



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

October 9, 1997

Dennis P. Whalen
Executive Deputy Commissioner

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Marcia E. Kaplan, Esq.
NYS Department of Health
5 Penn Plaza - Sixth Floor
New York, New York 10001

Alan Lambert, M.D., J.D.
Lifshutz, Pollard & Associates, P.C.
675 Third Avenue
New York, New York 10017

Allan Weinberg, R.P.A.
2417 Coyle Street
Brooklyn, New York 11235

RE: In the Matter of Allan Weinberg, R.P.A.

Dear Parties:

Enclosed please find the Determination and Order (No.97-161) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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.

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

ALLAN WEINBERG, R.P.A. (Respondent)

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

ADMINISTRATIVE
REVIEW BOARD
DECISION AND
ORDER NUMBER
ARB NO. 97-161

**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, due to a disciplinary action against the Respondent in Arizona and due to a false statement on an application, a BPMC Committee placed terms on the Respondent's practice in New York for three years. Such terms include supervision and psychiatric treatment. In this proceeding that the New York State Department of Health (Petitioner) commenced pursuant to N.Y. Pub. Health Law § 230-c(4)(a) (McKinney's Supp. 1997), neither the Petitioner nor the Respondent challenge the terms the Committee imposed. The parties, however, disagree on the basis and the framework for imposing those terms. The Petitioner argues that Arizona disciplined the Respondent for actions that would constitute professional misconduct under New York Law and the Petitioner argues that this conduct warrants a penalty such as probation, pursuant to N.Y. Pub. Health Law § 230-a (McKinney Supp. 1997). The Respondent argues that Arizona took no disciplinary action against the Respondent, but that the Committee had the authority to impose the terms against the Respondent's practice, pursuant to their authority to monitor a licensee's practice under N.Y. Pub. Health Law § 230(17)(McKinney Supp. 1997). After considering the hearing record and the parties' briefs, the Board modifies the Committee's Determination and finds the Respondent guilty of professional misconduct, because Arizona took disciplinary action against the Respondent for conduct that would constitute professional misconduct under New York Law. As a penalty, the Board places the Respondent on probation for three years, under the same terms that the Committee enumerated at page 7 in their Determination.

Administrative Law Judge **JAMES F. HORAN** served as the Board's Administrative Officer and drafted this Determination. **ALAN LAMBERT, M.D., J.D.** represented the Respondent. **MARCIA E. KAPLAN, ESQ.** represented the Petitioner.

COMMITTEE DETERMINATION ON CHARGES

The Petitioner filed charges with BPMC alleging that the Respondent violated N.Y. Educ. Law §6530(9)(d)(McKinney Supp. 1997), because the duly authorized disciplinary agency in Arizona took disciplinary action against the Respondent for actions which would constitute professional misconduct under New York Law. The charges allege that the Respondent's Arizona conduct, if committed in New York, would constitute violations under N.Y. Educ. Law §§6530(3) & (32)(McKinney Supp. 1997), under the following categories:

- practicing medicine with negligence on more than one occasion; and,
- failing to maintain accurate patient records.

The Petitioner brought the case pursuant to N.Y. Pub. Health Law §230(10)(p)(McKinney's Supp. 1997), which authorizes BPMC to refer cases dealing with administrative adjudications from other forums as an expedited proceeding (Direct Referral). The statute limits such proceeding strictly to receiving evidence to determine the nature and severity for the penalty that the Committee will impose for the administrative violation.

In addition to the charges in the Direct Referral Proceeding, the Petitioner charged that the Respondent violated N.Y. Educ. Law §6530(2)(McKinney Supp. 1997) by practicing medicine fraudulently in New York. This charge alleged that the Respondent denied in an application to Beth Israel Medical Center (Beth Israel) that there had ever been an investigation into professional misconduct involving the Respondent and that he denied in a letter to Beth Israel that there had ever been a disciplinary action against him. The charge alleged that the Respondent gave these answers knowing that Arizona had investigated and disciplined the Respondent.

Pursuant to N.Y. Pub. Health Law § 230(7)(McKinney's Supp. 1997), three BPMC Members, **BENJAMIN WAINFELD, M.D., Chair, JACK SCHNEE, M.D. and MICHAEL J. BROWN, R.P.A.** comprised the Committee who conducted the hearing into the charges and who rendered the Determination that the Board now reviews. Administrative Law Judge **MICHAEL P. McDERMOTT** served as the Board's Administrative Officer and drafted the Determination. The Committee sustained neither the Direct Referral Charge or the Fraud Charge against the Respondent

The Committee concluded from the record, however, that more than ample justification existed to place terms on the Respondent's practice for three years.

On the Direct Referral Charge, the Committee found that the Respondent appeared before the Arizona Joint Board on the Regulation of Physician Assistants (Joint Board) to discuss patient care issues and the Respondent's treatment for bi-polar disorders. On that date, the Joint Board's Executive Director stated that a proposed Stipulation between the Joint Board and the Respondent, on the matters under discussion, would not be a disciplinary action, but that the Joint Board took the action because the Respondent was not in Arizona for concurrent monitoring. The Committee found further that, on August 21, 1995, the Respondent and the Joint Board entered a Stipulation and Order providing that, before the Respondent performed health tasks in Arizona, he would obtain counselling regarding appropriate behavior with female patients. The Stipulation also contained the Respondent's admission to matters from a February 21, 1995 Complaint and Hearing Notice. The Committee concluded that the Joint Board Executive Director's Statement demonstrated that the Respondent was not the subject of an Arizona Disciplinary Action and the Committee dismissed the Direct Referral Charge.

On the Fraud Charge, the Committee found that, in answer to a Beth Israel Application question that asked whether there had been any professional misconduct investigations or findings involving the Respondent, the Respondent answered no. The Respondent also submitted a letter to Beth Israel, that indicated that Arizona had investigated him and took no disciplinary action against him. The Committee concluded that the confusion which the ambiguous Arizona proceedings created gave the Respondent a reason to rely on the Executive Director's assertion that the Arizona proceedings did not constitute disciplinary action. The Committee concluded that the Respondent committed no fraud in his statements to Beth Israel and the Committee dismissed the Fraud Charge.

The facts in the case did raise serious concerns among the Committee about issues the Committee felt they must address, if the Respondent is to practice as a Physician Assistant in New York State. The Committee found that the record indicated that Arizona brought charges against the Respondent involving patient care and that the Respondent made admissions to such charges in his Stipulation with the Joint Board. The Committee concluded that the conduct the Respondent admitted

would constitute misconduct under New York Law. The Committee found further that the Joint Board showed concern over the Respondent's treatment for bi-polar disorder and for a previous alcohol problem. The Committee concluded that the Respondent should practice for three years, under restrictions or terms that the Committee imposed at page 7 in their Determination. Those terms included a requirement that the Respondent receive approval from the Office of Professional Medical Conduct (OPMC) for his practice supervisor, that the supervisor submit quarterly reports to OPMC regarding the Respondent's practice, that the Respondent examine a female patient only with a chaperon present, that the Respondent continue psychiatric treatment with a psychiatrist that OPMC must approve and that the psychiatrist submit quarterly reports to OPMC.

REVIEW HISTORY AND ISSUES

The Committee rendered their Determination on July 1, 1997. The Respondent then commenced this proceeding on July 11, 1997, when the Board received the Notice requesting a Review pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1997). The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and reply brief and the Petitioner's brief and reply brief. The Board received the Respondent's brief on August 22, 1997, the Petitioner's brief on August 27, 1997, the Respondent's reply on August 27, 1997 and the Petitioner's reply on September 2, 1997.

The Petitioner asserts that the Committee erred in finding that Arizona took no disciplinary action against the Respondent, after the Committee made findings that the Respondent had signed a Stipulation with Arizona and that the Respondent's Arizona conduct would constitute misconduct in New York. The Petitioner traces the Committee's error from their reliance on the February, 1994 statement, by the Arizona Joint Board Executive Director, concerning a then-proposed non-disciplinary Stipulation. The Petitioner contends that the Respondent never signed that document and that by the time the Respondent finally entered a Stipulation with Arizona in August, 1995, the Joint Board had filed a disciplinary complaint, containing charges relating to patient care issues. The Petitioner asserts further that the Committee erred by imposing a penalty after dismissing charges

against the Respondent and by imposing a penalty other than what Public Health Law § 230-a permits. The Petitioner argues that the statute permits a Committee to impose terms or conditions on a license only through a limited license or probation. The Petitioner requests that the Board modify the Committee's Determination and find the Respondent guilty on the Direct Referral Charge and to modify the Committee's Penalty by making their penalty terms effective through a license limitation or probation.

The Respondent argues that the Committee acted appropriately in relying on the Executive Director's Statement and in dismissing the charges against the Respondent. The Respondent contends that the Committee had the authority to impose terms against the Respondent's License pursuant to N. Y. Pub. Health Law § 230(17) (McKinney Supp. 1997), that permits Committees to monitor a licensee's practice absent sufficient evidence to constitute misconduct.

In replying to the Respondent's brief, the Petitioner contends that the Respondent's brief distorts the facts from the record and contends that the Respondent miscites Public Health Law § 230(17) as the source for the Committee's Penalty. In reply to the Petitioner's brief, the Respondent argues that Public Health Law § 230(17) expressly authorizes the Committee's Penalty and argues that the Petitioner failed to sustain their burden to prove the charges at issue in this case.

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).

REVIEW BOARD DETERMINATION

The Board has considered the record and the parties' briefs. We conducted deliberations in this case on September 5, 1997. We overturn the Committee's Determination dismissing the Direct Referral Charge against the Respondent. We sustain the Committee's Determination to dismiss the fraud charge. As a penalty for the Respondent's misconduct, we vote to place the Respondent on probation for three years, under the terms that the Committee established at page 7 in their Determination.

The Petitioner's Exhibit 5, on the third and fourth pages, indicates that on February 4, 1994, the Respondent appeared before the Arizona Joint Board for an informal interview to discuss patient care issues, his treatment for bi-polar disorder and a reported previous alcohol problem. Apparently, at this interview, the Arizona Executive Director stated that the Stipulation proposed for signature at that meeting would not constitute a disciplinary action (Committee Finding of Fact 3). Petitioner's Exhibit 5 indicates further that the Respondent never signed that Stipulation and that in February, 1995, the Arizona Joint Board filed a Complaint and Notice of Hearing against the Respondent, charging that the Respondent had been terminated from employment due to patient complaints. In June, 1995, the Respondent signed a Stipulation and Order admitting the matters stated in the February, 1995 Complaint. The matters stated included allegations that the Respondent:

- made inappropriate remarks or conducted himself improperly toward three female patients; and,
- gave a penicillin derivative to a patient, although the chart identified the patient as allergic to penicillin.

The Order provided that the Respondent submit promptly to a psychiatric evaluation and perform no health care tasks as a Physician Assistant in Arizona, until he appears before the Joint Board and

obtains permission to do so.

The Review Board concludes from the Respondent's admissions and from the sanction that the Joint Board imposed that the duly authorized Arizona disciplinary agency disciplined the Respondent for professional misconduct. The Board, therefore, overturns the Committee's conclusion that the Arizona Board took no disciplinary action against the Respondent. The Board sustains the Committee's conclusion, at Page 6 in their Determination, that the conduct the Respondent admitted in his Stipulation with the Arizona Board would constitute professional misconduct under New York Law. The Board, therefore, sustains the charge that the Respondent's committed misconduct under N. Y. Educ. Law § 6530(9)(d).

The Board agrees with the Committee that insufficient evidence exists to find that the Respondent committed fraud, through the statements he made in applying for a position at Beth Israel. The statement by the Arizona Executive Director, concerning whether the Arizona proceeding constituted a disciplinary action, provided a sufficient basis for the Respondent to conclude that Arizona took no disciplinary action against him and explained the Respondent's answer on the Beth Israel Pre-Employment Application. In addition, the Respondent indicated to Beth Israel that Arizona had investigated him. The confusion over the Arizona action and the Respondent's admission that Arizona had investigated him demonstrates that the Respondent acted with no intent to mislead Beth Israel by the answers on his employment application.

The Board places the Respondent on probation for three years, under the terms that the Committee established at page 7 in their Determination. The Board shares the Committee's concerns over the Respondent's mental condition and over his admissions regarding patient care issues. The Board concludes that the terms that the Committee imposed against the Respondent will address those concerns, through the approved Supervisor, the ongoing treatment, the chaperon and the quarterly reporting. We note also that neither party challenged the terms the Committee imposed. The Board concludes that a three year probationary period will provide an adequate opportunity to determine whether the Respondent can practice safely in New York.

ORDER

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

1. The Board votes unanimously to **OVERTURN** the Committee's Determination dismissing the charge that the Respondent committed professional conduct as a violation under N. Y. Educ. Law § 6530(9)(d) and we vote unanimously to **SUSTAIN** the charge that the Respondent committed professional misconduct under that statute.

2. The Board votes unanimously to **SUSTAIN** the Committee's Determination dismissing the charge that the Respondent practiced medicine fraudulently.

3. The Board votes unanimously to **MODIFY** the Committee's Penalty Determination.

4. The Board places the Respondent on **PROBATION** for three years, under the terms that the Committee imposed at Page 7 in their Determination.

ROBERT M. BRIBER

SUMNER SHAPIRO

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

WILLIAM A. STEWART, M.D.

IN THE MATTER OF ALLAN WEINBERG, R.P.A.

WINSTON S. PRICE, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Allan Weinberg.

DATED: Brooklyn, New York

9/23, 1997



WINSTON S. PRICE, M.D.

NYS DOH - ADJUDICATION Fax:518-402-0751

Sep 24 '97 15:31 P.09

IN THE MATTER OF ALLAN WEINBERG, R.P.A.

WILLIAM A. STEWART, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Allan Weinberg.

DATED: Syracuse, New York

24 Sept. 1997

William A Stewart

WILLIAM A. STEWART, M.D.

IN THE MATTER OF ALLAN WEINBERG, R.P.A

SUMNER SHAPIRO, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Allan Weinberg.

DATED: Delmar, New York
September 24, 1997



SUMNER SHAPIRO

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516 0621

E.C. Sinnott MD

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IN THE MATTER OF ALLAN WEINBERG, R.P.A.

EDWARD C. SINNOTT, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Allan Weinberg.

DATED: Roslyn, New York

September 24, 1997



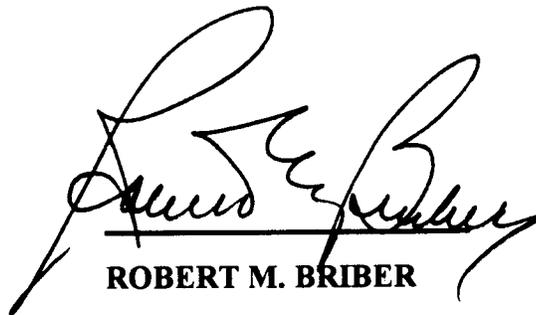
EDWARD C. SINNOTT, M.D.

IN THE MATTER OF ALLAN WEINBERG, R.P.A.

ROBERT M. BRIBER, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Allan Weinberg.

DATED: Schenectady, New York

Sept 25, 1997



ROBERT M. BRIBER