

**DOH** STATE OF NEW YORK  
DEPARTMENT OF HEALTH

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

Barbara A. DeBuono, M.D., M.P.H.  
*Commissioner*

Karen Schimke  
*Executive Deputy Commissioner*

February 20, 1996

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Michael A. Hiser, Esq.  
NYS Dept. of Health  
Rm. 2438 Corning Tower  
Empire State Plaza  
Albany, New York 12237

Carlton F. Thompson, Esq.  
Levene, Gouldin & Thompson, LLP  
P.O. Box F-1706  
Binghamton, New York 13902-  
0106

Jorge D. Smud, M.D.  
429 Main Street  
Oneonta, New York 13820

Effective Date: 02/27/96

**RE: In the Matter of Jorge D. Smud, M.D.**

Dear Mr. Hiser, Mr. Thompson and Dr. Smud :

Enclosed please find the Determination and Order (No. 95-253) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. The 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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  
Empire State Plaza  
Corning Tower, Room 438  
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.

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,



Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:

Enclosure

**COPY**

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

**IN THE MATTER  
OF  
JORGE D. SMUD, M.D.**

**ADMINISTRATIVE  
REVIEW BOARD  
DECISION AND  
ORDER NUMBER  
ARB NO. 95-253**

The Administrative Review Board for Professional Medical Conduct (hereinafter the "Review Board"), consisting of **ROBERT M. BRIBER, SUMNER SHAPIRO, WINSTON S. PRICE, M.D., EDWARD C. SINNOTT, M.D. and WILLIAM A. STEWART, M.D.**<sup>1</sup> held deliberations on January 12, 1996 to review the Hearing Committee on Professional Medical Conduct's (Hearing Committee) October 31, 1995 Determination finding Dr. Jorge D. Smud (Respondent) guilty of professional misconduct. The Respondent requested the Review through a Notice which the Board received on November 9, 1995. James F. Horan served as Administrative Officer to the Review Board. Carlton F. Thompson, Esq. filed a brief for the Respondent on December 13, 1995. Peter D. VanBuren, Esq. filed a reply brief for the Office of Professional Medical Conduct (Petitioner).

**SCOPE OF REVIEW**

New York Public Health Law (PHL) §230(10)(i), §230-c(1) and §230-c(4)(b) provide that the Review Board shall review:

- 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 PHL §230-a.

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<sup>1</sup>The Review Board conducted the deliberations by telephone conference.

Public Health Law §230-c(4)(b) permits the Review Board to remand a case to the Hearing Committee for further consideration.

Public Health Law §230-c(4)(c) provides that the Review Board's Determinations shall be based upon a majority concurrence of the Review Board.

**HEARING COMMITTEE DETERMINATION**

The Petitioner brought this case pursuant to Public Health Law Section 230(10)(p) and Education Law Section 6530(90)(a)(i), which provide an expedited hearing in cases in which professional misconduct charges against a Respondent are based upon a prior criminal conviction in New York or another jurisdiction or upon a prior administrative adjudication which would amount to misconduct if committed in New York. In this case, the Petitioner alleged that the Respondent had signed a Stipulation with the Department of Health admitting that the Respondent violated Public Health Law Article 33 and New York Codes, Rules and Regulations (NYCRR) Title 10, Part 80. The expedited hearing determines the nature and severity of the penalty which the Hearing Committee will impose based upon the criminal conviction or prior administrative adjudication.

The Hearing Committee in this case determined that the Petitioner had met its burden of proof in establishing that the Respondent entered a Stipulation with the Department of Health on January 25, 1995, admitting to thirteen violations of Public Health Law Article 33, concerning the prescribing of controlled substances. The Committee adopted the Petitioner's Statement of Charges (DOH Ex. 1) as the Committee's findings of fact. The Committee found that the Respondent stipulated that on thirteen occasions between January, 1992 and April, 1993, he authorized prescriptions for the controlled substance Lortab to four patients without making notations in the patients' records as required by law. The Committee found that the Respondent admitted further that he had issued prescriptions for Lortab on ten occasions between January, 1992 and April, 1993, which were not written in the course of professional practice. The Committee found that the Respondent's admitted conduct constituted violations of Public Health Law Sections 3370(2) and 3335(1). Under the Stipulation, the Respondent received a civil penalty of Four Thousand Dollars (\$4,000.00). The

Stipulation suspended that penalty contingent on the Respondent's compliance with the Stipulation's terms and provided that the Respondent commit no violations under Public Health Law Article 33 for a three year period from the Stipulation's effective date.

The Committee noted that the Respondent had prior involvement in disciplinary proceedings on two occasions, both arising from difficulties between the Respondent and the Oneonta Police Department. The Committee found that alcoholic beverages were a major element on each occasion, although the Respondent was never charged with an offense involving alcohol. The Committee found that the Respondent's most recent misconduct involved prescribing potent analgesics to the Respondent's sons and a friend. The Committee found that none of the three proceedings against the Respondent rises to the level of serious misconduct.

The Committee concluded that the Respondent's clinical activities pose no danger to the public, but that the Respondent's number of close encounters with various authorities establish the Respondent as someone to watch with extreme caution.

The Committee voted to revoke the Respondent's license to practice medicine in New York State, stayed the revocation in lieu of five years probation, according to terms which the Committee set out in their Order. The Committee provided that if the Respondent was cited for any violation of probation, that the revocation would be immediately instituted notwithstanding any administrative rights or other proceedings available to the Respondent.

**REQUESTS FOR REVIEW**

RESPONDENT: The Respondent contends that the Hearing Committee's penalty was much too severe and asks that the Review Board modify the penalty. The Respondent asks that the Review Board eliminate the direction revoking the Respondent's license, and substitute a provision for a stayed suspension, with the stay conditioned on no further proven violation.

The Respondent contends that the Respondent's Article 33 violations do not warrant the nature and extent of the Committee's penalty. The Respondent argues that he prescribed the Lortab for his two sons and for a close friend, that he did not realize that he could not issue prescriptions for his family members, and, that the prescriptions were for genuine medical reasons. The Respondent contends that the penalty connected with the Respondent's Article 33 Stipulation was sufficient to assure that the Respondent will not repeat this mistake involving controlled substances.

The Respondent contends that the Committee's penalty was motivated in major part by the Respondent's two prior encounters with licensing authorities. The Respondent questions whether the Hearing Committee had a clear understanding of the prior proceedings, as the Committee stated incorrectly that alcohol was a major element in both prior disciplinary proceedings.

The Respondent notes that the Committee's Order would vacate the stay of revocation immediately upon notice to the Office of Professional Medical Conduct Director of a probation violation by the Respondent. The Respondent contends that this condition denies him due process.

PETITIONER: The Petitioner supports the Hearing Committee's Determination in this case. The Petitioner contends that the Committee carefully weighed the penalty, based on the Committee's concern for the public's safety and their responsibility to discourage repeated instances of professional misconduct.

**REVIEW BOARD DETERMINATION**

The Review Board has considered the entire record below and the briefs which counsel have submitted.

The Review Board votes to sustain the Hearing Committee's Determination finding the Respondent guilty of professional misconduct. The Committee's finding of guilt on the Specification of Misconduct was not raised as an issue in this review.

The Review Board votes 5-0 to overturn the Hearing Committee's Determination revoking the Respondent's license. We vote further to overturn the provisions staying the revocation and imposing conditions of probation, which provide that the stay would be vacated immediately upon notice of a parole violation and that the revocation would then be in full force and effect<sup>2</sup>. Finally, the Review Board votes to overturn the Hearing Committee's conclusion that alcoholic beverages were a major element on each occasion in the Respondent's prior two disciplinary proceedings, because that conclusion does not properly reflect the facts from the prior proceedings.

The Board votes 5-0 to suspend the Respondent's license for ninety days, and we permanently stay the last sixty days of the penalty. The thirty day actual suspension will commence sixty days from the effective date of this Order, to enable the Respondent to obtain coverage for his practice during the period of the suspension. The Respondent may choose to commence the thirty day suspension sooner than this Order would require, if the earlier start would better suit his practice.

The Review Board finds further that the Respondent's disciplinary history does not rise to a level that warrants revocation. We find further, that the revocation penalty by the Committee was inconsistent with the Committee's conclusion that none of the Respondent's acts rose to the level of serious misconduct<sup>3</sup>.

The Review Board finds that probation will not be appropriate in this case. First, the Board finds that the terms of the Committee's probation are inappropriate for several reasons. The provision that removes the stay of revocation merely upon notice of a violation is inappropriate, because notice of a violation is only the first step in an investigation to determine whether a violation has occurred<sup>4</sup>. Reimposing the revocation upon notice of a violation would be punishing the Respondent for an allegation before the Respondent had the opportunity for a hearing to determine if a violation has actually occurred. We agree with the Respondent that this provision denies due process. An additional provision of the probation is inconsistent with the Committee's Determination. The

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<sup>2</sup>Hearing Committee Order, Paragraph 5.

<sup>3</sup>Hearing Committee Determination , page 3.

<sup>4</sup>Public Health Law §230(19).

Committee found that the Respondent posed no danger to the public due to his clinical activities (H.C. Det. page 3), but the Committee's Order provided for a practice monitor who could randomly select office records, patient records and hospital charts for review (Order para. 4(ii)). If there was no danger due to clinical activities, the Board sees no need for a monitor. The Review Board believes that the Stipulation which the Respondent entered in the Article 33 action will address any clinical issues, without the need for monitoring.

The Review Board finds that alcohol was not a major element in the Respondent's prior disciplinary proceedings. We feel that this characterization by the Committee indicates incorrectly that Respondent had a problem with alcohol. There was no evidence from the first proceeding that the Respondent had even been drinking and neither of the prior disciplinary penalties involved assessments or monitoring for alcohol abuse.

The Review Board finds that the major elements in the prior disciplinary proceedings were the Respondent's temper and his bad judgment in interfering with officers from the Oneonta Police while the officers were engaged in their official duties. The two instances in which the Respondent's temper led to his arrest suggested not an underlying alcohol problem, but rather the possibility that the Respondent may have suffered from some underlying mental condition. That concern was addressed at the time of the 1991 Consent Agreement, when the Respondent agreed to undergo a psychiatric evaluation, which determined that the Respondent did not suffer from any underlying mental impairment.

The current charges against the Respondent again arise from the Respondent's poor judgement and, perhaps, from what the prosecutor's summation characterized as the Respondent's difficulty in following the rules<sup>5</sup>. The Respondent's defense to the latest charges was that he did not know that it was improper to prescribe for family or friends. The Review Board does not accept that defense. Any physician must be aware that he must keep a record of any treatment he provides to a person, for the benefits of subsequent treating physicians. The Respondent made no record for the prescriptions he wrote that were at issue in the current case. Any physician must also know that he /she can not

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<sup>5</sup>Hearing Transcript page 42.

prescribe medication for persons without certain basic information about the person's past history and current medical condition. In the current case, the Respondent provided a prescription for a friend who was not his patient.

Bad judgment is not a deficiency that we can correct through retraining. The Review Board feels that the thirty day actual suspension which we now impose will force the Respondent to reflect upon his pattern of poor judgement and his history of disciplinary problems. We also note that a period of actual suspension is necessary as a sanction to the Respondent and as a deterrent to others. In the previous disciplinary cases, the Respondent received a censure and reprimand on both occasions, with limited probation on the second occasion. He also received a stayed fine in the Article 33 proceeding that led to this latest proceeding.

The prosecutor at the hearing requested a monetary civil penalty. The Review Board does not feel that a monetary penalty is necessary in this case.

**ORDER**

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

1. The Review Board **SUSTAINS** the Hearing Committee's October 31, 1995 Determination finding the Respondent guilty of professional misconduct.
2. The Review Board **OVERRULES** the Hearing Committee's Determination to revoke the Respondent's license, stay the revocation and place the Respondent on probation.
3. The Review Board **SUSPENDS** the Respondent's license for ninety days, with the final sixty days stayed permanently.
4. The Respondent's suspension shall commence sixty days from the effective date of this Order.

†

**ROBERT M. BRIBER**

**SUMNER SHAPIRO**

**WINSTON S. PRICE, M.D.**

**EDWARD SINNOTT, M.D.**

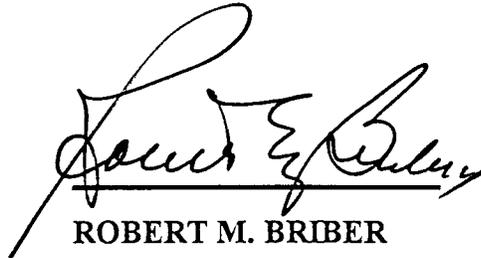
**WILLIAM A. STEWART, M.D.**

IN THE MATTER OF JORGE D. SMUD, 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. Smud.

DATED: Schenectady, New York

Jan 25, 1996

  
ROBERT M. BRIBER

NEW YORK STATE DEPARTMENT OF HEALTH 19

IN THE MATTER OF JORGE D. SMUD, 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. Smud.

DATED: Delmar, New York

FEB 14, 1996

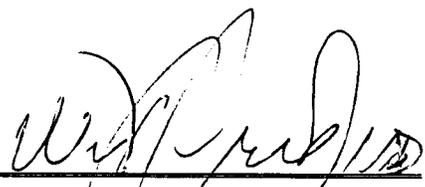
  
SUMNER SHAPIRO

IN THE MATTER OF JORGE D. SMUD, M.D.

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 Dr. Smud.

DATED: Brooklyn, New York

1/26, 1996

  
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WINSTON S. PRICE, M.D.

NEW YORK STATE DEPARTMENT OF HEALTH

IN THE MATTER OF JORGE D. SMUD, M.D.

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 Dr. Smud.

DATED: Syracuse, New York

7.5 / 1996

A handwritten signature in cursive script that reads "William A. Stewart". The signature is written in dark ink and is positioned above a horizontal line.

WILLIAM A. STEWART, M.D.



STATE OF NEW YORK  
DEPARTMENT OF HEALTH

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

Barbara A. DeBuono, M.D., M.P.H.  
Commissioner

Karen Schimke  
Executive Deputy Commissioner

November 14, 1995

NEW YORK STATE DEPARTMENT OF HEALTH 19

Carlton F. Thompson, Esq.  
Levene, Gouldin & Thompson, LLP  
P.O. Box F-1706  
Binghamton, New York 13902-0106

Peter D. Van Buren, Esq.  
NYS Dept. of Health  
Rm. 2429 Corning Tower  
Empire State Plaza  
Albany, New York 12237

**RE: In the Matter of Jorge D. Smud, M.D.**

Dear Mr. Thompson and Mr. Van Buren :

The Administrative Review Board has received the Respondent's Notice requesting an Administrative Review in this case.

Each party has until December 14, 1995 to submit briefs to the Review Board. Each party also has seven days from the receipt of your adversary's brief to file a reply brief with the Review Board.

There are no requirements as to the form for briefs and replies, except that the parties may not submit evidence to the Review Board which was not before the Hearing Committee. Please provide six copies of all documents to the Board and one copy to your adversary. Please serve all documents by certified mail.

The Review Board does not require the parties to submit a stipulated record. The Hearing Committee's Administrative Officer will transfer the hearing record to the Board.

Public Health Law Sec. 230-c(4)(a) stays any penalty which the Hearing Committee imposed in this matter until the Review Board issues a final determination in this case. There is, however, no stay if there is a summary order in effect in this case.

Sincerely,

James F. Horan  
Administrative Law Judge