



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

June 23, 1997

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

Vito Edward Caselnova, M.D.
505 Devon Place
West Islip, New York 11795

RE: In the Matter of Vito Edward Caselnova, M.D.

Dear Ms. Bresler and Dr. Caselnova:

The Review Board has reviewed the record and conducted deliberations in this matter. As their enclosed Interim Order indicates, the Board has decided to hold a final Determination in this matter in abeyance until the New York Courts of Appeals decides the appeal in Matter of Caselnova v. N.Y.S. Department of Health. The Interim Order explains the reasons for this decision in greater detail.

Sincerely,

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

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

IN THE MATTER

OF

VITO EDWARD CASELNOVA, M.D.
RESPONDENT

Administrative Review from a Determination by a Hearing
Committee (Committee) from the Board for Professional
Medical Conduct (BPMC)

COPY

ADMINISTRATIVE
REVIEW BOARD
INTERIM
ORDER

Before: ROBERT M. BRIBER, SUMNER SHAPIRO, WINSTON S. PRICE, M.D., EDWARD
C. SINNOTT, M.D. and WILLIAM A. STEWART, M.D., Board Members.

In this proceeding, the New York State Department of Health (Petitioner) asks the Board to revoke the Respondent's New York Medical License, because the Respondent violated terms from an earlier disciplinary probation. A BPMC Committee conducted a hearing and sustained charges that the Respondent violated probation and, as a penalty, the Committee extended the probation for an additional six months. The Petitioner then commenced this proceeding to overturn the penalty under N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1997), arguing that the Committee's penalty made the Petitioner's misconduct appear acceptable. In opposing the Petitioner's requests, the Respondent notes that the Appellate Division has recently overturned certain terms and conditions from the prior probation and that the Petitioner has appealed that ruling, Matter of Caselnova v. New York State Department of Health __AD2d__, 653 NYS2d 398 (Third Dept. 1997). After reviewing the record in this case, the Board has decided unanimously to hold this case in abeyance until such time as the New York Court of Appeals decides the Petitioner's appeal, from the Appellate Division ruling that invalidated some terms from the Respondent's probation.

Administrative Law Judge JAMES F. HORAN served as the Board's Administrative Officer and drafted this Determination. JEAN BRESLER, ESQ. (Associate Counsel, NYS Department of Health) represented the Petitioner. The RESPONDENT represented himself.

COMMITTEE DETERMINATION ON THE CHARGES

Under N.Y. Pub. Health Law § 230(7) and (19)(McKinney's Supp. 1997), three member Committees from the State Board for Professional Medical Conduct (BPMC) conduct disciplinary proceedings to determine whether a physician has violated probation terms or conditions. Through a September 30, 1996 letter, the Acting Director (Director) of the Office of Professional Medical Conduct (OPMC) charged that the Respondent violated probation that Order Number BPMC-95-227 (Order 95-227) imposed against his license by:

- 1 - practicing medicine without obtaining OPMC approval for a monitoring physician;
- 2 - failing to meet quarterly with a monitoring physician;
- 3 - failing to comply with insurance coverage requirements under N.Y. Pub. Health Law § 230(18)(McKinney's Supp. 1997);
- 4 - prescribing controlled substances; and,
- 5 - failing to submit mandated quarterly declarations.

The Respondent contested the charges and a hearing followed.

Three BPMC Members **IRWIN J. COHEN, M.D.** (Chair), **RICHARD S. KOPLIN, M.D.** and **MICHAEL J. BROWN, RPA** comprised the Committee who conducted the hearing and who rendered the Determination that the Board now reviews. Administrative Law Judge **CHRISTINE C. TRASKOS** served as the Committee's Administrative Officer. The Committee sustained the charge that the Respondent violated probation and found the facts in the case largely undisputed.

The Committee found that the Respondent signed a Stipulation with the Commissioner of Health, in 1994, in which he admitted violating Title 10 (Health) of the Official Codes, Rules and Regulations of the State of New York (10 NYCRR) § 80.62, by dispensing Vicodin to three patients without preparing a complete patient record. The Stipulation then served as the basis for a disciplinary action that Petitioner brought, alleging that the Respondent's conduct violated N.Y. Educ. Law § 6530(9)(e), because the Commissioner of Health determined that the Respondent had

violated the Public Health Law provisions relating to controlled substances. In that initial BPMC proceeding, the initial BPMC Committee considered those charges and rendered Order 95-227, through which they found the Respondent guilty on the charges. Order 95-227 suspended the Respondent's license for two years, stayed the suspension and placed the Respondent on two years probation. The probation banned the Respondent from prescribing controlled substances for two years and ordered the Respondent to obtain and meet quarterly with a monitor.

In sustaining all five probation violation charges, the Committee found that the Respondent acknowledged prescribing Fastin and Adipex during the probation period, because he did not realize the drugs appeared as Schedule IV controlled substances. The Committee found further that the Respondent made good faith initial attempts to obtain the monitoring physician the probation required, but that he encountered difficulty when he realized that N.Y. Pub. Health Law § 230(18)(b)(McKinney's Supp. 1997) required him to obtain unaffordable malpractice insurance coverage, as a monitored physician. The Committee concluded that the Respondent must comply with every probation provision in order to practice in New York. The Committee voted to extend the Respondent's probation an additional six months and emphasized that the monitoring requirements apply to all aspects in his practice. The Committee found no patient harm and, therefore, no basis to revoke the Respondent's license.

REVIEW HISTORY AND ISSUES

The Committee rendered their Determination on March 24, 1997. On March 27, 1997, the Board received the Petitioner's Notice requesting this Review. The Notice stayed the Committee's penalty automatically pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1997). The Petitioner filed their brief on April 23, 1997 and the Board received the Respondent's Reply on April 28, 1997.

The Petitioner's brief characterized the Committee's penalty as inconsistent with their findings and inappropriate as a sanction for the Respondent's constant failure to cooperate with the Physician Monitoring Program and his probation terms. The Petitioner argues that the Board should revoke the Respondent's license, because he withheld information about his employment at the Tri-Community Health Center and for misrepresenting his practice. The Petitioner argued that if the Respondent felt burdened by overly harsh probation terms, he should have appealed the Order or applied for modified probation.

The Respondent's reply urged the Board to sustain the Hearing Committee, who rendered their Determination with full awareness about the circumstances surrounding the Respondent's probation violations. In response to the Petitioner's comments, about the Respondent's failure to appeal, the Respondent notes that he did appeal, that the Appellate Division upheld his contentions and that the State is now fighting the determination that he should receive a new hearing.

On April 30, 1996, the Board received a corrected brief from the Petitioner that removed any reference to the Respondent's failure to appeal his probation.

THE BOARD'S REVIEW 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(1) & 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 AD2d 86, 606 NYS2d 381 (Third Dept. 1993), in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 AD2d 940, 613 NYS2d 759 (Third Dept. 1994), and in determining credibility Matter of Minielly v. Comm. of Health 222 AD2d 750, 634 NYS2d 856 (third Dept. 1995).

THE BOARD'S DETERMINATION

The Board has considered the record below and the parties' briefs. We conducted deliberations in this case on May 16, 1997. Dr. Stewart and Mr. Briber participated in these deliberations by telephone conference call.

The Board knows that on January 23, 1997, the Appellate Division annulled the penalty from Order 95-227, because the initial BPMC Committee imposed certain probation terms, including monitoring and increased malpractice premiums, without authority from N.Y. Pub. Health Law § 230-a(McKinney's Supp. 1997), Matter of Caselnova v. NYS Department of Health (supra). We know about the case, because we receive all court decisions dealing with the BPMC disciplinary process from our Administrative Officer. The Respondent's reply brief indicates that the Petitioner has appealed that Appellate Division decision.

The Board concludes that we can impose or approve no penalty against the Respondent until the Courts resolve whether certain probation terms are legally authorized. The Board will, therefore, hold this case in abeyance until the New York Court of Appeals decides the appeal over the initial probation terms. At such time that the Court of Appeals issues the decision in that case, the Board directs our Administrative Officer to return this matter to our calendar for an immediate Determination. Until such time as we render that Determination, the Hearing Committee Determination on the probation violations remain stayed.

INTERIM ORDER

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

The Board will hold this case in abeyance until such time as the New York Court of Appeals renders a final decision in Matter of Caselnova v. NYS Department of Health.

ROBERT M. BRIBER

SUMNER SHAPIRO

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

WILLIAM A. STEWART, M.D.

**IN THE MATTER OF VITO EDWARD CASELNOVA, M.D.
INTERIM ORDER**

EDWARD C. SINNOTT, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in this Interim Order in the Matter of Dr. Caselnova.

DATED: Roslyn, New York

June 13, 1997

A handwritten signature in black ink, appearing to read "Edward C. Sinnott", written over a horizontal line. There are some additional scribbles to the right of the signature.

EDWARD C. SINNOTT, M.D.

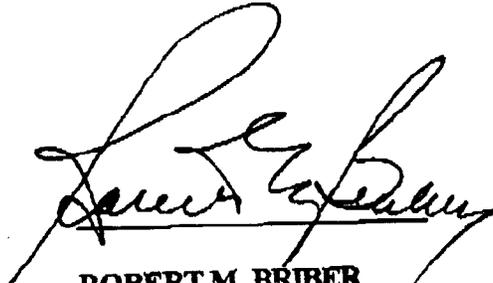
IN THE MATTER OF VITO EDWARD CASELNOVA, M.D.

INTERIM ORDER

ROBERT M. BRIBER, a member of the Administrative Review Board for Professional Medical Conduct, concurs in this Interim Order in the Matter of Dr. Caselnova.

DATED: Schenectady, New York

6/15, 1997



ROBERT M. BRIBER

**IN THE MATTER OF VITO EDWARD CASELNOVA, M.D.
INTERIM ORDER**

SUMNER SHAPIRO, a member of the Administrative Review Board for Professional Medical Conduct, concurs in this Interim Order in the Matter of Dr. Caselnova.

**DATED: Delmar, New York
June 16, 1997**


SUMNER SHAPIRO

IN THE MATTER OF VITO EDWARD CASELNOVA, M.D.

INTERIM ORDER

WILLIAM A. STEWART, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in this Interim Order in the Matter of Dr. Caselnova.

DATED: Syracuse, New York

20 June, 1997



WILLIAM A. STEWART, M.D.