



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.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

April 13, 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

David W. Smith, Esq.
NYS Department of Health
5 Penn Plaza – Sixth Floor
New York, New York 10001

Eugene Schwalben, M.D.
421 Devonshire Road
Baldwin, New York 11510

Ariella M. Colman, Esq.
Nathan L. Dembin & Associates, P.C.
225 Broadway – Suite 1400
New York, New York 10007

RE: In the Matter of Eugene Schwalben, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 00-12) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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:nm

Enclosure

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

COPY

In the Matter of

Eugene Schwalben, 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. 00-12

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

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

**David W. Smith, Esq.
Ariella M. Colman, Esq.**

In this case, a BPMC Committee rendered a 1998 Determination finding the Respondent guilty for gross negligence and incompetence, negligence and incompetence on more than one occasion, fraud and moral unfitness. The Committee revoked the Respondent's License to practice medicine in New York State (License). Following a court challenge, the Appellate Division for the Third Department invalidated the findings that the Respondent practiced with negligence and incompetence on more than one occasion, affirmed the Committee's other findings and remitted to the Committee to reconsider their penalty. On remittur, the Committee again voted for revocation. Now, the Respondent moves pursuant to N.Y. Pub. Health Law §230-c (4)(a)(McKinney's Supp. 1999), requesting that the ARB to nullify the Committee's Penalty Determination and alleging that the Committee failed to follow the Appellate Division's directions for the remittur proceeding. Upon reviewing the case record and the briefs by both parties, we affirm the Committee. The misconduct specifications that the Appellate Division affirmed (fraud, gross negligence, gross incompetence and moral unfitness) provide more than sufficient grounds on which to revoke the Respondent's License.

The Case History

The Petitioner commenced this case in 1996 by filing charges with BPMC alleging that the Respondent violated various specifications under N. Y. Educ. Law § 6530(McKinney Supp. 1999-2000) that define professional misconduct by a physician. Following a hearing and certain judicial proceedings, a BPMC Committee rendered an April 8, 1998 Determination that sustained charges that the Respondent practiced with gross negligence, gross incompetence negligence on more than one occasion and incompetence on more than one occasion in treating one person, Patient A. The Committee found that the Respondent failed to evaluate and treat adequately the Patient's ectopic pregnancy, during a November 21, 1995 visit, and failed to adequately evaluate the patient during an October 31, 1995 visit. The Committee also sustained charges that the Respondent practiced fraudulently and engaged in conduct that evidenced moral unfitness in practice, for lying to a State Investigator concerning the Respondent's hospital privileges and for falsifying a medical record to indicate the Respondent called an ambulance for Patient A on November 21, 1995. The Committee voted to revoke the Respondent's License.

In a subsequent proceeding pursuant to N.Y. C.P.L.R. Article 78 (McKinney Supp. 1999-2000), the Respondent challenged the Committee's Determination before the New York Supreme Court Appellate Division for the Third Department¹. The Appellate Division affirmed the findings that the Respondent practiced with gross negligence and gross incompetence in treating Patient A on November 21, 1995. In the record, the Respondent admitted that he suspected ectopic pregnancy, the Respondent indicated that the Patient was suffering exquisite abdominal pain and vaginal staining or bleeding and the Respondent testified that the Patient's momentary dizziness indicated the possibility that the ectopic pregnancy had ruptured. The Court noted that despite the Patient's symptoms and the indications, the Respondent failed to stabilize the Patient adequately before transport and placed the Patient in a police cruiser without establishing an intravenous line. The Court also sustained the fraud and moral unfitness findings, upon

¹ Matter of Scwalben v. DeBuono, __ A.D.2d __, 696 N.Y.S.2d 262 (Third Dept. 1999)

determining that sufficient evidence in the record established that the Respondent made false statements to a State investigator concerning the Respondent's hospital privileges and that the Respondent falsely stated that he summoned an ambulance for Patient A. The Court also rejected the Respondent's arguments that he failed to receive due process or a fair hearing.

The Third Department overruled the Committee's findings that the Respondent practiced with negligence or incompetence on more than one occasion. The Court found insufficient evidence in the record to support the Committee's conclusions concerning the care the Respondent rendered to Patient A on October 31, 1995. The Court also annulled the penalty the Committee imposed, because the Committee failed to specify whether the Committee based the revocation upon each sustained charge or on the sustained charges' cumulative effect. The Third Department remitted the case to the Committee to re-determine the penalty.

On remittur, the Committee offered both parties the opportunity to submit additional briefs, which the Committee considered prior to their additional deliberations. In their Supplemental Determination and Order, the Committee again adopted their original findings and conclusions. The Committee once again voted to revoke the Respondent's License. The Committee found that the Respondent endangered Patient A's life by failing to take appropriate steps to address the Patient's ectopic pregnancy and by abandoning the Patient on the street. The Committee found that the Respondent violated the medical profession's moral and ethical standards. The Committee concluded that the conduct involving Patient A, either as gross negligence, gross incompetence or moral unfitness, would standing alone warrant revocation. The Respondent also made false statements about his hospital privileges and about calling for an ambulance. The Committee found such conduct amounted to fraud and moral unfitness and the Committee indicated that each violation would, standing alone, warrant revocation. The Committee stated that the Respondent possessed no insight into his shortcomings as a physician. The Committee concluded, from the lack of insight, that the Respondent presented as a danger to repeat the unfortunate circumstances from this case, if the Committee allowed the Respondent to continue in practice.

Review History and Issues

The Committee rendered their Supplemental Determination on January 11, 2000. This proceeding commenced on January 25, 2000, 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 March 6, 2000.

The Respondent argues that the Committee failed to reconsider the penalty as the Appellate Division ordered. The Respondent argues further that the Committee failed to consider the numerous mitigating factors in the case, such as:

- the Respondent's nearly half century in practice without compliant,
- the Respondent's inability to practice any longer due to his health,
- the offer by BPMC to settle the case for a penalty less severe than revocation,
- the Respondent's inability to defend against the charges completely,
- the State's illegal conduct in the case, and,
- the Appellate Division's trouble with the Committee's finding that the Respondent abandoned Patient A.

The Respondent argues that under such mitigating circumstances, the ARB could fashion a penalty less severe than revocation.

The Petitioner responds that the Respondent's brief raised facts never in evidence at the hearing, such as the Respondent's health and the settlement offer. The Petitioner notes that the Respondent also raised issues that the Appellate Division has resolved already, such as the Respondent's due process and fair hearing challenges. The Petitioner argues that the Committee

has now explained their reasons for revoking the Respondent's License and that those reasons support the Committee's Determination to revoke the Respondent's License.

Determination

The ARB has considered the record and the parties' briefs. We sustain the Committee's Determination. The Respondent practiced with gross negligence and gross incompetence in treating Patient A. He displayed a disregard for the Patient and he has since displayed an unwillingness to learn from his mistakes. Despite the Respondent's prior record without complaint, the Respondent now presents as a danger to repeat his misconduct if we allow the Respondent to return to practice. In addition to his conduct toward Patient A, the Respondent also committed fraud in both his statements about trying to obtain an ambulance for Patient A and about his hospital privileges. Fraud in practice, standing alone also provides grounds for revoking a License.

The Respondent argued that the Committee failed to reconsider the penalty as the Appellate Division directed. We disagree. The Appellate Division remitted only because the Committee failed to specify whether they voted for revocation for individual misconduct acts or for revocation as a cumulative penalty for all the charges the Committee sustained, including those sustained findings that the Appellate Division reversed. The Committee has now made clear that they felt that either the care for Patient A on November 12, 1995 or the Respondent's fraudulent conduct would have provided sufficient grounds on which to revoke the Respondent's License. We reject the Respondent's contention that the Appellate Division's decision indicated that the Court found revocation totally inappropriate as a penalty in this case.

We also disagree with the Respondent that mitigating factors in this case require that we reduce the penalty. As the Petitioner's response brief notes, the Respondent raised issues before the ARB from beyond the hearing record, such as the Respondent's health and a settlement offer

by BPMC. The Respondent also attempted to reargue issues that the Appellate Division settled. The Respondent attempts to argue that the Appellate Division was troubled by the Committee's Determination that the Respondent abandoned Patient A. The Respondent also argued that the ARB must consider certain witnesses' credibility in assessing a penalty. The Appellate Division has already reviewed credibility and has determined that the Respondent committed gross negligence and gross incompetence for failing to stabilize the Patient and for placing the Patient in a police cruiser without establishing an intravenous line. The Respondent also argued that the ARB should consider the State's improper conduct in the case and the Respondent's inability to defend fully against the charges, when assessing the penalty. Again, the Appellate Division resolved those issues in their decision when they stated that they rejected the Respondent's fair hearing/ due process challenges. The Respondent's brief also attempted to re-argue the findings concerning whether the Respondent called an ambulance. Once more, the Appellate Division resolved that issue by their decision that sufficient evidence supported the Committee's findings on fraud and moral unfitness.

The Respondent's prior record without complaint did constitute a legitimate factor for the Committee to consider in assessing the penalty and the Committee addressed that issue in their Supplemental Determination, at page 7. There the Committee discussed the egregious misconduct the Respondent committed in Patient A's case and found that the conduct warranted a serious penalty, despite the Respondent's prior record. The Committee stated further that the Respondent's lack of insight into his errors raises the expectation that such errors will recur and that only revocation will protect the public from further harm. As another mitigating factor, the Respondent described his false statements about his hospital privileges as remote. We hold that the false statements about the hospital privileges and the ambulance demonstrate a pattern of fraud by the Respondent, that proves the Respondent lacks the integrity to practice medicine in New York.

ORDER

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

The ARB **AFFIRMS** the Committee's Determination to revoke the Respondent's License to practice medicine in New York State.

Robert M. Briber
Sumner Shapiro
Winston S. Price, M.D.
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.

In the Matter of Eugene Schwalben, M.D.

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

Dated: April 11, 2000



Robert M. Briber

In the Matter of Eugene Schwalben, M.D.

**Sumner Shapiro, an ARB Member concurs in the
Determination and Order in the Matter of Dr. Schwalben.**

Dated: April 10, 2000


Sumner Shapiro

In the Matter of Eugene Schwalben, M.D.

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

Dated: 4/12/, 2000

A handwritten signature in cursive script, appearing to read "W. S. Price", is written over a horizontal line.

Winston S. Price, M.D.

In the Matter of Eugene Schwalben, M.D.

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

Dated: April 10, 2000



Stanley L Grossman, M.D.

In the Matter of Eugene Schwalben, M.D.

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

Dated: April 10, 2000

A handwritten signature in cursive script that reads "Therese G. Lynch M.D." with a horizontal line underneath the signature.

Therese G. Lynch, M.D.