptions. The Committee also rejected the Petitioner's request that the Committee revoke the Respondent's License.

The Committee voted to suspend the Respondent's License for five years. The Committee's penalty order provided for a stay of the last four and one-half years of the suspension, with probation as the replacement, if the Respondent surrenders his Drug Enforcement Agency Certificate. The Committee stated that no patient harm occurred because undercover investigators received the prescriptions. The Committee also stated that letters from appreciative patients demonstrated the Respondent's dedication to providing excellent medical care to his patients.

Review History and Issues

The Committee rendered their Determination on January 6, 2003. This proceeding commenced on January 15, 2003, 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 10, 2003.

The Petitioner requests that the ARB overturn the Committee's Determination on penalty. The Petitioner argues that the Committee failed to consider that the Respondent practiced medicine despite the Commissioner's Summary Suspension Order and the Petitioner argues that the Committee considered improperly that no patient harm occurred. The Petitioner contends that

the ARB may impose a sanction without proof that patient harm occurred. The Petitioner asks that the ARB revoke the Respondent's License due to the Respondent's repeated, serious criminal conduct.

The Respondent argues that he has suffered terribly already as a result of his criminal conviction. The Respondent contends that he entered a guilty plea to the criminal charges only under pressure and that he has sought unsuccessfully to withdraw that guilty plea. The Respondent requests the opportunity to recommence his medical practice.

Determination

The ARB has considered the record and the parties' briefs. The ARB may substitute our judgement for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 A.D.2d 86, 606 N.Y.S.2d 381 (3rd Dept. 1993). We elect to substitute our judgement in this case. We vote to overturn the Committee and revoke the Respondent's License.

First, we reject the Respondent's attempt to repudiate his guilt on the criminal charges and his plea in Supreme Court. On the date the Respondent entered his guilty plea, he stated under oath that he pleaded guilty of his own free will, after consulting with his attorney [Hearing Exhibit C, page 6]. The Respondent went on to testify that he wrote a prescription for a controlled substance with knowledge that the drug would not be used for a legitimate medical reason [Exhibit C, page 7]. Second, we reject the Committee's conclusion that the Respondent warranted a sanction less severe than revocation, because no patient harm occurred. The Respondent wrote a prescription knowingly for other than a legitimate medical reason. The Respondent knew or should have known that those seeking controlled substances for other than legitimate medical reasons seek the substances to feed their own addiction or for sale to addicts.

The Respondent used his License to engage knowingly in criminal conduct and used his License to violate the trust in the medical profession. We conclude that the Respondent has demonstrated his unfitness to continue in medical practice in New York State.

In reaching our Determination, we gave no consideration to the Petitioner's arguments concerning practice that violated the Commissioner's Summary Order, because the Petitioner made no charge concerning any unauthorized practice. A Committee or the ARB would violate due process by imposing a punishment for uncharged misconduct, 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 overturns the Committee's Determination to suspend the Respondent's License and to place the Respondent on probation.
3. The ARB votes unanimously to revoke the Respondent's License.

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 Frank J. Applegate, M.D.

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

Dated: MAY 12 , 2003



Winston S. Price, M.D.

In the Matter of Frank J. ^{Applegate} Applegate, M.D.

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

Dated: May 9, 2003

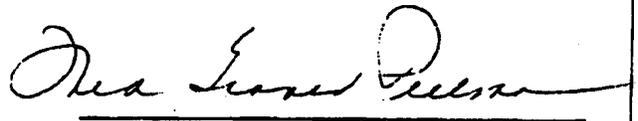
Stanley L. Grossman M.D.

Stanley L. Grossman, M.D.

Applegate
In the Matter of Frank J. Applegate, M.D.

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

Dated: May 5, 2003



Thea Graves Pellman

In the Matter of Frank J. ^{Applegate} Applegate, M.D.

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

Dated: May 6, 2003

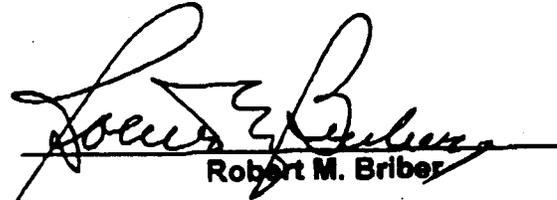
Therese G. Lynch M.D.

Therese G. Lynch, M.D.

In the Matter of Frank J. Applegate, M.D.

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

Dated: May 5, 2003


Robert M. Briber