



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

July 31, 1998

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

Vito E. Caselnova, M.D.
18 Lakeside Lane
Bay Shore, New York 11706

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

Dear Ms. Bresler and Dr. Caselnova:

Enclosed please find the Determination and Order (No. 97-72) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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 cursive script that reads "Tyrone T. Butler / ac".

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:lcc

Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH (Petitioner)

COPY

In The Matter Of
Vito Edward Caselnova, M.D. (Respondent)

**Administrative Review
Board (ARB)
Determination and
Order 97 - 72 A**

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

**Before Board Members : Briber, Grossman, Lynch, Price & Shapiro.
Administrative Law Judge James F. Horan served as the Board's Administrative Officer.**

**For the Respondent: The Respondent represented himself.
For the Petitioner: Jean Bresler, Esq.**

In this proceeding (Caselnova II), pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney Supp. 1998), the Petitioner asks the ARB to revoke the Respondent's New York Medical License (License), due to the Respondent's violations against terms from an earlier disciplinary probation (Caselnova I). The ARB considered this matter initially one year ago, but issued an Interim Order in this case, holding our Determination in abeyance until the New York Courts resolved the Respondent's appeal to the Caselnova I probation terms. Now that the New York Court of Appeals has sustained the Caselnova I probation terms¹, the Petitioner again requests that the ARB revoke the Respondent's License. The Respondent argues that the ARB has surrendered jurisdiction in this case, by failing to render a final Determination within forty-five days from the date the parties filed their initial briefs in this proceeding. After considering the record and the parties' submissions, the ARB holds that we retain jurisdiction in this proceeding and we vote to sustain the Committee's Determination in Caselnova II, that the Respondent violated the Caselnova I probation terms. We vote 5-0 to revoke the Respondent's License, due to his probation violations and his repeated misconduct involving prescriptions for controlled substances.

Caselnova I

In 1994 the Respondent entered into a Stipulation with the Commissioner of Health, in which the Respondent 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

¹ Matter of Caselnova v. N.Y.S Department of Health 91 NY2d 441 (1998).

preparing a complete patient record. That 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 the proceeding in Caselnova I, a BPMC Committee considered those charges and rendered Determination BPMC # 95-227, through which they found the Respondent guilty on the charges. 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 their Determination, the Committee expressed concern, because the Respondent's refusal to testify at the hearing left the Committee with numerous questions about the Respondent's knowledge and practice regarding controlled substances [Petitioner Exhibit A, page 4].

The Respondent then appealed the Caselnova I Determination to the Courts. In January, 1997, the New York Supreme Court Appellate Division for the Third Judicial Department overruled certain Caselnova I probation terms, such as the monitoring requirement, holding that no authority existed for such terms under N.Y. Pub. Health Law § 230-a (McKinney Supp. 1997), the statute that establishes the permissible penalties for physician misconduct². The Petitioner appealed that ruling. In May, 1998, the New York Court of Appeals overruled the Appellate Division and reinstated the Caselnova I probation terms in full. The Court of Appeals held that authority existed for the monitoring provisions under N.Y. Pub. Health Law § 230(18) (McKinney Supp. 1998), that provides the authority for the Director of the Office for Professional Medical Conduct (OPMC Director) to monitor physicians on probation³. While the parties contested the Caselnova I probation terms in court, the Petitioner brought a new proceeding against the Respondent concerning his compliance with the probation terms.

² Matter of Caselnova v. N.Y.S. Department of Health 235 A.D.2d 864, 635 N.Y.S.2d 398 (Third Dept. 1997).

³ Matter of Caselnova v. N.Y.S. Department of Health 91 N.Y.2d 441 (1998).

Caselnova II

Through a September 30, 1996 letter, the OPMC Director charged that the Respondent violated the Caselnova I probation terms 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 probation violation hearing followed, pursuant to N. Y. Pub. Health Law §§ 230(7) & 230(19) (McKinney Supp. 1998). The Committee sustained the charge that the Respondent violated probation and found the facts in the case largely undisputed.

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 also found the Respondent confused in his understanding about the probation terms [Committee Determination page 6]. 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. The Petitioner then commenced this proceeding challenging the Caselnova II Penalty.

The Caselnova II Review History and Issues

The Committee rendered their Determination on March 24, 1997. On March 27, 1997, the ARB 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 argued that the ARB 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 noted that he did appeal and that the Appellate Division had upheld his contentions.

On April 30, 1997, the Board received a corrected brief from the Petitioner that removed any reference to the Respondent's failure to appeal his probation.

The ARB conducted deliberations in this case in this case initially on May 16, 1997⁴. We concluded that we could impose or approve no penalty against the Respondent until the New York Court of Appeals decided the appeal over the Caselnova I probation terms. The ARB voted to hold the case in abeyance until the Court of Appeals decision and we ordered that the penalty under the Caselnova II Determination would remain stayed, until such time as we would render a final Determination in this case.

⁴ Since our initial review in this case, Therese Lynch, M.D. and Stanley Grossman, M.D. have replaced Edward Sinnott, M.D. and William Stewart, M.D. as members on the ARB.

After the Court of Appeals sustained the Caselnova I probation terms, the ARB asked the parties for additional submissions concerning the Court of Appeals decision. The Petitioner submitted a letter on May 21, 1998, continuing the assertion that the Respondent makes an inappropriate candidate for continued probation, due to his intentional probation violations, and asking the ARB to revoke the Respondent's License. The Petitioner argues that the failure to impose a severe punishment upon the Respondent will strip any meaningful authority from the Physician Monitoring Program. The Respondent submitted a letter on June 5, 1998, stating that the ARB has failed to submit a written determination within forty-five days from receiving the parties' briefs. The Respondent argues that the ARB has, therefore, lost authority under N.Y. Pub. Health Law § 230-c (McKinney's Supp. 1998) to overturn the Committee's Determination and penalty. The Respondent indicates further that the Committee imposed an appropriate and effective penalty and asks the ARB to uphold that penalty, that extended the Caselnova I probation terms for an additional six months.

Review Board Determination

All ARB members participated in this case. The ARB votes to sustain the Committee's Determination finding the Respondent guilty for violating the Caselnova I probation. Neither party disputed the Committee's findings on the probation violation charges. The ARB holds that we retain jurisdiction in this case, even though we have rendered our Final Determination more than forty-five days after the parties submitted their initial briefs. The ARB votes to revoke the Respondent's License.

Jurisdiction: Under N. Y. Pub. Health Law § 230-c (4)(a) (McKinney's Supp. 1998), the ARB must render a Determination within forty-five days from the time the parties submits briefs. The statute provides no limitation, however, on the ARB's ability to act after the time limit expires. In Matter of Ross v. New York State Dept. of Health 226 A.D.2d 863, 640 N.Y.S.2d 359 (Third Dept. 1996), the Appellate Division for the Third Judicial Department refused to annul a Determination that the ARB had rendered beyond the forty-five day time limit, because the Court found the limitation directory rather than mandatory in nature.

Undue delay can provide the grounds for a court or an administrative body to annul any

administrative determination, if the reviewing body determines that the delay handicapped or caused prejudice to a party in mounting a defense to an administrative proceeding, Matter of Cortlandt Nursing Home v. Axelrod 66 N.Y.2d 169, cert. denied 476 U.S. 1115; Matter of Gold v. Chassin 215 A.D.2d 18, lv. denied 87 N.Y.2d 805. The Respondent has alleged no prejudice to him due to the delay in this case. Further, the ARB concludes the Respondent suffered no prejudice during the delay, because the Committee's penalty in Caselnova II remained on stay while the ARB awaited the Court of Appeals Determination in Caselnova I. Such stay allowed the Respondent to continue in practice.

Penalty: The ARB concludes that the Committee imposed an inappropriate penalty in this case, by merely extending, by six months, the probation terms that the Respondent has already violated willfully. The Respondent demonstrated clearly in the Caselnova II proceeding that he continues the careless prescribing pattern that he demonstrated in Caselnova I. The Respondent's testimony at the Caselnova II proceeding also demonstrated the Respondent's confusion in his understanding about the probation terms [Committee Determination page 6]. The Caselnova II Determination failed to explain how the Committee concluded that additional probation would deter the Respondent from further misconduct or provide sufficient protection to the public from the Respondent's substandard prescribing pattern. Due to their concern about the Respondent's ability to prescribe safely, the Caselnova I Committee allowed the Respondent to continue practicing only under a monitor's supervision and under a ban on prescribing controlled substances. The Respondent violated both probation terms. The Respondent's probation violations demonstrate that the Respondent presents a bad candidate for further probation.

In the Caselnova I Determination, the Committee expressed concern, because the Respondent's refusal to take the stand left the Committee with numerous questions about the Respondent's knowledge and practice regarding controlled substances [Petitioner Exhibit 1, page 4]. That Committee also concluded that the Respondent placed patients at grave risk for harm by misusing his controlled substances privileges [Petitioner Exhibit 1]. The record in Caselnova II demonstrates that the Caselnova I Committee had reason for such concern.

At the Caselnova II hearing, the Respondent explained that he prescribed Fastin and Adipex, despite the probation ban on prescribing controlled substances, due to his ignorance that Fastin and

Adipex appear as Schedule IV Controlled Substances. Although the Respondent may have intended such testimony as mitigating evidence, the ARB finds such ignorance as an aggravating rather than mitigating factor in this case. Medications appear on the Controlled Substance Schedules due to the medications' addictive natures. All physicians bear the responsibility to know such information when prescribing medications. If anything, the Respondent should have prescribed medications with even greater care, due to his past prescribing misconduct and due to the ban on prescribing controlled substances under the Caselnova I probation. The Respondent's repeated controlled substance violations demonstrate that the Respondent continues to place patients at grave risk.

In previous Determinations, the ARB has held that the public's protection requires that we revoke a physician's license, when that physician refuses to abide by probation terms in place to protect patients, see Matter of Kite v. DeBuono, 233 A.D.2d 783, 650 N.Y.S.2d 384 (Third Dept. 1996); Matter of Floyd Wesley White (ARB # 96-116A). In Matter of Binenfeld v. New York State Department of Health 226 A.D.2d 935, 640 N.Y.S.2d 924 (Third Department 1996), the Appellate Division upheld an ARB Determination revoking a physician's license for repeated controlled substances violations, upon concluding that controlled substance abuse created a public health menace. The ARB concludes that the record in this case demonstrates that we can protect the public in this case only by revoking the Respondent's License to practice medicine in New York State.

In reaching our Determination on the penalty in this case, we reject any suggestion by the Petitioner that we could have revoked the Respondent's License or imposed any disciplinary action against the Respondent, because he withheld or misrepresented information [Petitioner's April, 1997 Brief, page 2]. The only charges in this proceeding involved violating probation [Caselnova II Determination, Appendix I]. No charges alleged that the Respondent withheld or misrepresented information. The ARB would violate due process if we imposed a penalty against the Respondent for such uncharged misconduct, Matter of Dhabuwala v. State Board for Professional Medical Conduct, 225 A.D.2d 209, 651 N.Y.S.2d 249 (Third Dept. 1996). As we indicated above, we based our Determination revoking the Respondent's License on the Committee's findings on the charges they sustained and on our judgement that those findings demonstrate that License revocation constitutes the only appropriate penalty in this case.

ORDER

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

1. The ARB **SUSTAINS** the Committee's Determination that the Respondent violated probation.
2. The ARB **REJECTS** the Respondent's challenge to our jurisdiction.
3. The ARB **OVERTURNS** the Committee's Determination to place the Respondent on probation for an additional period.
4. The ARB **REVOKES** the Respondent's License to practice medicine in New York State.

Robert M. Briber

Sumner Shapiro

Winston S. Price, M.D.

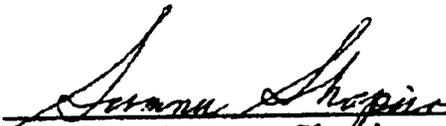
Stanley L. Grossman, M.D.

Therese G. Lynch, M.D.

In The Matter Of Vito Edward Caselnova, M.D.

Sumner Shapiro, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Caselnova.

DATED: July 24, 1998

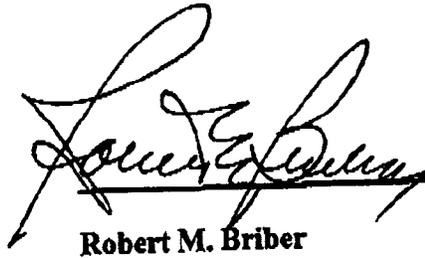


Sumner Shapiro

In The Matter Of Vito Edward Caselova, M.D.

**Robert M. Briber, a member of the Administrative Review Board for Professional Medical
Conduct, concurs in the Determination and Order in the Matter of Dr. Caselova.**

Dated : 7/27/98



Robert M. Briber

FROM : Sylvia and Bob Briber

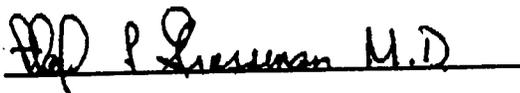
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In The Matter Of Vito Edward Caselnova, M.D.

Stanley L. Grossman, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Caselnova.

Dated: July 27, 1998



Stanley L. Grossman, M.D.

In The Matter Of Vito Edward Caselnova, M.D.

Therese G. Lynch, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Caselnova.

Dated : 7/28 , 1998

Therese G. Lynch M.D.

Therese G. Lynch, M.D.