



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

April 18, 2002

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

David Schwartz, M.D.
5252 Dawes Avenue
Alexander, Virginia 22311

David Schwartz, M.D.
11437 Hollow Timber Court
Reston, Virginia 20194

David Schwartz, M.D.
412 First Street, South East
Washington, DC 20003

RE: In the Matter of David T. Schwartz, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 02-33) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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 "Tyrone T. Butler". The signature is written in a cursive style with a large 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**

In the Matter of

David T. Schwartz, 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. 02-33

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:

Pro Se

After a hearing below, a BPMC Committee revoked the Respondent's License to practice medicine in New York State (License), due to disciplinary findings against the Respondent in another state. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's 2002), the Respondent alleges errors at the hearing and asks the ARB to nullify that Determination. After reviewing the hearing record and review submissions from the parties, the ARB affirms the Committee's Determination and rejects the Respondent's allegations concerning errors at the hearing.

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)(b) & (9)(d) (McKinney Supp. 2001) by committing professional misconduct 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.

The Petitioner's Statement of Charges [Petitioner Exhibit 1] alleged that the Respondent's misconduct in Virginia would constitute misconduct if committed in New York, under the following categories:

- practicing medicine with negligence on more than one occasion, a violation under N. Y. Educ. Law § 6530(3) (McKinney 2001),
- practicing medicine with gross negligence, a violation under N. Y. Educ. Law §6530(4) (McKinney 2001)
- practicing medicine with incompetence on more than one occasion, a violation under N. Y. Educ. Law §6530(5) (McKinney 2001)
- practicing medicine with gross incompetence, a violation under N. Y. Educ. Law §6530(6) (McKinney 2001), and/or,
- failing to maintain accurate records, a violation under N. Y. Educ. Law § 6530(32) (McKinney 2001).

The proceeding commenced by a Summary Order from the Commissioner of Health, pursuant to N.Y. Pub. Health Law § 230(12)(a). The Summary Order suspended the Respondent's License summarily, upon the Commissioner's Determination that the Respondent's practice constituted an imminent danger to the public health. A hearing on the charges and the Summary Order ensued before the BPMC Committee which rendered the Determination now on review. 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 Committee found that the Virginia Board of Medicine (Virginia Board) accepted the surrender for indefinite suspension of the Respondent's Virginia medical license through a March 9, 2001 Consent Order. The Consent Order provided that the Respondent:

- exhibited significant deficiencies in his specialty with regard to judgement involving patient selection, including inadequate preoperative assessment of whether to perform surgery, particularly high-risk surgeries;

- failed to appreciate surgical complications in some high risk surgeries he performed, failed to use appropriate surgical techniques in some circumstances, and lacked sufficient experience in procedures to minimize properly the consequences of complications that occurred;
- exhibited deficiencies in documenting patient charts, including using anatomically inaccurate descriptions in notes;
- in a finding by the Colorado Personalized Education for physicians program, exhibited deficiencies in judgement with regard to case selection, organizing data and documenting patient treatment; and,
- exhibited deficiencies in patient care that resulted in 1999-2000 hospital privilege denial or restriction [Hearing Committee Determination page 4].

The Committee also found that the District of Columbia (DC) Department of Health suspended the Respondent's DC medical license summarily due to the Virginia action.

The Committee voted to revoke the Respondent's License. The Committee concluded that the Respondent failed to appreciate the seriousness of his actions and failed to convince the Committee about the Respondent's capability for rehabilitation. The Committee also indicated that, after they made their findings and conclusions on the charges, they received evidence that the Respondent spent time incarcerated for tax evasion and for practicing with a suspended medical license.

Review History and Issues

The Committee rendered their Determination on January 16, 2002. This proceeding commenced on January 28, 2002, 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 reply brief and the Petitioner's response brief. The record closed when the ARB received the reply brief on March 11, 2002.

The Respondent's brief argued that he received no chance to present his own germane evidence at the hearing and that he received no chance to rebut all the evidence against him. The Respondent also argued that New York Law would bar the Committee from considering all the cases on which the Virginia Board based its decision. In response, the Petitioner argued that no merit exists to any point the Respondent raised in his brief. The Petitioner asked that the ARB sustain the Committee's Determination.

Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination that the Respondent's conduct in Virginia would constitute misconduct in New York and would make the Respondent liable for disciplinary action against his license pursuant to Educ. Law §§ 6530(9)(b) & (9)(d). We also affirm the Committee's Determination to revoke the Respondent's License. We find no merit to the challenges to the Committee's Determination that the Respondent raised in his brief.

The Respondent alleged error by the Committee's Administrative Officer for excluding evidence the Respondent offered. The Administrative Officer refused to receive that evidence, however, because the evidence amounted to re-litigating the Virginia disciplinary proceeding that ended in the Order to which the Respondent consented. We see no error in the Administrative Officer's action. In an expedited hearing pursuant to Pub. Health Law §230(10)(p), 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 Respondent also alleged that he received no opportunity to examine evidence against him. That objection involved the evidence on prior incarcerations that the Committee received following their judgement on the charges. The ARB rejects those contentions. The Respondent had notice about that evidence when the exhibits concerning the prior incarcerations entered into evidence. The Respondent made no objection to the exhibits coming into evidence. The Respondent also complained about receiving no chance for cross-examination, but the Petitioner presented no witnesses.

In his final argument, the Respondent contended that Pub. Health Law § 230(10)(m)(iii) barred evidence at the hearing concerning cases over three years old. The ARB finds no validity to that argument. The provisions in Pub. Health Law § 230(10)(m)(iii) apply to a proceeding concerning violations of a minor or technical nature. The Respondent's hearing proceeded pursuant to a different statute, Pub. Health Law § 230(10)(p), that statute involves proceedings following criminal conviction or administrative violations. The latter statute contains no such limitation on cases over three years old.

In making their Determination to revoke the Respondent's License, the Committee referred to the Respondent's violations that resulted in incarceration and that pre-dated the Virginia Agreed Order. The ARB sees no need to consider those cases in order to make a conclusion on the proper penalty in this case. The Virginia Consent Order listed extensive deficiencies in the Respondent's practice, which the Committee summarized at page 4 in their Determination. We hold that these deficiencies demonstrated the Respondent's unfitness to practice medicine in New York State and provided sufficient grounds on which to revoke the Respondent's License.

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.

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 David T. Schwartz, M.D.

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

Dated: _April 11, 2002



Robert M. Briber

In the Matter of David T. Schwartz, M.D.

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

Dated: 4/11, 2002

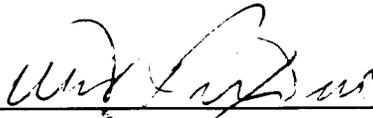


Thea Graves Pellman

In the Matter of David T. Schwartz, M.D.

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

Dated: 4/15, 2002



Winston S. Price, M.D.

In the Matter of David T. Schwartz, M.D.

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

Dated: April 10, 2002

 M.D.

Stanley L Grossman, M.D.

In the Matter of David T. Schwartz, M.D.

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

Dated: April 10, 2002

Therese G. Lynch M.D.

Therese G. Lynch, M.D.