



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

Leslie Eisenberg, Esq.
NYS Department of Health
5 Penn Plaza – 6th Floor
New York, New York 10001

Alan Lambert, Esq.
LaBarbera & Lambert PC
60 East 42nd Street
New York, New York 10165

Joseph Burrascano, M.D.
68 Old Trail Road
Watermill, New York 11042

Joseph Burrascano, M.D.
139 Springs Fireplace Road
East Hampton, New York 11937

RE: In the Matter of Joseph Burrascano, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 01-265) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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

Joseph Burrascano, 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. 01-265

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):
For the Respondent:**

**Leslie Eisenberg & Roy Nemerson, Esqs.
Alan Lambert, Esq.**

After a hearing below, a BPMC Committee determined that the Respondent committed professional misconduct in treating two patients and the Committee voted to place the Respondent on probation for six months. In this proceeding pursuant to N.Y. Pub. Health Law §230-c(4)(a)(McKinney's 2002), both parties ask the ARB to nullify or modify that Determination. The Petitioner asks that the ARB make Findings of Fact and sustain additional charges against the Respondent. The Respondent requests that we dismiss the charges the Committee sustained and overturn the penalty the Committee imposed. After reviewing the hearing record and the review submissions from each party, the ARB affirms the Committee's Determination on the charges, but we modify the penalty, to increase the period on probation from six months to two years.

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(2-6), 6530(32) & 6530(35)(McKinney 2002) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,

- practicing medicine with negligence on more than one occasion,
- practicing medicine with gross negligence,
- practicing medicine with incompetence on more than one occasion,
- practicing medicine with gross incompetence,
- failing to maintain accurate patient records, and,
- ordering excessive tests, treatments or use of treatment facilities unwarranted by patient condition.

The charges arose from the care that the Respondent provided to seven persons, Patients A-G. The charges as to all Patients included allegations concerning treatment for Lyme Disease. The record refers to the Patients by letter to protect patient privacy. A hearing on the charges followed under N.Y. Pub. Health Law § 230(10), before the Committee that rendered the Determination now on review.

The Committee dismissed all factual allegations concerning treatment for Lyme Disease and the Misconduct Specifications that charged gross negligence, gross incompetence, incompetence on more than one occasion, fraud and failure to maintain accurate records. The Committee sustained factual allegations that the Respondent committed negligence in treating Patient D, by treating the Patient for ehrlichiosis¹, without clinical and laboratory evidence that the Patient suffered from the disease. The Committee also found the Respondent negligent for prescribing Bicillin for Patient F on a continuous basis after the Patient suffered a seizure while on the medication. The Committee determined that the Respondent practiced with negligence on more than one occasion in treating Patients D and F and that the Respondent subjected Patient D to unwarranted treatment. The Committee voted to suspend the Respondent's License for six months, to stay the suspension and to place the Respondent on probation for six months, under terms that appear at Appendix II to the Committee's Determination. The probation terms include a requirement that the Respondent practice under supervision by a practice monitor with board certification in infectious diseases.

¹ Ehrlichiosis is a bacterial infection transmitted by tick bite that can prove fatal if untreated [Hearing Committee Finding of Fact 26].

Review History and Issues

The Committee rendered their Determination on November 6, 2001. This proceeding commenced on November 21, 2001, 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 response brief and the Respondent's brief and response brief. The record closed when the ARB received the Petitioner's response brief on January 18, 2002.

Although the Petitioner requested a review of the Committee's Determination, the Petitioner's brief asks that the ARB issue a final determination including our own Findings of Fact. The Petitioner asserts that the Committee failed to address the real and vital issues in the hearing, that the Committee threw up their hands and that the Committee failed to do its job. The Petitioner asks the ARB to identify the uncontested facts from the record and asks the ARB to rely on proposed findings by the parties in rendering a determination. The Petitioner argues that they proved the charges by persuasive, substantial, and in many cases, irrefutable evidence. In the alternative, the Petitioner requests that the ARB impose a longer period of probation for the misconduct findings that the Committee made.

The Respondent opposes the Petitioner's request that the ARB sustain additional charges. In his review brief, the Respondent asks that the ARB overturn the Committee's findings on negligence on more than one occasion and ordering unwarranted treatment. The Respondent also asks that the ARB overturn the penalty that the Committee ordered. The Respondent argues that the Petitioner chose an unrepresentative sample of patient charts for review, that the Committee's Findings of Fact misrepresent the hearing record and that the record fails to prove the charges concerning Patients D and F.

Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination that the Respondent practiced with negligence on more than one occasion and subjected Patient D to unwarranted treatment. We find no grounds on which to sustain new charges. We affirm the Committee's Determination to suspend the Respondent's License, to stay the suspension and to place the Respondent on probation. We overturn the Committee and extend the period on probation from six months to two years.

In requesting that the ARB adopt our own Findings of Fact, the Petitioner concedes that the Committee Determination provides insufficient grounds to overturn the Committee and sustain additional charges. The Petitioner asks that the ARB draft our own Hearing Committee Determination and use that document as the basis to sustain the charges. Under N. Y. Pub. Health Law §§ 230(10)(g)(1) & 230c-(a)(4)(McKinney Supp. 2001), the Committees make findings of fact and the ARB reviews those findings. The ARB may correct errors by Committees, Matter of Brigham v. DeBuono, 288 A.D.2d 870, N.Y.S.2d (3rd Dept. 1996). The ARB has exercised that authority in the past by amending or deleting some clearly erroneous Committee findings or conclusions. As we noted in a recent case, the ARB has never made a single new finding of fact in any prior case Matter of Dean Cory Mitchell, ARB # 01-120. In this case, the Petitioner requests that the ARB exceed our authority by adopting extensive additional findings of fact. We decline the request.

The Petitioner argued that the Committee failed to do its job. We disagree. The Committee's Determination noted that the Committee found their role as answering the questions that the Statement of Charges raised [Committee Determination page 42]. In addressing those questions, the Committee found the Petitioner's proof unconvincing. The Committee stated that

they found the Petitioner's expert witness arrogant and that the Committee found the expert reluctant to acknowledge error when the expert ignored some portion of a Patient's medical record. The Committee noted that the Petitioner's expert answered every question emphatically, without equivocation, and that the expert appeared determined to get across the point that the Respondent acted improperly. The Petitioner alleged error by the Committee for their judgement on credibility. The ARB holds that the Committee as fact finder constitutes the proper body to make the judgement on credibility and the ARB as a review body owes the Committee deference in making that judgement. The ARB sees no grounds to overturn that judgement in this case.

The Respondent challenged the Committee's findings that the Respondent practiced with negligence on more than one occasion and ordered unwarranted treatment. We hold that the evidence the Committee cited to support their findings provided preponderant evidence to establish that the Respondent committed professional misconduct.

Both parties challenged the penalty the Committee imposed. We agree with the Petitioner that the Committee imposed an inappropriately short penalty by placing the Respondent on probation for only six months. The Committee stated that they hoped the time they set for probation would allow the Respondent to consider whether he has sufficient clinical evidence to warrant treatment for a disease entity and to review patient responses to drug therapy [Committee Determination page 44]. The ARB concludes that six months provides too little time on probation. The ARB holds that two years will provide sufficient time for reflection by the Respondent on the need to correct the deficiencies in his practice and will allow the practice monitor to ensure that the Respondent has corrected those deficiencies. The Committee had suspended the Respondent's medical license for six months and stayed the suspension. The Committee set their probation penalty to run during the time of the stayed suspension. Under

N.Y. Educ. Law § 230-a(9), however, a Committee or the ARB may impose a probation penalty separate from any other penalty. The ARB chooses, therefore, to extend the probation beyond the period of the stayed suspension.

ORDER

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

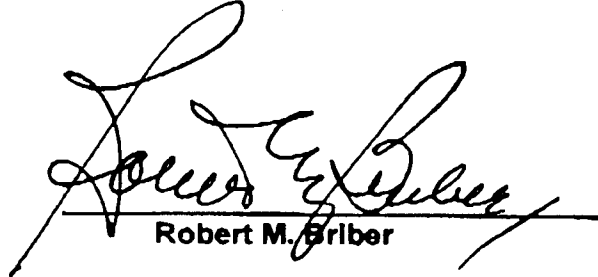
1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB rejects the Petitioner's request that we make additional findings of fact and sustain additional misconduct charges.
3. The ARB affirms the Committee's Determination to suspend the Respondent's License, to stay the suspension and to place the Respondent on probation, under the terms that appear as Appendix II in the Committee's Determination.
4. The ARB modifies the Committee's Determination to increase the probation from six months to two years.

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 Joseph Burrascano, M.D.

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

Dated: March 28, 2002

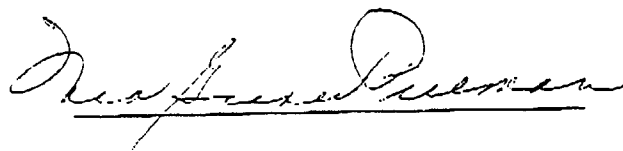


Robert M. Briber

In the Matter of Joseph Burrascano, M.D.

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

Dated: March 28, 2002



Thea Graves Pellman

In the Matter of Joseph Burrascano, M.D.

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

Dated: 4/15, 2002

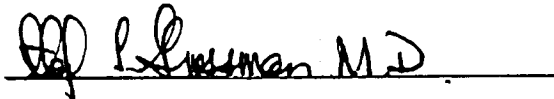
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Winston S. Price, M.D.

In the Matter of Joseph Burrascano, M.D.

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

Dated: March 28, 2002

A handwritten signature in black ink, appearing to read "Stanley L. Grossman M.D.", is written over a horizontal line.

Stanley L Grossman, M.D.

In the Matter of Joseph Burrascano, M.D.

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

Dated: March 23, 2002

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

Therese G. Lynch, M.D.