



# STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Barbara A. DeBuono, M.D., M.P.H.  
*Commissioner*

Dennis P. Whalen  
*Executive Deputy Commissioner*

November 25, 1997

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Daniel Guenzburger, Esq.  
NYS Department of Health  
5 Penn Plaza - Sixth Floor  
New York, New York 10001

Gerald L. Goldberg, M.D.  
27 S. Pentaquit Avenue  
Bay Shore, New York 11706

**RE: In the Matter of Gerald L. Goldberg, M.D.**

Dear Mr. Guenzburger and Dr. Goldberg:

Enclosed please find the Determination and Order (No.97-112) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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 that reads "Tyrone T. Butler nm". The signature is written in a cursive style with a large initial 'T' and 'B'.

Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:nm

Enclosure

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

**COPY**

**IN THE MATTER**

**OF**

**GERALD L. GOLDBERG, M.D. (Respondent)**

**Proceeding to review a Determination by a Hearing Committee  
(Committee) from Board for Professional Medical Conduct  
(BPMC)**

**ADMINISTRATIVE  
REVIEW BOARD  
FINAL ORDER  
ARB NO. 97-112**

**BEFORE: ROBERT M. BRIBER, SUMNER SHAPIRO, WINSTON S. PRICE, M.D.,  
EDWARD C. SINNOTT, M.D. and WILLIAM A. STEWART, M.D.**

After a hearing into charges that the Respondent committed professional misconduct, a BPMC Committee sustained charges that the Respondent practiced medicine fraudulently and with repeated and gross negligence and repeated and gross incompetence. As a Penalty, the Committee voted to revoke the Respondent's New York Medical License (License). In this proceeding pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1997), the Respondent asked the Board to overturn the Committee's findings and nullify the Committee's Penalty. The New York State Department of Health (Petitioner) requested that the Board make certain technical corrections to clarify the Committee's Determination. After considering the hearing record and the parties' briefs, the Board remanded this case to the Hearing Committee, for the Committee to answer certain questions. The Committee provided those answers in a Supplemental Determination on August 27, 1997. Now, upon reviewing the Committee's Supplemental Determination and after reviewing again the hearing record and the parties briefs, the Board sustains the Committee's Determination on the charges and we sustain the Committee's Determination to revoke the Respondent's License.

Administrative Law Judge **JAMES F. HORAN** served as the Board's Administrative Officer and drafted this Determination. The Respondent represented himself in this Review. **DANIEL GUENZBURGER, ESQ.** (Asst. Counsel, NYS Dept. of Health) represented the Petitioner.

## COMMITTEE DETERMINATION ON CHARGES

The Petitioner filed charges with BPMC alleging that the Respondent committed professional misconduct by violating N. Y. Educ. Law §§ 6530 ( 2 - 6) (McKinney Supp. 1997), 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; and,
- practicing medicine with gross incompetence.

The fraud charges related to the Respondent's answers to questions on applications for privileges at Brookhaven Memorial Hospital Medical Center (Brookhaven) and for participating provider status with Genesis Health Plan (Genesis). The negligence and incompetence charges related to the Respondent's care for five patients, whom the record refers to by the initials A through E, to protect the Patients' privacy. Pursuant to N.Y. Pub. Health Law § 230(7)(McKinney's Supp. 1997), three BPMC Members, **SHARON C. H. MEAD, M.D., Chair, LEO FISHEL, JR., M.D. and ROBIN BUSKEY, R.P.A.**, conducted a hearing into the charges and rendered the Determination which the Board now reviews. Administrative Law Judge **MICHAEL P. MCDERMOTT** served as the Committee's Administrative Officer and drafted their Determination. The Committee concluded that the Respondent provided inappropriate and/or inadequate medical care to Patients A to D and the Committee concluded that the Respondent knowingly and with intent to deceive, failed to provide appropriate information on his applications to Brookhaven and Genesis. The Committee voted to revoke the Respondent's License, finding him to lack remorse, insight into his wrongdoing, and credibility in his hearing testimony.

## **REVIEW HISTORY AND ISSUES**

The Committee rendered their Determination on May 22, 1997. The Respondent then commenced this Review Proceeding, by filing a Notice pursuant to N.Y. Pub. Health Law § 230-c(4)(a) (McKinney's Supp. 1997), that the Board received on May 27, 1997. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and the Petitioner's brief and reply brief. The Board received the Respondent's brief on July 1, 1997, the Petitioner's brief on July 1, 1997, and the Petitioner's reply on July 8, 1997.

In his brief, the Respondent challenged the Committee's findings and conclusions on the care for the patients and on the Brookhaven and Genesis Applications. He also alleged legal errors, arguing that the Committee based their conclusions about the Respondent on their dislike for him personally, on conduct beyond the Statement of Charges, and on information from outside the record. The Respondent alleged a further error in the Committee's Determination, because Committee Member Fishel missed one hearing day and never provided the Respondent with an affirmation that Dr. Fishel read and considered the transcripts and evidence from the proceedings he missed.

The Petitioner urged the Board to sustain the Committee's Determination and argued that the Respondent has raised many review issues with the Board that fall outside the Board's review authority. The Petitioner requested that the Board make several technical corrections to clarify the Committee's Determination, because the Committee failed to make specific statements sustaining:

- Specifications Third and Fourth, charging gross negligence;
- Specifications Fifth and Sixth, charging gross incompetence; and,
- Specifications Seventh and Eighth, charging fraud.

## **REVIEW BOARD AUTHORITY**

In reviewing a Committee's Determination, the Board 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 the law permits [N.Y. Pub. Health

Law § 230(10)(i), § 230-c(4)(b)(McKinney's Supp. 1997)]. The Board may remand a case to the Committee for further consideration [N.Y. Pub. Health Law § 230-c(4)(b)(McKinney's Supp. 1997)]. The Board's Determinations result from a majority concurrence among the Board's Members [N.Y. Pub. Health Law § 230-c(4)(c)(McKinney's Supp. 1997)].

The Review Board may substitute our judgment for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 Ad 2d 86, 606 NYS 2d 381 (Third Dept. 1993), in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 AD 2d 940, 613 NYS 2d 759 (Third Dept. 1994), and in determining credibility Matter of Minielly v. Comm. of Health 222 AD 2d 750, 634 NYS 2d 856 (Third Dept. 1995).

### **REMAND ORDER**

After deliberations on July 25, 1997, the Board concluded that we should remand this case to the Hearing Committee, for the Committee to issue a Supplemental Determination to clarify certain issues that the parties raised. The Board asked that the Committee answer the following questions:

- I. Did Dr. Fishel affirm that he reviewed the testimony and exhibits from any proceedings that he missed? If Dr. Fishel's has made such an affirmation, please attach the same as an Appendix to the Committee's Supplemental Determination.
- II. Did the Committee sustain Misconduct Specifications Third, Fourth, Fifth, Sixth, Seventh and Eighth?

The Board asked that the Committee conduct the additional deliberations as expeditiously as possible (such as by telephone), because no stay applied against the Committee's Revocation Penalty and the Board lacked the authority to impose a stay during this remand (see 1996 Laws of New York, Chapter 627). The Order provided that the Committee should serve a Supplemental Determination upon each party and that each party would have fourteen days from receiving the Supplemental Determination to provide the Board with any comments, concerning the Supplemental Determination only.

## SUPPLEMENTAL DETERMINATION

In a Supplemental Determination, that the Committee rendered on August 27, 1997, the Committee indicated that they had sustained Misconduct Specifications Third, Fourth, Fifth, Sixth, Seventh and Eighth. The Committee's Supplemental Determination also appended an affirmation from Committee Member Fishel, indicating that Dr. Fishel had reviewed the transcript and considered the evidence from the March 7, 1997 hearing day that he had missed.

The Board's Remand Order had provided that each party would have fourteen days from receiving the Supplemental Determination to submit further comments to the Board. Neither party submitted any additional comments.

## FINAL BOARD DETERMINATION

The Board conducted additional deliberations in this case on September 26, 1997. We reject the Respondent's legal challenges to the Committee's Determination, we sustain the Committee's Determination on the charges and we sustain the Committee's Determination revoking the Respondent's License.

**The Respondent's Legal Arguments:** At pages 1-2 in his brief, the Respondent alleged three legal errors by the Hearing Committee, relating to the Affirmation by Dr. Fishel, to findings based on uncharged conduct and to findings based on evidence from outside the record. We reject the Respondent's allegations on all three grounds. As to the Affirmation, we have noted already that the Committee's Supplemental Determination appends Dr. Fishel's Affirmation. The Respondent also alleged that the Committee based their Finding of Fact 6, at Determination page 2, on conduct from outside the Statement of Charges. The Board finds that the Committee's Finding of Fact 6 concerns the Respondent's statements on an application to renew his New York medical license (Renewal Application) and we find that there was no charge in the Statement of Charges [Petitioner's Exhibit 1] concerning the Renewal Application. The Board concludes, however, that the Committee made no reversible error in Finding 6, because the Committee in no way based their guilt determination or

penalty on that Finding. The Committee based their Determination on the fraud charges on the Respondent's Brookhaven and Genesis Applications only [see Findings 51-54, and Conclusions on Hearing Committee Determination pages 18-19]. The Respondent also alleged that the Committee based their Finding of Fact 7, at Determination page 2, on Petitioner's Exhibit 27, a document that the Committee's Administrative Officer never received into the record. The Board disagrees. At the conclusion of Finding 7, the Committee cited to testimony from Transcript pages 294-296 and 605 as the basis for that Finding. Neither Finding 7 nor any other Finding in the Committee's Determination cites Petitioner's Exhibit 27 as the basis for the Finding.

**Determination on the Charges:** The Board sustains the Committee's Determination that the Respondent committed professional misconduct in treating Patient A, for failing to adequately address the Patient's hyperkalemia (elevated potassium) and for ordering treatments inappropriately for the Patient [see Committee Findings of Fact 18-19, 21-25]. The Petitioner's Reply Brief questioned whether the Committee had made specific enough Findings to support Charges A2(b), A2(d) and A2(e), that related to inappropriate treatments using Adrenocorticotrophic hormone, calcium bicarbonate and intravenous normal saline. The Board concludes that the Committee's Findings of Fact 21, 23, 24 and 25 provide the grounds for sustaining those charges. The Board also sustains the Committee's Conclusions that the Respondent committed negligence on more than one occasion and incompetence on more than one occasion in treating Patients B through D and gross negligence and gross incompetence in treating Patient B. The Respondent reargued all the Committee's findings and presented his own opinion as to the care he provided to the Patients. The Respondent's contrary opinion merely created a fact question for the Committee to resolve. The Committee resolved that issue in finding that the Respondent lacked credibility as a witness due to his evasive testimony. The Board finds the record supports the Committee's findings and we see no reason to upset the Committee's conclusions on credibility.

At several points in his brief, the Respondent challenged findings relating to medical practice standards, because the Health Department has no public policy establishing a specific standard. The Courts have ruled, however, that the Department has no obligation to enumerate specifically the acts constituting negligence, incompetence, gross negligence or gross incompetence, because those terms

provide physicians sufficient warning that they must practice their profession in accordance with reasonable medical standards, Matter of Binenfeld v. N.Y.S. Dept. of Health, 226 AD2d 863, 640 NYS2d 924 (Third Dept. 1996). The Board concludes that the expert testimony in the record provided sufficient evidence to support the Committee's conclusion that the Respondent's care for the Patients at issue in this case fell below accepted standards and showed that the Respondent lacked the skill and knowledge to practice medicine safely and effectively.

The Board sustains the Committee's Determination the Respondent practiced medicine fraudulently, by failing intentionally to provide appropriate information on his applications to Brookhaven and Genesis. We reject the Respondent's contention that his misrepresentations on the Genesis Application occurred beyond the scope of his medical practice. The Genesis Application involved medical practice, because the Respondent was applying to be a participating medical services provider under the Genesis Plan. A health maintenance organization, as well as a hospital, must be able to guarantee that their participating providers can provide safe and adequate services to the organizations' members. When reviewing providers' qualifications for participating, the organization must rely on a physician's integrity to provide accurate information, just as the organization will have to rely on the physician's integrity when the physician submits billings to the organization. The Respondent demonstrated that he lacked integrity in his applications to Genesis and Brookhaven.

**Penalty:** The Board sustains the Committee's Determination revoking the Respondent's License to practice medicine in New York State. The Respondent's repeated fraudulent applications, standing alone, provide a sufficient reason to revoke the Respondent's License, Matter of Glassman v. Comm. of the Dept. of Health, 208 AD2d 1060, 617 NYS2d 413 (Third Dept. 1994), lv denied 85 NY2d 801, 624 NYS2d 371. The Committee's conclusion that the Respondent lacks the insight or remorse necessary to correct his improper conduct and the Committee's conclusions that the Respondent provided repeated and egregiously substandard medical care provided further support for the Committee's Determination, Matter of Bezar v. DeBuono, \_\_ AD2d \_\_, 659 NYS2d 547 (Third Department 1997). The ample grounds for the Committee's Penalty leads the Board to reject the Respondent's contention that the Committee based their penalty on their personal dislike for the

Respondent, rather than the facts in the record.

**ORDER**

**NOW**, based upon this Determination, the Review Board renders the following **ORDER**:

1. The Review Board sustains the Committee's Determination finding the Respondent guilty for Professional Misconduct.
2. The Review Board sustains the Committee's Determination revoking the Respondent's License to practice medicine in New York State.

**ROBERT M. BRIBER**

**SUMNER SHAPIRO**

**WINSTON S. PRICE, M.D.**

**EDWARD SINNOTT, M.D.**

**WILLIAM A. STEWART, M.D.**

**IN THE MATTER OF GERALD L. GOLDBERG, M.D.**

**EDWARD C. SINNOTT, M.D.**, a member of the Administrative Review Board for Professional Medical Conduct, concurs in this Determination in the Matter of Dr. Goldberg.

**DATED: Roslyn, New York**

November 19, 1997

A handwritten signature in black ink, appearing to read "Ed C. Sinnott", written over a horizontal line.

**EDWARD C. SINNOTT, M.D.**

**IN THE MATTER OF GERALD L. GOLDBERG, M.D.**

**WILLIAM A. STEWART, M.D.**, a member of the Administrative Review Board for Professional Medical Conduct, concurs in this Determination in the Matter of Dr. Goldberg.

**DATED: Syracuse, New York**

*20 Nov.*, 1997



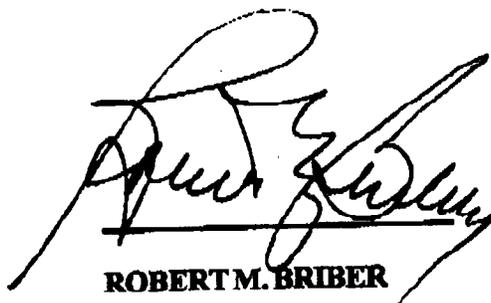
**WILLIAM A. STEWART, M.D.**

**IN THE MATTER OF GERALD L. GOLDBERG, M.D.**

**ROBERT M. BRIBER**, a member of the Administrative Review Board for Professional Medical Conduct, concurs in this Determination in the Matter of Dr. GOLDBERG.

**DATED:** Schenectady, New York

11/27, 1997



**ROBERT M. BRIBER**

IN THE MATTER OF GERALD L. GOLDBERG, M.D.

**SUMNER SHAPIRO**, a member of the Administrative Review Board for Professional Medical Conduct, concurs in this Determination in the Matter of Dr. Goldberg.

**DATED: Delmar, New York**  
**November 22, 1997**

  
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**SUMNER SHAPIRO**

APPENDIX I

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

**IN THE MATTER  
OF  
GERALD L. GOLDBERG, M.D.**

**ORIGINAL**

**SUPPLEMENTAL  
DETERMINATION**

ARB No. 97112RS

**SHARON C.H. MEAD, M.D., CHAIRPERSON, ROBIN N. BUSKEY, R.P.A. and  
LEO FISHEL, JR., M.D.**, duly designated members of the State Board for Professional Medical Conduct, appointed by the Commissioner of Health of the State of New York pursuant to Section 230(1) of the Public Health Law, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. **MICHAEL P. MCDERMOTT, ESQ.** Administrative Law Judge, served as Administrative Officer for the Hearing Committee.

After consideration of the entire record, the Hearing Committee submitted its Determination and Order, dated May 12, 1997, **REVOKING** the Respondent's license to practice medicine in New York State.

The matter was appealed to the Administrative Review Board and the Board remanded the case to the Hearing Committee, Administrative Review Board Remand, ARB No. 97-112R.

The Board asked the Hearing Committee to answer two questions and the Hearing Committee deliberated by telephone conference call on August 14, 1997.

Question No.1. Did Dr. Fishel affirm that he reviewed the testimony and exhibits from any proceedings that he missed?

Answer: Yes. Dr. Fishel's affirmation is attached as Appendix A.

Question No. 2. Did the Committee sustain Misconduct Specifications Third, Fourth, Fifth, Sixth, Seventh and Eighth?

Answer: Yes. The Hearing Committee's vote on the Third and Fourth Specifications, Fifth and Sixth Specifications and Seventh and Eighth Specifications are reported on pages 30 and 31 of the Hearing Committee's Determination and Order.

NOTE: In drafting the Hearing Committee's Determination and Order, the Administrative Law Judge incorrectly headed the paragraph on Fraudulent Practice (page 31) as Seventh Specification. It should have been headed Seventh and Eighth Specifications. The recorded vote verifies that the charges in the Eighth Specification were voted on.

In Summary: The Third, Fourth, Fifth, Sixth, Seventh and Eighth Specifications were **SUSTAINED.**

DATED: Massapequa, New York  
August 20, 1997

  
SHARON C.H. MEAD, M.D., Chairperson

ROBIN BUSKEY, R.P.A.  
LEO FISHEL, JR., M.D.

TO: Daniel Guenzburger, Esq.  
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**STATE OF NEW YORK : DEPARTMENT OF HEALTH  
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT**

**IN THE MATTER  
OF  
GERALD GOLDBERG, M.D.**

**AFFIDAVIT**

I, Leo Fishel, Jr., M.D., do hereby affirm that I have read the transcripts and considered the evidence presented at the above cited proceedings on March 7, 1997.

  
\_\_\_\_\_