



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

July 31, 2001

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

Winston L. Moorehead, P.A.
1 Mitchell Avenue
Yonkers, New York 10701

RE: In the Matter of Winston L. Moorehead, P.A.

Dear Parties:

Enclosed please find the Determination and Order (No. 01-79) 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.

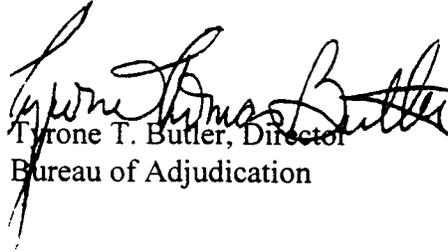
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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



Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

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

In the Matter of

Winston L. Moorehead, P.A. (Respondent)

**A proceeding to review a Determination by a
Committee (Committee) from the Board for
Professional Medical Conduct (BPMC)**

COPY

Administrative Review Board (ARB)

Determination and Order No. 01-79

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

**For the Department of Health (Petitioner): Paul Robert Mahar, Esq.
For the Respondent: Pro Se**

After a hearing before a BPMC Committee, the Committee determined that the Respondent committed professional misconduct due to his Federal criminal convictions for engaging in sex with a patient. The Committee voted to revoke the Respondent's License as a Physician's Assistant. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 2001), the Respondent asks the ARB to modify that Determination by considering mitigating factors in the case and by reducing the sanction against the Respondent. After considering the hearing record and the review submissions by the parties, we affirm the Committee's Determination in full, because we conclude that the Respondent's sexual misconduct against a vulnerable patient warrants revocation.

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)(ii)(McKinney Supp. 2001), due to the Respondent's conviction for crimes under federal law. An expedited hearing (Direct Referral

¹ ARB Member Winston Price, M.D. took no 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).

Proceeding) ensued pursuant to N.Y. Pub. Health Law §230(10)(p)(McKinney Supp. 2001), before the BPMC Committee that 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 evidence at the hearing [Petitioner Exhibit 5] showed that the Respondent entered guilty pleas to three counts (all misdemeanors) for engaging in sexual acts with a detainee at an Immigration and Naturalization Facility, all violations under Title 18 U.S.C. § 2243(b). An affidavit accompanying the Respondent's indictment indicated that the Respondent admitted to an investigator that he abused an immigration detainee by touching the detainee in the genital area [Petitioner Exhibit 5]. The detainee came into the Respondent's care after complaining about a toothache and requesting a dental referral. The Respondent also told that investigator that the Respondent has sexually abused three to five detainees over the prior two years [Petitioner Exhibit 5]. The United States Magistrate Judge for the Southern District of New York sentenced the Respondent to twenty-one months in prison and one year supervised release. The Respondent actually spent eighteen months in prison.

The Committee found that the conduct that resulted in the Respondent's criminal conviction constituted professional misconduct under §6530(9)(a)(ii). The Committee voted to revoke the Respondent's License as a Physician' Assistant. The Committee found that the Respondent failed to recognize the gravity of his behavior. The Committee concluded that the Respondent's repeated sexual misconduct evidenced an abuse of professional trust and moral unfitness to practice the profession.

Review History and Issues

The Committee rendered their Determination on March 28, 2001. This proceeding commenced on April 13, 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 the Petitioner's brief. The record closed when the ARB received the Respondent's brief on May 24, 2001.

The Respondent challenged the Committee's finding on misconduct, arguing that his acts involving the detainee included no violence or coercion. The Respondent also argued that he had no attorney to represent him before the Committee. In challenging the penalty the Committee imposed, the Respondent raised four points:

- the Committee erred in concluding that the Respondent experienced no remorse for his act;
- the Respondent has endured sufficient punishment for his acts through the incarceration under his criminal sentence;
- the Committee abused its discretion by revoking the Respondent's License, without taking into account efforts at rehabilitation, an unblemished work history and no prior criminal record; and,
- licensees who have committed far worse offenses than the Respondent have received less severe penalties.

The Respondent argues that he could return to practice safely with limitations on his practice and a probation that requires monitoring and therapy.

The Petitioner requests that the ARB affirm the Committee's Determination in full. The Petitioner argues that the Respondent's sexual acts with the detainee demonstrated that the Respondent lacked the moral qualities that a licensee must possess. The Petitioner argues further that the boundary violations constituted misconduct, even without violence, Slakter v. DeBuono, 263 A.D.2d 269 (3rd Dept. 1999); Matter of D'Amico v. Commissioner of Education of the State of New York, 167 A.D.2d 769 (3rd Dept. 1990). The Petitioner argues that although revocation

constitutes a severe penalty, the Respondent's conduct merits that sanction. The Petitioner also argues that the hearing testimony and his brief demonstrate that the Respondent fails to understand the gravity of his acts.

Determination

The four member ARB quorum 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 revoking the Respondent's License.

The Respondent challenged the Committee's Determination that the Respondent's crimes constituted misconduct, arguing that the criminal acts involved no violence. Under § 6530(9)(a)(ii), a licensee commits misconduct by engaging in conduct that results in a conviction under Federal law. Nothing in § 6530(9)(a)(ii) indicates that only a conviction for a violent crime amounts to professional misconduct. The Respondent also challenged the misconduct finding because the Respondent had no lawyer to represent him at the hearing. At the hearing, however, the Committee's Administrative Officer, Judge McDermott, asked the Respondent if he was waiving his right to counsel by proceeding without counsel at the hearing [Hearing Transcript page 10]. The Respondent indicated that he waived the right to counsel [Hearing Transcript page 10, line 18]. The ARB sees no reason to overturn the Committee's Determination on misconduct on the grounds that the Respondent raised.

As to the penalty, the ARB sees no validity to the Respondent's arguments for reducing the penalty in this case due to mitigating factors or to the penalty's severe impact. The Respondent violated the trust that a patient placed in him and used his position and his access to patients to obtain sexual gratification. Revocation constitutes the appropriate sanction for such a

violation of trust, Matter of Morrison v. DeBuono, 255 A.D.2d 710, 680 N.Y.S2d 703 (3rd Dept. 1998). In this case, the Respondent served an especially vulnerable population - detainees in Immigration Facilities. The Respondent's hearing testimony demonstrated that he realized that vulnerability:

" the situation was such that people in immigration or the detainees are in such a situation that they would accept a kind word or a gesture, even sexual acts, from anyone, whether it's the cleaning staff, the administrative staff, the medical staff, all the officers there [Hearing Transcript page 12]."

The Respondent's testimony also indicated that he took advantage of that vulnerability. He conceded that he gave a statement to an investigator admitting that:

" ... I fondled probably three patients, total. Three to five." [Hearing Transcript page 16].

The Respondent's abusive conduct ceased only when the complainant-detainee made the complaint that began the criminal case against the Respondent. Although his statement at Transcript page 12 indicated that the detainees would accept the Respondent's sexual misconduct, the investigator's affidavit that accompanied the Respondent's indictment indicated that the complainant-detainee resisted the Respondent's attempts to fondle her during the examination [Petitioner Exhibit 5]. The criminal charges against the Respondent also charged that the Respondent's crimes occurred with the Respondent in "custodial, supervisory and disciplinary authority over the complainant-detainee [Petitioner Hearing Exhibit 5].

Although the Respondent's record reveals no prior criminal or disciplinary actions, the record from his Federal conviction reveals that the Respondent engaged in serious misconduct that demonstrated his unfitness to practice as a Physician's Assistant. The ARB agrees with the Committee that the Respondent shows no remorse for his abusive conduct. The Respondent, instead, regrets getting caught.

ORDER

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

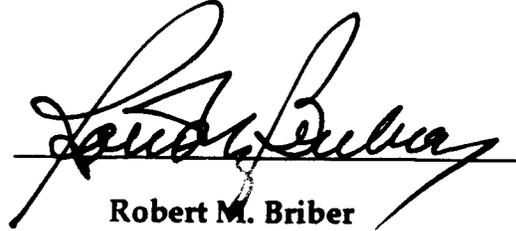
1. The ARB **AFFIRMS** the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB **AFFIRMS** the Committee's Determination to revoke the Respondent's license as a Physician's Assistant.

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

In the Matter of Winston L. Moorehead, P.A.

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

Dated: June 29, 2001



Robert M. Briber

In the Matter of Winston L. Moorehead, P.A.

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

Dated: June 30, 2001

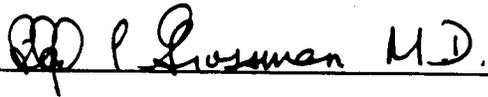


Therese G. Lynch, M.D.

In the Matter of Winston L. Moorehead, P.A.

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

Dated: July 5, 2001



Stanley L Grossman, M.D.

In the Matter of Winston L. Moorhead, P.A.

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

Dated: 7/29, 2001



Thea Graves Pellman