



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

October 30, 2001

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Amy Merklen, Esq.
NYS Department of Health
Corning Tower Room 2509
Empire State Plaza
Albany, New York 12237

Leon J. Greenspan, Esq.
Greenspan & Greenspan
34 South Broadway
Suite 605
White Plains, New York 10601-4400

Charles C. Lucas, Jr., M.D.
2039 Palmer Avenue
Suite 103
Larchmont, New York 10538

Charles C. Lucas, Jr., M.D.
76 Khakum Wood Road
Cottage House
Greenwich, CT 06831

RE: In the Matter of Charles C. Lucas, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 01-154) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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:cah
Enclosure

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

In the Matter of

Charles C. Lucas, M.D. (Respondent)

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

Administrative Review Board (ARB)

Determination and Order No. 01-154

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):

Amy B. Merklen, Esq.

For the Respondent:

Leon J. Greenspan, Esq.

After a hearing below, a BPMC Committee determined that the Respondent committed professional misconduct by violating probation terms from a prior disciplinary action (Lucas I). The Committee voted to suspend the Respondent's License to practice medicine in New York (License) for five years, to stay the suspension and to place the Respondent on five years additional probation under the terms that appear in the Committee's Determination Appendix I. 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 the Committee's Determination by reducing the penalty to a censure and reprimand. After reviewing the hearing record and the parties' review submissions, we reject the Respondent's request for a reduction in the sanction. On our own motion, we vote 4-1 to increase the sanction to include six months actual suspension and four and one-half years on probation.

Committee Determination on the Charges

The Petitioner commenced the proceeding upon notice to the Respondent, pursuant to N.Y. Pub. Health Law § 230(19), that the Director of the Office for Professional Medical

Conduct (OPMC) determined that the Respondent had violated terms under the Lucas I probation. Violating probation constitutes professional misconduct under N.Y. Educ. Law §6530(29)(McKinney 2001). A hearing on the charges ensued before the Committee that rendered the Determination now on review (Lucas II).

The Lucas II hearing record indicated that the Lucas I Committee rendered a December 24, 1996 Determination that found the Respondent guilty for habitual alcohol abuse/or drug dependence. The Lucas I Committee suspended the Respondent's License for three years, stayed the suspension and placed the Respondent on probation for three years. The probation terms required the Respondent to submit to random drug screening, to abstain from medication, other than that prescribed to the Respondent by another physician, and to report to OPMC any disciplinary actions against the Respondent within thirty days from each charge or action. On October 21, 1998, the Respondent entered a Consent Agreement with the North Carolina Board of Medicine. That consent agreement arose from the New York action in Lucas I. In the Respondent's 1999 application for License renewal in New York, the Respondent failed to reveal the North Carolina action. On August 7, 1999 a urine screen on the Respondent tested positive for morphine.

The Lucas II Committee determined that the Respondent violated probation by:

- failing to provide written notification to OPMC within thirty days from the North Carolina charges or consent order, and,
- failing to remain drug free.

In making their Determination, the Committee found the Respondent's explanations for the positive drug screen implausible and found the Respondent's hearing testimony evasive and inconsistent. The Committee also found the Respondent in denial about his condition. The Lucas II Committee voted to suspend the Respondent's License for five years, to stay the suspension in full and to place the Respondent on probation for five years under the terms that appear at Appendix I to the Committee's Determination. The terms included a practice supervisor, a therapy monitor and random drug tests. The Committee voted to censure and reprimand the Respondent for failing to report the North Carolina action.

Review History and Issues

The Committee rendered their Determination on July 12, 2001. This proceeding commenced on July 25, 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 response brief. The record closed when the ARB received the response brief on September 10, 2001. The Respondent also submitted a reply to the Petitioner's response brief.

The Respondent asks that the ARB reduce the entire sanction against the Respondent to censure and reprimand. The Respondent argues that that the Lucas I Committee disciplined the Respondent for mental impairment and that no evidence in the Lucas I proceeding indicated that the Respondent used an opium or cocaine based controlled substance at that time. The Respondent notes that his positive test in 1999 represented only a single lapse and the Respondent speculated about the actual drug level in his system that produced the positive result. The Respondent admits that he failed to report the North Carolina consent agreement, but asserts that he harbored no intent to violate the probation terms on disclosure. At pages 24-34 in his brief, the Respondent states that he could find no BPMC case analogous to his own for comparison on the sanction and he discusses the sanctions from several reported BPMC cases. He argues that physicians in those cases received less severe sanctions for more serious conduct than the Respondent's violations.

The Petitioner's reply brief argued that the Respondent's brief presented many matters from outside the hearing record. The Petitioner asked the ARB to disregard such matters. The Petitioner also submitted a letter that the ARB received on September 24, 2001 in which the Petitioner asked the ARB to disregard the Respondent's reply to the Petitioner's response brief.

The Petitioner argues that the Committee's findings concerning the probation violations constituted more than sufficient grounds for the sanction the Committee imposed and the Petitioner asks that the ARB affirm the Committee's sanction at the minimum.

Determination

The ARB has considered the record and the parties' briefs. We refuse to consider the submission the Respondent filed in answer to the Petitioner's reply brief. Under N.Y. Pub. Health Law § 230-c (4)(a), parties may file a brief and/or a response brief. The ARB will consider no additional submissions from the parties, Matter of Jacob Neuman, M.D., ARB 97-34, 1997 WL 1053262 (N.Y.D.O.H. Admin. Rev. Bd.). We also refuse to consider any references in the Respondent's brief to evidence from outside the hearing record. The attempt to introduce evidence post-hearing denies the opposing party a chance to test that information, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3rd Dept. 1997). 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 for five years. We overturn the Committee's Determination to stay the penalty in full. We vote 4-1 to stay only the last fifty-four months in the penalty and to place the Respondent on probation for those fifty-four months under the terms that appear at the Committee's Determination Appendix I.

In reviewing a Committee's Determination, the ARB determines: whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law; and, whether the Penalty is appropriate and within the scope of penalties which N.Y. Pub. Health Law §230-a permits [N.Y. Pub. Health Law §230(10)(i), §230-c(1) and §230-c(4)(b)]. That authority allows the ARB to 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); and in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 NYS 2d 759 (3rd Dept. 1994). The ARB may choose to substitute our judgement on our own motion, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). We elect to substitute our judgement on our own motion in this case.

The Committee in Lucas I found the Respondent guilty for misconduct in part for abuse and dependence on certain drugs [Lucas I Determination, page 12, Petitioner's Exhibit 1]. The Committee stayed a suspension in Lucas I on condition that the Respondent comply with probation terms that included remaining drug free and reporting any disciplinary charges or actions within thirty days. The Respondent violated both those conditions. Such conduct constituted professional misconduct under N.Y. Educ. Law §6530(29).

The Respondent attempted to minimize his violations by arguing that he bore no intent to violate probation. The provisions in N.Y. Educ. Law §6530(29), however, contain no requirement that the Petitioner must show intent or willful conduct to prove probation violations. Also, no court decision on probation violations in professional disciplinary cases has indicated the need to prove intent or willfulness, see Matter of Kite v. DeBuono, 233 A.D.2d 783, 650 N.Y.S.2d 384 (3rd Dept 1996); Matter of White v. State Bd. for Prof. Med. Cond., 277 A.D.2d 608, 715 N.Y.S.2d 116 (3rd Dept. 2000). The Respondent also offered explanations to excuse the positive urine screen, which the Committee found implausible. The Committee's refusal to accept the Respondent's excuses constitutes strictly a credibility determination by the fact finder Matter of White v. State Bd. for Prof. Med. Cond. (supra). We agree with the Committee that the Respondent offered implausible excuses for the positive screen. The Respondent also attempted to minimize the positive screen by arguing facts from outside the record concerning the drug

level in the urine sample. As we noted above, we refuse to consider evidence from outside the hearing record.

In challenging the sanction by the Committee, the Respondent's brief discussed the sanctions in a number of prior BPMC cases. No case the Respondent mentioned, however, dealt with probation violations. In prior cases, the ARB has held that probation violations provide sufficient grounds on which to revoke a Respondent's License, Matter of Kite v. DeBuono, (supra); Matter of White v. State Bd. for Prof. Med. Cond., (supra). In both those cases, the Appellate Division for the Third Department affirmed the revocation orders. In White, the probation violation resulted from a positive urine drug screen.

The ARB disagrees with the Respondent that the stayed suspension with additional probation constitutes an overly harsh sanction in this case. We hold that the Committee imposed an inappropriate sanction by failing to order actual time on suspension. The Committee's Determination found the Respondent in denial concerning his condition [Lucas II Committee Determination, page 6]. The Respondent's violation of the Lucas I probation terms demonstrates that a stayed suspension with probation fails to deter the Respondent from further misconduct. Further probation with no more severe sanction will signal the Respondent that he may commit further violations without the fear for more serious consequences. On our own motion, we vote 4-1 to stay the suspension in this case for only the final fifty-four months. The majority holds that the six month actual suspension will force the Respondent to confront his condition and will signal the Respondent that his failure to abide by the probation conditions in the future could result in the Respondent's permanent removal from medical practice in New York. The dissenting member would revoke the Respondent's License.

During the suspension the Respondent shall commence or continue therapy under the conditions that appear at Paragraph 13, Appendix I in the Lucas II Committee's Determination. The Respondent shall also submit to drug screens under the schedule for the first six months on probation that appears at paragraph 12, Appendix I in the Committee's Determination. Following the suspension, the Respondent shall serve fifty-four months additional probation under all the terms at Appendix I in the Committee's Determination.

ORDER

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

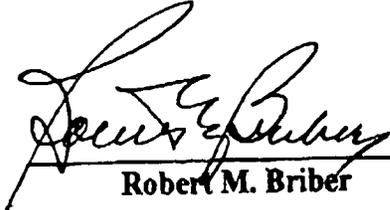
1. The ARB affirms the Committee's Determination that the Respondent violated probation.
2. The ARB affirms the Committee's Determination to suspend the Respondent's License for five years.
3. We overturn the Committee's Determination to stay the suspension in full and place the Respondent on probation for five years.
4. By a 4-1 vote, we stay the suspension for the final fifty-four months and place the Respondent on probation for that period under the terms that appear at Appendix I to the Committee's Determination.
5. During the six months actual suspension, the Respondent shall remain subject to random urine screens as this Determination provides.

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 Charles C. Lucas, M.D.

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

Dated: October 1, 2001



Robert M. Briber

In the Matter of Charles C. Lucas, M.D.

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

Dated: Oct 1, 2001

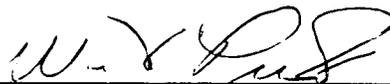


Thea Graves Pellman

In the Matter of Charles C. Lucas, M.D.

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

Dated: 10/24, 2001

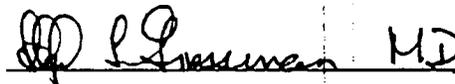


Winston S. Price, M.D.

In the Matter of Charles C. Lucas, M.D.

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

Dated: October 8, 2001

 M.D.

Stanley L Grossman, M.D.

In the Matter of Charles C. Lucas, M.D.

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

Dated: Sept 29, 2001

Therese G. Lynch M.D.

Therese G. Lynch, M.D.