



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Mark R. Chassin, M.D., M.P.P., M.P.H.
Commissioner

Paula Wilson
Executive Deputy Commissioner

August 17, 1994

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Burton A. Waisbren, Jr., M.D.
75 Country Club Road
Ipswich, MA 01938

Robert Wright, Esq.
Melli & Wright, Esqs.
West 155 Century Road
Paramus, NJ 07652

Terrence Sheehan, Esq.
Associate Counsel
NYS Department of Health
5 Penn Plaza - Sixth Floor
New York, New York 10001

RE: In the Matter of Burton A. Waisbren, Jr., M.D.

Dear Dr. Waisbren, Mr. Wright and Mr. Sheehan :

Enclosed please find the Determination and Order (No. 94-155) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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
Corning Tower - Fourth Floor (Room 438)
Empire State Plaza
Albany, New York 12237

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.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "(t)he

determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

Request for review of the Committee's determination by the Administrative Review Board stays all action until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

All notices of review must be served, by **certified mail**, upon the Administrative Review Board **and** the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

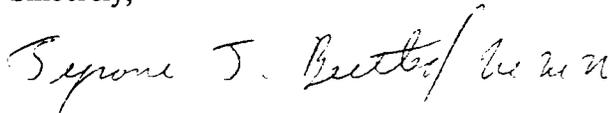
The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Empire State Plaza
Corning Tower, Room 2503
Albany, New York 12237-0030

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,



Tyrone T. Butler, Director
Bureau of Adjudication

TTB:mmn

Enclosure

REC-100-10
AUG 19 1994
100-100-100

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

**IN THE MATTER
OF
BURTON A. WAISBREN, JR. , M.D.**

**DETERMINATION
AND
ORDER**

BPMC NO-94-155

A Notice of Hearing and Statement of Charges, both dated March 24, 1994, were served upon the Respondent, **BURTON A. WAISBREN, JR. , M.D.** **ROBERT BRUCE BERGMANN, M.D.**, (Chair), **ANDREW CONTI, M.D.**, and **EUGENIA HERBST**, duly members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. **CHRISTINE C. TRASKOS, ESQ.**, Administrative Law Judge, served as the Administrative Officer. A hearing was held on April 27, 1994. The Department of Health appeared by **TERRENCE SHEEHAN, Esq.**, Associate Counsel. The Respondent appeared by, **MELLI & WRIGHT, ESQS.**, **ROBERT WRIGHT, ESQ.** of counsel. Evidence was received and witnesses sworn and heard and transcripts of these proceedings were made.

After consideration of the entire record, the Hearing Committee issues this Determination and Order.

STATEMENT OF CASE

This case was brought pursuant to Public Health Law Section 230(10)(p). The statute provides for an expedited hearing where a licensee is charged solely with a violation of Education Law Section 6530(9). In such cases, a licensee is charged with misconduct based upon a prior criminal conviction in New York or another jurisdiction, or upon a prior

administrative adjudication regarding conduct which would amount to professional misconduct, if committed in New York. The scope of an expedited hearing is limited to a determination of the nature and severity of the penalty to be imposed upon the licensee.

In the instant case, Respondent is charged with professional misconduct pursuant to Education Law Section 6530 (9) (b) and (d). A Copy of the Notice of Referral Proceeding and Statement of Charges is attached to this Determination and Order in Appendix I.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers in parentheses refer to transcript page numbers or exhibits. These citations represent evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence.

1. Respondent was authorized to practice medicine in New York State on June 3, 1975 by the issuance of license number 123821 by the New York State Education Department. (Pet. Ex. #5)

2. On September 22, 1993, Respondent's license to practice medicine in the Commonwealth of Massachusetts was revoked by the Board of Registration in Medicine, after a formal administrative hearing. The Massachusetts Board found that Respondent's conduct consistently evidenced "a deviation from good and accepted standards of care and medical practice", in that Respondent had systematically overutilized diagnostic services, promoted his obesity drug therapy through false and misleading advertising, prescribed clinically unwarranted medications in order to induce weight loss, tested for HIV antibody without the patient's knowledge or consent, misdiagnosed a patient regarding HIV and misprescribed AZT. (Pet. Ex.3)

3. On June 9, 1993, Respondent signed a Consent Order with the New Jersey State Board of Medical Examiners which prohibits Respondent from practicing medicine in New Jersey until such time as he appears before the New Jersey Board of Medical Examiners and

receives approval to commence practice. Respondent is to also provide the Board with a progress report from his psychotherapist prior to his appearance before the Board. (Pet. Ex.4)

4. At the hearing Respondent testified that he has been diagnosed as suffering from bipolar affective disorder, but that he has successfully brought this condition under control through the use of lithium and monitoring. (T .34, 47)

CONCLUSIONS OF LAW

The following conclusions were made pursuant to the Findings of Fact listed above. All conclusions resulted from a unanimous vote of the Hearing Committee unless noted otherwise.

The Hearing Committee unanimously concluded that the Department has sustained its burden of proof. The preponderance of the evidence demonstrates that Respondent's license to practice medicine was revoked by the Massachusetts Medical Board for his deviations from accepted standards of medical practice on numerous occasions. Section 6530(9)(b) defines professional misconduct as "Having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York State, constitute professional misconduct under the laws of New York State." In addition, during the pendency of his disciplinary case in Massachusetts, Respondent entered into a consent order with the New Jersey State Board of Medical Examiners which prohibits Respondent's practicing medicine in New Jersey until he appears before the New Jersey Board and is granted approval. " Section 6530 (9) (d) of the Education Law defines professional misconduct in part as "having disciplinary action taken against his or her license after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation , suspension or other disciplinary action involving the license or refusal, revocation or suspension of an application for a license or

the surrender of the license would, if committed in New York State, constitute professional misconduct under the laws of New York State." As a result, the Hearing Committee voted to sustain the First and Second Specifications of professional misconduct contained within the Statement of Charges.

DETERMINATION AS TO PENALTY

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, unanimously determined that Respondent's license to practice medicine in New York State should be revoked. This determination was reached upon due consideration of the full spectrum of penalties available pursuant to statute, including revocation, suspension and/or probation, censure and reprimand, and the imposition of monetary penalties.

The Hearing Committee found Respondent to be a well qualified physician. However, the Hearing Committee was not convinced that Respondent's use of lithium to control his bipolar affective disorder would allow him to resume his medical practice absent the professional misconduct he incurred in the past. Moreover, in response to inquiry by the Hearing Committee, Respondent admitted that he still suffered from depression. (T. 67) Respondent further indicated that he intended to re-apply for his medical license in Massachusetts and New Jersey on the basis that his impairments from the past were now under control. (T. 18, 60, 66) The Hearing Committee has an independent obligation to protect the health, safety and welfare of the citizens of New York State. Until such time that Respondent can clearly establish a clean track record as a practicing physician in another jurisdiction, he should not be permitted to practice in New York State. Therefore, the Hearing Committee determined that revocation is the appropriate sanction under the circumstances.

In the event that Respondent maintains a successful long-term recovery, he may petition the Board of Regents for reinstatement.

ORDER

Based upon the foregoing, **IT IS HEREBY ORDERED THAT:**

1. The Specifications of professional misconduct contained within the Statement of Charges (Petitioner's Exhibit #1) is **SUSTAINED**;
2. Respondent's license to practice medicine in New York State be and hereby is **REVOKED**.

Dated: Albany, New York

(Signed) 15, 1994


ROBERT BRUCE BERGMANN, M.D.
(Chair)
ANDREW CONTI, M.D.
EUGENIA HERBST

TO: Terrence Sheehan, Esq.
Associate Counsel
NYS Department of Health
5 Penn Plaza - 6th Floor
New York, NY 10001

Robert Wright, Esq.
Melli & Wright Esqs.
West 115 Century Road
Paramus, NJ 07652

Burton A. Waisbren, Jr. M.D.
75 Country Club Road
Ipswich, MA 01938

APPENDIX I

f

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

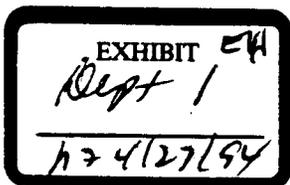
-----X
: IN THE MATTER : NOTICE OF
: OF : REFERRAL
: BURTON A. WAISBREN, JR., M.D. : PROCEEDING
: :
-----X

TO: BURTON A. WAISBREN, JR., M.D.
75 County Club Road
Ipswich, MA 01938

PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of N.Y. Pub. Health Law Section 230(10)(p) (McKinney Supp. 1994) and N.Y. State Admin. Proc. Act Sections 301-307 and 401 (McKinney 1984 and Supp. 1994). The proceeding will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct (Committee) on the 27th day of April, 1994 at 10:00 o'clock in the forenoon of that day at 5 Penn Plaza, 6th Floor, New York, New York 10001.

At the proceeding, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the proceeding will be made and the witnesses at the proceeding will be sworn and examined.



You may appear in person at the proceeding and may be represented by counsel. You may produce evidence or sworn testimony on your behalf. Such evidence or sworn testimony shall be strictly limited to evidence and testimony relating to the nature and severity of the penalty to be imposed upon the licensee. Where the charges are based on the conviction of state law crimes in other jurisdictions, evidence may be offered which would show that the conviction would not be a crime in New York State. The Committee also may limit the number of witnesses whose testimony will be received, as well as the length of time any witness will be permitted to testify.

If you intend to present sworn testimony, the number of witnesses and an estimate of the time necessary for their direct examination must^f be submitted to the New York State Department of Health, Division of Legal Affairs, Bureau of Adjudication, Corning Tower Building, 25th Floor, Empire State Plaza, Albany, New York 12237, ATTENTION: HON. TYRONE BUTLER, DIRECTOR, BUREAU OF ADJUDICATION, (henceforth "Bureau of Adjudication") as well as the Department of Health attorney indicated below, on or before April 19, 1994 .

You may file a written answer, brief, and affidavits with the Committee. Six copies of all papers you wish to submit must be filed with the Bureau of Adjudication at the address indicated above on or before April 19, 1994 and a copy of all

papers must be served on the same date on the Department of Health attorney indicated below. Pursuant to Section 301(5) of the State Administrative Procedure Act, the Department, upon reasonable notice, will provide at no charge a qualified interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person.

The proceeding may be held whether or not you appear. Please note that requests for adjournments must be made in writing to Bureau of Adjudication, at the address indicated above, with a copy of the request to the attorney for the Department of Health, whose name appears below, at least five days prior to the scheduled date of the proceeding. Adjournment requests are not routinely granted. Claims of court engagement will require detailed affidavits of actual engagement. Claims of illness will require medical documentation. Failure to obtain an attorney within a reasonable period of time prior to the proceeding will not be grounds for an adjournment.

The Committee will make a written report of its findings, conclusions as to guilt, and a determination. Such determination may be reviewed by the administrative review board for professional medical conduct.

SINCE THESE PROCEEDINGS MAY RESULT IN A
DETERMINATION THAT SUSPENDS OR REVOKES YOUR
LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE

AND/OR IMPOSES A FINE FOR EACH OFFENSE CHARGED,
YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT
YOU IN THIS MATTER.

DATED: New York, New York
March 24, 1994

 for:

CHRIS STERN HYMAN
Counsel
Bureau of Professional
Medical Conduct

Inquiries should be addressed to:

Terrence Sheehan
Associate Counsel
(212) 613-2601

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

-----X
IN THE MATTER : STATEMENT
OF : OF
BURTON A. WAISBREN, JR., M.D. : CHARGES
-----X

BURTON A. WAISBREN, JR., M.D., the Respondent, was authorized to practice medicine in New York State on June 3, 1975 by the issuance of license number 123821 by the New York State Education Department. The Respondent is currently registered with the New York State Education Department to practice medicine.

1

FIRST SPECIFICATION

HAVING BEEN FOUND GUILTY OF PROFESSIONAL
MISCONDUCT BY ANOTHER STATE

Respondent is charged with professional misconduct in violation of N.Y. Educ. Law Section 6530(9)(b) (McKinney Supp. 1994) in that Respondent was found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York State, constitute professional misconduct

under N.Y. Educ. Law Section 6530(2)(3)(26)(27) and (35) (McKinney Supp. 1994). Specifically Petitioner charges:

On or about September 22, 1993, the Massachusetts Board of Registration in Medicine found, after a formal hearing, that Respondent had systematically overutilized diagnostic services, promoted his obesity drug therapy through false and misleading advertising, prescribed clinically unwarranted medications in order to induce weight loss, tested for HIV antibody without the patient's knowledge or consent, misdiagnosed a patient regarding HIV and misprescribed AZT.

Based on these findings the Massachusetts Board revoked Respondent's medical license.

SECOND SPECIFICATION

HAVING DISCIPLINARY ACTION TAKEN BY ANOTHER STATE

Respondent is charged with professional misconduct in violation of N.Y. Educ. Law Section 6530 (9) (d) (McKinney Supp. 1994) in that Respondent had disciplinary action taken against his license to practice medicine by a duly

authorized professional disciplinary agency of another state, where the conduct resulting in such disciplinary action would, if committed in New York State, constitute professional misconduct under N.Y. Educ. Law Sections 6530(2)(3)(26)(27) and (35).

Specifically Petitioner charges:

On or about June 9, 1993, Respondent entered into a Consent Order with the New Jersey State Board of Medical Examiners which prohibits Respondent from practicing medicine in New Jersey until such time as he appears before the New Jersey Board and receives approval to practice. The basis for New Jersey Board's action was Respondent's agreement with the Massachusetts Board not to practice in any state during the pendency of his disciplinary case in Massachusetts and also Respondent's admission to the New Jersey Board that he suffered from severe manic depressive illness.