



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

March 23, 1993

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Joseph C. Heffernan, M.D.
2628 El Camino Avenue A-8
Sacramento, California 95821-5989

Paul Stein, Esq.
New York State Department of Health
Bureau of Professional
Medical Conduct
5 Penn Plaza - 6th Floor
New York, New York 10001-1810

RE: In the Matter of Joseph Charles Heffernan, M.D.

Dear Dr. Heffernan and Mr. Stein:

Enclosed please find the Determination and Order (No. ARB-92-117) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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
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 than 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)].

Very truly yours,

Tyrone T. Butler nam

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nam
Enclosure

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

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IN THE MATTER : ADMINISTRATIVE
OF : REVIEW BOARD
JOSEPH CHARLES HEFFERNAN, M.D. : DETERMINATION
: AND ORDER
: ORDER NO. ARB-93-117
-----X

A quorum of the Administrative Review Board for Professional Medical Conduct (hereinafter the "Review Board"), consisting of ROBERT M. BRIBER, MARYCLAIRE B. SHERWIN, EDWARD C. SINNOTT, M.D. and WILLIAM A. STEWART, M.D.¹ held deliberations on February 23, and March 8, 1993² to review the Professional Medical Conduct Hearing Committee's (hereinafter the "Hearing Committee") December 24, 1992 Determination and Order finding Dr. Joseph Charles Heffernan guilty of professional misconduct based upon an action by the Medical Board of California. The Department of Health requested the review through a Notice of Review which the Review Board received on January 11, 1993. JAMES F. HORAN, ESQ. served as Administrative Officer to the Review Board. Dr. Heffernan filed a Brief on his own behalf on February 10, 1993. Paul Stein, Esq. filed a Brief on behalf of the Department of Health on January 25, 1993.

¹ At the time at which the Administrative Review Board met to deliberate this case, the New York State Senate had confirmed only four members of the five member Administrative Review Board that was created pursuant to Chapter 606 of the Laws of 1991.

² Dr. Sinnott was not present for the deliberations on February 23, 1993.

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.

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 Office of Professional Medical Conduct brought this proceeding against Dr. Heffernan pursuant to PHL §230(10)(p) and Education Law §6530(9), which provide an expedited hearing in cases in which professional misconduct charges against a physician 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. 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 matter found that the Department had met its burden of proof in establishing that the Respondent entered into a Stipulation with the Medical Board of California in which the Respondent admitted to committing repeated negligent acts regarding three female patients. A summary of the Respondent's conduct toward the three patients appears at pages 3 and 4 of the Hearing Committee's Determination and Order. As a result of the Stipulation, the California Board revoked the Respondent's license, stayed the revocation and placed the Respondent on five-years probation. The California probation terms require that the Respondent be evaluated by a Diversion Evaluation Committee, conduct no physical examination of any female patient, or of any patient under the age of eighteen, unless a female employee is present during the entire examination and that the Respondent have no contact with any female patient or any patient under the age of eighteen outside of his practice or a hospital setting.

The New York Hearing Committee found that the Respondent's actions regarding the three patients would constitute misconduct in New York. The Hearing Committee voted to suspend the Respondent's New York license for five years, and, if the Respondent indicated a desire to return to New York to practice, the Committee voted that any remaining period of suspension would be stayed, and the Respondent would be on probation for two years.

The Hearing Committee noted that the Respondent's

conduct regarding the three California patients constituted a serious breach of the public trust but noted that they believed that the Respondent was remorseful and could be rehabilitated. The Hearing Committee stated that they did not impose probation on the Respondent while he remains in California, because it would be impossible to monitor the Respondent's compliance.

REQUESTS FOR REVIEW

The Department of Health has asked that the Review Board revoke Dr. Heffernan's license to practice in New York State. The Department believes that the Hearing Committee's penalty in this case is inappropriate and inconsistent with the Committee's findings of fact. The Department argues that the Respondent's conduct towards the three patients involved in the California action was sexual in nature and that the Respondent suffers from a serious and deep rooted psychological problem. The Department asserts that the Hearing Committee's penalty focuses too much on rehabilitation and does not give sufficient weight to protecting the public.

The Respondent replies that the terms of the California Probation are arduous and adequate to protect the public and that he signed a stipulation relating to repeated negligent acts and not to sexual misconduct. The Respondent requests that the Review Board be lenient.

REVIEW BOARD DETERMINATION

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

The Review Board votes unanimously to sustain the Hearing Committee's Determination and Order finding that Dr. Heffernan was guilty of professional misconduct for conduct in California which would constitute negligence on more than one occasion in New York.

The Review Board votes to overturn the Hearing Committee's penalty, which would place Dr. Heffernan on two-years probation in New York, because the penalty is not consistent with the Hearing Committee's findings concerning the Respondent's inappropriate conduct toward the three female patients in California, and because the penalty would not provide sufficient protection to the public. The Review Board believes that the proper penalty for the Respondent's admitted misconduct toward the three patients and the penalty necessary to protect the public in New York is to revoke the Respondent's license to practice in New York.

Currently, the Respondent's license in California is restricted under a five-year probation, with three and one-half years remaining on the term. The New York Hearing Committee suspended Dr. Heffernan's license in New York, but provided that if the Respondent chose to return to New York, the suspension would be stayed and the Respondent would be placed on two-years probation. The New York probation would include a chaperon when

the Respondent examined female and minor patients, and would require that the Respondent undergo a psychiatric evaluation. The Review Board believes that establishing a penalty in New York which is shorter in duration than the California probation encourages the Respondent to come to New York to take advantage of the shorter probationary period. The Respondent noted in his brief that he does plan to return to New York. We see no reason to encourage the Respondent to abandon the California rehabilitation program before he has completed the Diversion Counselling Program or demonstrated that he can function successfully within the probationary restrictions without committing further misconduct towards his female patients. We also believe that the penalty is inappropriate because the Respondent would not be subject to any restrictions such as chaperons or ongoing counselling when the two-year probation concludes.

The Hearing Committee stated that they did not revoke the Respondent's license because they believed he was remorseful and that he could be successfully rehabilitated. The Review Board does not believe that the evidence from the hearing is adequate to demonstrate that the Respondent can be rehabilitated. The Respondent must still complete three and one-half years of Diversion counselling from the California probation successfully before we can judge whether he can be rehabilitated. Further, the Review Board does not see evidence of remorse on the Respondent's part. In his Brief, the Respondent admitted only

that he could improve his interaction with female patients.

The Respondent's continued negligent conduct towards Patients J.C., A.B. and D.H., as summarized at pages 3 and 4 of the Hearing Committee's Determination and Order, was clearly sexual rather than medical in nature. The supposed examination of Patient J.C. involved a number of undressings and lasted one and one-half hours, when it should have taken a shorter time. During the supposed examination of A.B., the Respondent left the Patient's breast exposed unnecessarily and he conducted an unnecessary breast examination. For both patients J.C. and A.B., the Respondent failed to record information from the examination in the patients' records. Such failure indicates that the Respondent's conduct in these situations was sexual in nature and unrelated to medical treatment or diagnosis.

The California Medical Board's penalty indicates clearly that the California Board was concerned about the sexual nature of the Respondent's conduct. The requirements that the Respondent participate in the Diversion Counselling Program, that he have a chaperon present when treating female and minor patients and that he avoid outside contact with female or minor patients are not typical of the disciplinary measures imposed upon physicians for negligent medical care or treatment. These terms indicate the California Board's intent to protect the Respondent's female and minor patients from misconduct such as the Respondent committed in the cases of Patients J.C., A.B. and D.H.

In assessing a penalty in Dr. Heffernan's case, the

Review Board's chief concern is protecting the public from misconduct as the Respondent committed in California. Since the Review Board is not convinced that the Respondent is capable of rehabilitation, we feel the only adequate penalty to protect the public in this case is to revoke the Respondent's license. Either a probation or a suspension would presume that the Respondent can be rehabilitated, and would lead to the Respondent receiving back his license automatically when the suspension or probation ceased. In the case of a revocation, the Respondent would have to apply for the return of his license at some future time. The Review Board believes that Dr. Heffernan should bear the burden to prove that he is rehabilitated and no longer poses a threat to his patients.

ORDER

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

1. The December 24, 1992 Determination and Order by the Hearing Committee on Professional Medical Conduct finding Joseph Charles Heffernan, M.D. guilty of negligence on more than one occasion is hereby **sustained**.
2. The Hearing Committee's Determination and Order suspending Dr. Heffernan's license to practice medicine in the State of New York for five years is hereby **overturned** and the Respondent's license to practice in New York is **revoked**.

ROBERT M. BRIBER

MARYCLAIRE B. SHERWIN

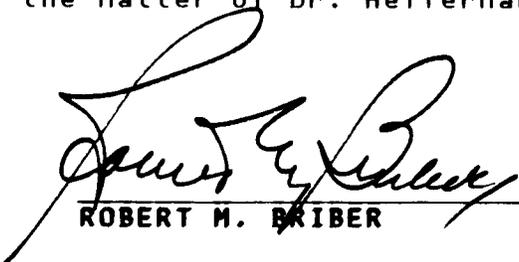
EDWARD C. SINNOTT, M.D.

WILLIAM A. STEWART, M.D.

IN THE MATTER OF CHARLES J. HEFFERNAN, 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. Heffernan.

DATED: Albany, New York
March 8, 1993


ROBERT M. BRIBER

IN THE MATTER OF CHARLES J. HEFFERNAN, M.D.

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

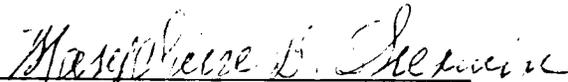
DATED: Albany, New York
March 4, 1993


WILLIAM A. STEWART, M.D.

IN THE MATTER OF CHARLES J. HEFFERNAN, M.D.

MARYCLAIRE B. SHERWIN, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Heffernan.

DATED: Albany, New York
March 8, 1993


MARYCLAIRE B. SHERWIN

IN THE MATTER OF CHARLES J. HEFFERNAN, 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. Heffernan.

DATED: Albany, New York
March 8, 1993

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

EDWARD C. SINNOTT, M.D.