

DOH 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 25, 1997

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

E. Marta Sachey, Esq.
NYS Department of Health
Corning Tower Room 2503
Empire State Plaza
Albany, New York 12237

Joseph Saldanha, M.D.
78 Bartlett Drive
Manhasset, New York 11030

Judi Abbott Curry, Esq.
Jeffrey R. Ruggiero, Esq.
Lester, Schwab, Katz & Dwyer
120 Broadway
New York, New York 10271-0071

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

Dear Parties:

Enclosed please find the Determination and Order (No.97-58) 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.

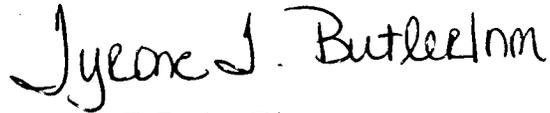
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified 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 a trailing 'nm'.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

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

COPY

-----X
IN THE MATTER : ADMINISTRATIVE
: REVIEW BOARD
OF : DECISION AND
: ORDER NUMBER
JOSEPH SALDANHA, M.D. : ARB# 97-58
-----X

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

After a hearing into charges that the Respondent, Joseph P. Saldanha, M.D. (Respondent) surrendered his license to practice in West Virginia after a disciplinary action was instituted, willfully filed false reports, demonstrated moral unfitness to practice, practiced fraudulently, and was convicted of a crime under New York State law, a Hearing Committee on Professional Medical Conduct (Committee) sustained the charges and revoked the Respondent's license to practice medicine in the State of New York. In this proceeding pursuant to New York Public Health Law (Pub. H.L.) §230-c(4)(a) (McKinney's Supp. 1997), the Respondent asks that the Administrative Review Board for Professional Medical Conduct (Board) reverse the March 3, 1997 Determination. After reviewing the record in this case and conducting deliberations on May 16, 1997, the Board votes to overturn the Committee's Determination regarding the First Specification of professional misconduct and to sustain the Committee's Determination on the remaining charges. We sustain the Committee's Determination revoking the Respondent's license, because we agree with the Committee that the Respondent's conduct

in falsely making and filing New York State Education Department registration applications and applications to two New York Hospitals reflects a pattern of unacceptable behavior.

Administrative Law Judge **LARRY G. STORCH** served as the Board's Administrative Officer. **LESTER, SCHWAB, KATZ & DWYER, JUDI ABBOTT CURRY, ESQ.** and **JEFFREY R. RUGGIERO, ESQ.**, of Counsel. represented the Respondent in this proceeding. **E. MARTA SACHEY, ESQ.** represented the Petitioner.

COMMITTEE DETERMINATION ON THE CHARGES

Pub. H.L. §230 authorizes three member committees from the State Board for Professional Medical Conduct (BPMC) to conduct disciplinary proceedings to determine whether physicians have committed professional misconduct by violating Educ. L. §6530. The Petitioner filed fourteen specifications of charges with BPMC alleging that the Respondent:

- surrendered his West Virginia medical license following the institution of disciplinary action in that state for conduct which would, if committed in New York State, constitute professional misconduct, in violation of Educ. L. §6530(9)(d);
- demonstrated moral unfitness in violation of Educ. L. §6530(20) [4 specifications];
- willfully made or filed false reports in violation of Educ. L. §6530(21) [4 specifications];
- practiced the profession fraudulently in violation of Educ. L. §6530(2) [4 specifications]; and
- was convicted of a crime under New York State Law in violation of Educ. L. §6530(a)(i).

Three BPMC Members, **MICHAEL R. GOLDING, M.D. (CHAIR)**,

OLIVE M. JACOB AND ELEANOR KANE, M.D. comprised the Committee which conducted a hearing pursuant to Pub. H.L. §230(10) and which rendered the March 3, 1997 Determination that the Board now reviews. Administrative Law Judge **JEFFREY W. KIMMER** served as the Committee's Administrative Officer.

The Committee found that on September 10, 1992, the Respondent entered into a Consent Order and Agreement with the West Virginia Board of Medicine under which he agreed to surrender his West Virginia license. The Consent Order and Agreement states that it is an action of the Board based on "reasons relating to Dr. Saldanha's professional conduct". The Committee further found that the conduct resulting in the surrender, as set forth in the West Virginia complaint, included altering a patient's medical records after the patient filed a malpractice claim, and threatening bodily harm to another physician if that physician treated any of the Respondent's patients or gave opinions regarding his treatment of patients.

The Hearing Committee further found that on February 21, 1992 the Respondent filed a delayed registration application with the New York State Education Department. The Respondent falsely answered "No" to the question "Since you last registered has any state other than New York instituted charges against you for professional misconduct, unprofessional conduct, incompetence or negligence or revoked, suspended or accepted surrender of a professional license held by you."

The Committee also found that the Respondent falsely answered "No" to the question "Since you last registered has any

hospital or licensed facility restricted or terminated your professional training, employment or privileges or have you ever voluntarily or involuntarily resigned or withdrawn from such association to avoid imposition of such action due to professional misconduct, unprofessional conduct, incompetence or negligence". This answer was false because in 1987, the Charleston Area Medical Center suspended the Respondent's staff privileges. In addition, the Committee found that in January 1988, the St. Francis Hospital, Charleston, West Virginia, had placed certain restrictions on the Respondent's surgical privileges.

The Hearing Committee also found that on October 6, 1992, the Respondent filed a registration application with the New York State Education Department for the period January 1, 1993 through December 31, 1994. The Respondent falsely stated that he had terminated his West Virginia license in good standing, although he knew that the West Virginia Consent Order and Agreement provided that the Respondent agreed that he could never be re-licensed in West Virginia again.

The Hearing Committee further found that the Respondent made similar false statements on applications for medical staff appointments at the Catholic Medical Center of Brooklyn and Queens, Inc. on March 31, 1992, and on an August 24, 1992 application for appointment to the medical staff of the Flushing Hospital Medical Center.

The Hearing Committee also found that on September 10, 1993, the Respondent was convicted upon a plea of guilty to

criminal possession of a weapon in the fourth degree, a Class A misdemeanor. He was sentenced to a conditional discharge.

The Committee concluded that all of the specifications of professional misconduct brought against the Respondent had been sustained. They further concluded that the Respondent intended to deceive the Education Department and the hospitals by making false statements. The Committee unanimously concluded that the Respondent's conduct evidenced moral unfitness to practice medicine, constituted the willful making or filing of false reports and the fraudulent practice of the profession.

The Committee voted to revoke the Respondent's license to practice medicine in New York State. The Committee held that considered alone, the Respondent's surrender of his West Virginia license is a basis to revoke his New York medical license. In addition, the Committee determined that his conduct in falsely making and filing two registration applications and applications to two New York hospitals reflects a totally unacceptable pattern of behavior.

REVIEW HISTORY AND ISSUES

The Respondent filed a Notice requesting a review on the Committee's Determination, which the Board received on March 24, 1997. The Notice did not stay the Committee penalty, pending the Board's final Determination on the review (Pub. H.L. §230-c(4)(a)). The Record on review contained the hearing transcript and exhibits and the parties' briefs. The Board received the Respondent's brief and the Petitioner's brief on April 24, 1997.

The Respondent submitted a reply brief which was received on May 2, 1997.

The Respondent raises the following arguments on his appeal:

I. The charge of surrender of license in another state cannot be sustained. The Hearing Committee had no basis to conclude that the Respondent's West Virginia surrender was a result of conduct which would be deemed professional misconduct, if committed in New York. Although the West Virginia charges alleged certain misdeeds, the Department never proved that the conduct occurred. Under Educ. L. §6530(9)(d), it was incumbent upon the Department to submit affirmative evidence to the Hearing Committee establishing that the conduct resulting in the surrender occurred and would constitute professional misconduct under New York law. The Department failed to sustain its burden of proof on this charge.

II. The specifications alleging moral unfitness, willfully filing a false report and practicing fraudulently cannot be sustained. A necessary predicate to these allegations is scienter, or knowledge, and requires a knowing, intentional or deliberate act. Amarnick V. Sobol, 173 A.D. 2d 914 (3rd Dept. 1991). The Department proved only the mere making or filing of a false report, without intent or knowledge of the falsity - therefore it failed to prove professional misconduct. The Respondent was suffering from depression and was incapable of forming the requisite intent to falsify.

III. The specification regarding the Respondent's criminal conviction must be dismissed. The Respondent routinely travelled with two target pistols, unloaded with the ammunition packed separately in a locked suitcase. He did not have a New York City pistol permit. While travelling through JFK airport, the Respondent was arrested and charged with criminal possession of a weapon in the third degree. He ultimately pled guilty to a misdemeanor charge of criminal possession of a weapon in the fourth degree. He was not required to serve jail time or pay a fine, and received a Certificate of Relief from Disabilities. The Federal Aviation Administration, following an investigation, chose not to institute federal charges. The alleged criminal conduct was, in fact, a simple

misunderstanding, and does not relate to the Respondent's practice of medicine. Therefore, this is not the type of conduct which should have been construed as professional misconduct under Educ. L. §6530(9)(a)(i).

IV. The penalty of revocation is unduly harsh and disproportionate to the offenses charged. None of the charges should have been sustained. However, even if the Review Board finds one or more of the charges sustainable, the penalty of revocation is unduly harsh and disproportionate to the offenses charged. The Review Board should consider the Respondent's mental impairment and current psychiatric treatment as a mitigation of the harsh penalty of revocation.

The Respondent respectfully urges the Review Board to dismiss the charges in their entirety.

The Petitioner raised the following arguments in response to the Respondent's appeal:

I. The Hearing Committee's assessment that the Respondent's surrender of his West Virginia license was sufficient to warrant revocation is well-founded. Sternberg v. ARB, 1997 N.Y. App. Div. LEXIS 767 (Index No. 75175). The Respondent surrendered his license and agreed not to apply for reinstatement at any time in the future. He surrendered the license only after institution of the West Virginia disciplinary action and after a hearing and recommended adverse decision by a hearing examiner. The conduct underlying the surrender is set forth in the West Virginia complaint.

II. The Hearing Committee made detailed findings of fact regarding what it concluded were false answers or explanations on four applications made in New York regarding the West Virginia disciplinary proceeding, license surrender and his status at two West Virginia hospitals. The Committee clearly explained its bases for concluding that the Respondent intended to deceive.

III. It was totally within the Hearing Committee's province to assess and accept or reject the evidence and testimony before it. The Committee rejected the Respondent's explanations regarding the false answers as not credible. The Hearing Committee rejected as

"unconvincing" the opinion of a psychiatrist whom the Respondent consulted shortly before the hearing began. The Committee noted that the psychiatrist's evaluation was based upon less than two hours of consultation and treatment. The psychiatrist rendered opinions regarding the Respondent's mental state as it existed approximately four and one-half years before the consultation, yet made no attempt to access primary material regarding the Respondent's circumstances in West Virginia independent of the Respondent as a source. The Committee's reasons for rejecting the psychiatrist's opinion are persuasive.

The Petitioner respectfully requests that the Review Board find that the Hearing Committee's determination and penalty are consistent with the findings of fact and conclusions of law made by the Committee, and further requests that the Review Board revoke the Respondent's license to practice medicine in New York State.

The Respondent submitted a reply brief, dated May 1, 1997. In his reply, the Respondent argues that the Petitioner's reliance on the Sternberg case is misplaced. He argues that this case does not relieve Petitioner of the burden of establishing with evidentiary proof that the "conduct" underlying the charges in West Virginia actually occurred and would constitute professional misconduct in New York. The Respondent cites Ricci v. Chassin, 220 A.D.2d 828 (3rd Dept. 1995) for the proposition that the hearing record must contain findings specific to the conduct in the other state.

The Respondent notes that his surrender of his West Virginia license was never deemed to be a disciplinary action against his license. Rather, the Consent Order and Agreement wherein the Respondent surrendered his license stated that the

surrender was for "personal and professional reasons". (See, Pet. Ex. #4).

THE BOARD'S REVIEW AUTHORITY

Pub. H.L. §230(10)(i), §230-c(1) and §230-c(4)(b) authorize the Board to review determinations by hearing committees for professional medical conduct and to decide:

- whether or not a hearing committee determination and penalty are consistent with the hearing committee's findings of fact and conclusions of law; and
- whether or not the penalty is appropriate and within the scope of penalties permitted by Pub. H.L. §230-a.

Pub. H.L. §230-c(4)(b) permits the Board to remand a case to the Committee for further consideration. Pub. H.L. §230-c(4)(c) provides that the Review Board's Determinations shall be based upon a majority concurrence of the Review Board.

The Board has the authority to substitute our judgement for that of the Hearing Committee, in deciding upon a penalty Matter of Bogdan 195 A.D.2d 86, 606 NYS 2d 381 (Third Dept. 1993), in determining guilt on the charges, Matter of Spartalis 205 A.D.2D 940, 613 N.Y.S. 2d 759 (Third Dept. 1994), and deciding credibility issues Matter of Minielly 222 A.D.2D 750, 634 NYS 2d 856, 1995.

THE BOARD'S DETERMINATION

The Board renders this Determination after reviewing the hearing record, the Committee's Determination and Order and the parties' briefs. The Board modifies the Committee's

Determination finding the Respondent guilty of professional misconduct. We reverse the Hearing Committee's Determination regarding the First Specification (surrender of the West Virginia medical license), and sustain the Committee's Determination regarding the remaining thirteen specifications.

The Consent Order and Agreement entered into by the Respondent and the West Virginia Board of Medicine makes no findings of fact regarding any of the allegations of professional misconduct raised by that Board. There was no plea of guilty on behalf of the Respondent, nor any admission of any guilt or wrongdoing. Indeed, the Consent Order finds that the Respondent contends that the charges are "constitutionally, legally and factually defective". (See, Pet. Ex. #4). The surrender of the Respondent's license was not deemed to be a disciplinary action, but was an action taken "for personal and professional reasons".

The Hearing Committee based its findings regarding the alleged conduct underlying the surrender on a bare recitation of the allegations contained in the West Virginia complaint. Under these circumstances, there was no factual basis for the Committee to conclude that the Respondent's surrender in West Virginia was due to conduct which would constitute professional misconduct, if committed in New York State. Thus, it was error for the Hearing Committee to conclude that the Petitioner had proved its case regarding the First Specification.

In Becker v. DeBuono et al., _A.D.2d_ (Index No. 75811 - 3rd Dept. May 8, 1997) the Court overturned a determination of this Board involving discipline against a physician's New Jersey

medical license under circumstances virtually identical to those presented by this case. In the Becker case, the physician did not plead guilty nor make any admission of guilt or wrongdoing. In addition, no findings of wrongdoing or liability were made. The Court held that "...it would defy due process and the concept of fairness to use unsubstantiated allegations and inconclusive findings with the force of affirmative or offensive collateral estoppel effect against petitioner". Becker, A.D.2d, at . Thus, it is clear that the First Specification of professional misconduct raised against the Respondent must fall.

The Review Board votes unanimously to sustain the Second through Thirteenth Specifications. These specifications, which allege moral unfitness, willful filing of false reports, and fraud all concern the false statements which the Respondent made in his applications for registration with the Education Department and his applications for hospital privileges at two New York hospitals.

The Respondent argued that he did not have the requisite intent to deceive when he made those false statements because he was suffering from depression. We reject this argument. The Hearing Committee carefully considered the Respondent's testimony, as well as that of the psychiatrist called on his behalf. Despite having seen the Respondent only twice shortly before the hearing, and without any attempt to obtain independent information about the Respondent's prior circumstances in West Virginia, the psychiatrist testified as to the Respondent's mental state approximately four and one-half

years before the consultation.

The Hearing Committee concluded that the opinion of the psychiatrist was unconvincing, and gave it no weight. In addition, there was ample evidence for the Hearing Committee to conclude that the Respondent knew that his answers were false at the time he submitted the various reports. We see no reason to disturb their conclusions regarding these charges.

The Review Board unanimously votes to sustain the Fourteenth Specification. This charge concerns the Respondent's conviction for criminal possession of a weapon in the fourth degree, a class A misdemeanor under New York law. The Respondent argued that the conviction arose from a simple misunderstanding surrounding his transportation of several handguns through a New York City airport without the necessary permits. He further argued that at the time of his plea, his trial counsel assured him that the criminal court judge believed that his medical license would be unaffected by the conviction. He also cited the fact that the conviction did not relate to his medical practice, and that no federal charges were filed, as support for his argument that this specification must be dismissed. We disagree.

The Respondent's arguments regarding the criminal conviction are specious. Education Law §6530(9)(a)(i) clearly defines professional misconduct as "Being convicted of committing an act constituting a crime under New York state law". The Respondent was convicted of a crime under New York state law. He freely waived his right to trial and admitted his guilt. He cannot now escape the consequences of that decision.

The Certificate of Relief from Disabilities which the Respondent received also does not exempt him from action by this Board. While the Certificate bars automatic forfeiture of his license, it does not prohibit the State Board for Professional Medical Conduct from taking appropriate action following an adjudicatory hearing.

The Board votes to sustain the Committee's penalty. We vote unanimously to revoke the Respondent's license to practice medicine. The Respondent is guilty of fraud, willful filing of false reports, and moral unfitness. These charges all relate to the false and misleading statements which the Respondent made on applications for registration regarding his New York medical license, and his applications for clinical privileges at two New York hospitals.

Fraud in the practice of medicine is serious misconduct and making false statements on applications for hospital staff privileges is grounds for revoking a physician's license. Matter of Glassman, 208 A.D.2d 1060, 617 N.Y.S.2d 413 (3rd Dept. 1994). Integrity is essential to the practice of medicine. Physicians must deal truthfully with patients, with other physicians, with facilities, with third-party insurers and with regulators. The Respondent's fraudulent conduct demonstrates that he is not fit to be licensed as a physician by the State of New York. Neither retraining nor continuing medical education can correct this condition. The Review Board unanimously finds that the Respondent's fraudulent conduct, standing alone, is serious

enough to call for the revocation of the Respondent's license to practice medicine.

ORDER

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

1. The Review Board **MODIFIES** the Hearing Committee's March 3, 1997 Determination finding the Respondent guilty of fourteen specifications of professional misconduct. The Review Board **DISMISSES** the First Specification and **SUSTAINS** the Second through Fourteenth Specifications, inclusive.
2. The Review Board **SUSTAINS** the Hearing Committee's Determination to revoke the Respondent's medical license.
3. The Board **REVOKES** the Respondent's license to practice medicine in New York State.

SUMNER SHAPIRO

ROBERT M. BRIBER

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

WILLIAM A. STEWART, M.D.

IN THE MATTER OF JOSEPH P. SALDANHA, M.D.

WILLIAM A. STEWART, M.D., a member of the
Administrative Review Board for Professional Medical Conduct,
concurrs in the Determination and Order in the Matter of Dr.
Saldanha.

DATED: Syracuse, New York

12 June, 1997

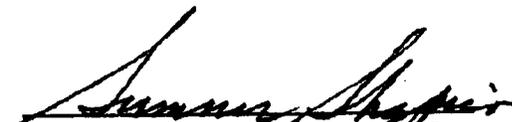


WILLIAM A. STEWART, M.D.

IN THE MATTER OF JOSEPH P. SALDANHA, 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. Saldanha.

DATED: Delmar, New York
June 12, 1997

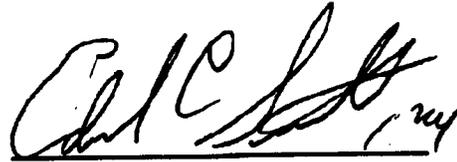

SUMNER SHAPIRO

IN THE MATTER OF JOSEPH P. SALDANHA, M.D.

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 Dr. Saldanha.

DATED: Roslyn, New York

June 13, 1997

A handwritten signature in cursive script, appearing to read 'Edward C. Sinnott, M.D.', written over a horizontal line.

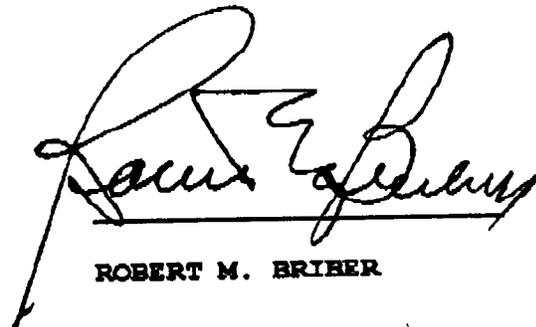
EDWARD C. SINNOTT, M.D.

IN THE MATTER OF JOSEPH P. SALDANHA, 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. Saldanha.

DATED: Schenectady, New York

6/16, 1997



ROBERT M. BRIBER