



# 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*

January 28, 1997

## **CORRECTED DETERMINATION**

Carl Levinson, M.D.  
845 Oakgrove Avenue, #220  
Menlo Park, California 94025

Mary Boresz Pike, Esq.  
96 St. Mark's Place  
New York, New York 10009-5801

Frederick Zimmer, Esq.  
New York State Department of Health  
Corning Tower - Room 2438  
Empire State Plaza  
Albany, New York 12237

**RE: In the Matter of Carl Levinson, M.D.**

Dear Dr. Levinson, Ms. Pike and Mr. Zimmer:

The Determination you received under the December 27, 1996 cover letter contained errors at page 6.

In the first paragraph on page 6, under the Board's Determination heading, the second sentence should read:

"We reject the Petitioner's contention..."

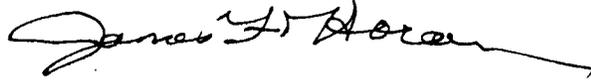
The fifth sentence in that paragraph should read:

"Next, we reject the Petitioner's contention..."

Both those sentences in the original referred incorrectly to the Respondent. In addition, the copy from the original Determination that you received omitted the final line on page six.

Please substitute this corrected Determination for the Determination you received previously. The Review Board authorized me to make and serve these corrections at their Deliberations on January 10, 1997.

Sincerely,

A handwritten signature in cursive script, appearing to read "James F. Horan". The signature is written in dark ink and extends across the width of the text block.

James F. Horan  
Administrative Law Judge

JFH:crc

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

COPY

IN THE MATTER  
OF  
CARL LEVINSON, M.D.

ADMINISTRATIVE  
REVIEW BOARD  
DETERMINATION  
ARB NO. 96-213

Administrative Review from a Determination by a Hearing  
Committee on Professional Medical Conduct

The New York State Department of Health (Petitioner) requests pursuant to New York Public Health Law (P.H.L.) §230-c(4)(a) (McKinney's Supp 1996), that the Administrative Review Board for Professional Medical Conduct (Board) review and modify a September 19, 1996 Determination by a Hearing Committee on Professional Medical Conduct (Committee), which found that **CARL LEVINSON, M.D.** (Respondent) had committed professional misconduct in his practice in California, but which imposed no sanction against the Respondent's New York Medical License. After reviewing the record in this case and conducting Deliberations on November 22, and December 13, 1996, a Quorum from the Board, **ROBERT M. BRIBER, SUMNER SHAPIRO, WINSTON S. PRICE, M.D.,** and **WILLIAM A. STEWART, M.D.,**<sup>1</sup> vote to sustain the Committee's Determination that the Respondent committed professional misconduct in violation of New York Education Law (E.L.) §6530 (McKinney's Supp 1996). We overturn the Committee's Determination on the Penalty and we place a condition on the Respondent's license, in the event that the Respondent chooses to return to New York to practice.

Administrative Law Judge **JAMES F. HORAN** served as the Board's Administrative Officer and drafted this Determination.

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<sup>1</sup> Dr. Edward Sinnott recused himself from participating in this case because he attended medical school with the Respondent. Dr. Winston Price was unable to participate in the Deliberations on November 22, 1996 and participated in the December 13th Deliberations by telephone conference. Dr. William Stewart participated in the November 22nd and December 13th Deliberations by telephone conference. Sumner Shapiro participated in the December 13th Deliberations by telephone conference.

MARY BORESZ PIKE ESQ. represented the Respondent.

FREDERICK ZIMMER, ESQ. (Deputy Counsel) represented the Petitioner.

### COMMITTEE DETERMINATION ON THE CHARGES

Under the provisions in PHL §230(7) three member committees from the State Board for Professional Medical Conduct (BPMC) conduct disciplinary proceedings to determine whether physicians have committed professional misconduct in violation of EL §6530. The Petitioner filed charges with BPMC (Pet 1)<sup>2</sup>, alleging that the Respondent violated EL §6530(9)(d) because:

- the duly authorized professional disciplinary agency from a sister state (California) disciplined the Respondent for,
- conduct which would constitute professional misconduct under New York Law, if the Respondent had committed the conduct in New York.

The charges involved a disciplinary action against the Respondent before the Medical Board of California (California Board) for prescribing medication for non-patients. The Petitioner alleged that, if the Respondent committed such conduct in New York, he would have violated:

- EL§ 6530(3), practicing with negligence on more than one occasion;
- EL§ 6530(4), practicing with gross negligence;
- EL§ 6530(5), practicing with incompetence on more than one occasion; and
- EL§ 6530(2), practicing the profession fraudulently.

The Petitioner brought this case as a direct referral proceeding pursuant to PHL §230(10)(p). The purpose for such a proceeding is to determine the nature and severity for the penalty to be imposed for the conduct.

Three BPMC Members, **WILLIAM P. DILLON, M.D. (Chair)**, **WILLIAM W. FALOON, M.D.** and **REV. EDWARD J. HAYES** comprised the Committee who conducted the hearing in the matter and who rendered the Determination which the Board now reviews. Administrative Law

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<sup>2</sup> Pet 1 indicates Petitioner's Exhibit 1.

Judge **JEFFREY ARMON** served as the Committee's Administrative Officer. The Respondent testified at the hearing and introduced documentary evidence, including three affidavits (Resp A)<sup>3</sup>. The Petitioner introduced several exhibits into evidence concerning the California Board Proceeding, including the California Board's Conditional Agreement with the Respondent ( Pet 4: Agreement) and the California Board's original Accusation against the Respondent (Pet 4: Accusation).

The Committee determined that the California Board adopted a Conditional Agreement for Public Letter of Reprimand, which the California Board and the Respondent entered into on May 26, 1995. In that Agreement, the Respondent waived a hearing and admitted to the truth and accuracy as to all allegations that appear in the Second to Seventh Causes for Disciplinary Action in the Accusation (Pet 4: Agreement page 3, paragraph 7; Accusation pages 12 - 23).

The Committee determined that the California Board found the Respondent subject to disciplinary action for:

- gross negligence, repeated negligent acts and incompetence for prescribing controlled substances for three non-patients, including prescriptions for two patients, for whom the prescriptions were contraindicated;
- prescribing dangerous drugs for himself and three individuals without a good faith examination or medical indication therefore; and
- prescribing controlled substances outside the course of his usual medical practice for himself and three individuals and obtaining a controlled substance for an individual via prescriptions which falsely represented the Respondent to be the patient.

As a Penalty for the misconduct, the California Board agreed to issue a Public Reprimand on condition that the Respondent complete successfully :

- professional competency examinations in gynecology and drug prescribing laws and practice;
- an ethics course; and
- a designated course in prescribing and/or pharmacology and therapeutics.

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<sup>3</sup> Resp A indicates the Respondent's Exhibit A.

The Committee concluded that if the Respondent had committed such conduct in New York, his conduct would constitute practicing medicine with gross negligence, fraud, and both negligence and incompetence on more than one occasion.

The Committee voted unanimously to impose no penalty against the Respondent's New York medical license. The Committee determined from the Respondent's testimony and from documentary evidence that the three non-patients for whom the Respondent prescribed the medication were the Respondent's wife and two sons. The Committee concluded that:

- no evidence indicated that the Respondent had prescribed for other than family members;
- physicians commonly prescribe for family members;
- little possibility exists that the Respondent will return to New York; and
- the California continuing medical education (CME) requirements addressed the Respondent's misconduct sufficiently.

The Committee noted that the Respondent prescribed Ritalin, Ampicillin, Donnatal, Kaopectate paregoric and Valium for his family. The Committee questioned whether the California Accusation and Agreement correctly characterized those medications as dangerous.

Following the Determination, the Petitioner filed a Notice requesting this Review.

### **REVIEW HISTORY AND ISSUES**

The Board received the Respondent's Review Notice on September 26, 1996. The Record for review contained the Committee's Determination, the hearing transcripts and exhibits, the Respondent's brief and reply brief and the Petitioner's brief and reply brief. The Board received the Petitioner's brief on October 30, 1996, the Respondent's brief on October 29, 1996, the Petitioner's Reply on November 4, 1996 and the Respondent's Reply after November 7, 1996.

The Petitioner asks the Board to modify the Committee's Determination by imposing a penalty commensurate with the penalty which California imposed. The Petitioner contends that the Committee's findings on the California misconduct call for at least a reprimand and probation if the Respondent

chooses to return to New York. The Petitioner also contends that the Committee erred in :

- accepting that the Respondent prescribed for family members;
- questioning whether a majority of the prescribed substances were dangerous;
- accepting affidavits from the Respondent into evidence;
- permitting the Respondent to relitigate the California charges;
- finding the Respondent credible; and
- failing to address their finding that the Respondent prescribed contraindicated

medication to two patients.

The Respondent contends that the Committee rendered a well reasoned decision which the record supports. The Respondent notes that PHL § 230(10)(p) provides expressly that the Respondent may introduce affidavits into evidence in the proceeding before the Committee. The Respondent argues that the Respondent presented evidence properly concerning the nature and circumstances underlying the California violations, **Scheiner v. Board of Regents**, 146 A.D.2d 957, 536 N.Y.S. 86 (Third Dept. 1989), and that the Review Board must accord great weight to the Committee's findings concerning credibility, **Nguyen v. Commissioner of Education**, 212 A.D. 2d 831, 622 N.Y.S. 2d 145 (Third Dept. 1995); **Adler v. Bureau of Professional Medical Conduct**, 211 A.D. 2d 990, 622 N.Y.S. 2d 609 (Third Dept. 1995).

### **THE BOARD'S REVIEW AUTHORITY**

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.

The Review Board may substitute our judgement for that of the Hearing Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 AD 2d 86, 606 NYS 2d 381 (Third Dept. 1993), in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 AD 2d 940, 613 NYS 2d 759 (Third Dept. 1994), and in determining credibility Matter of Minielly v. Comm. of Health 222 AD 2d 750, 634 NYS 2d 856 (Third Dept. 1995).

### **THE BOARD'S DETERMINATION**

The Board has considered the record below and the parties' briefs. The quorum considering the case votes 4 - 0 to sustain the Hearing Committee's Determination finding that the California Board disciplined the Respondent for conduct that would constitute gross negligence, negligence on more than one occasion, incompetence on more than one occasion and fraud, if the Respondent had committed the conduct in New York. We reject the Petitioner's contention that the Committee permitted the Respondent to relitigate the California misconduct. The Committee found the Respondent had prescribed medication for non-patients, but they allowed the Respondent to explain that the non-patients were the Respondent's wife and sons. The Respondent may explain the circumstances surrounding his misconduct and the Committee may consider those circumstances in determining a penalty. Next, we reject the Petitioner's contention that the Committee erred in considering evidence from affidavits which the Respondent introduced. As the Respondent's reply brief notes, the statute under which the Committee conducted the hearing [PHL § 230(10)(p)] allows the Respondent to submit affidavits to the Committee. Finally, we reject the Petitioner's assertion that the Respondent lacked credibility as a witness. The Committee as fact finder observed the Respondent's testimony and found him to be credible as to certain issues. The Board owes great deference to the Committee's Determination on witness credibility and we find no grounds to overturn their Determination in this case.

The Board's quorum votes 3-1 to modify the Committee's penalty. We place a condition on the Respondent's license to require that, if the Respondent chooses to return to practice in New York State, he must:

- provide BPMC with ninety days prior notice that he intends to return;
- provide BPMC with proof that the Respondent's license remains in good standing in any other state in which the Respondent maintains a license; and
- inform any New York hospital at which he applies for employment or privileges about this disciplinary action.

The Board finds that the Committee based their Determination, in part, on the Respondent's representation that he had no plans to return to New York. The Committee made no provision in their Penalty in the event that the Respondent chooses to return to New York, and, the Respondent's representation binds him in no way legally from changing his mind about returning to practice here. The Board finds that placing the prior notice condition on the Respondent's license will provide sufficient protection to New York's citizens.

The three Member majority rejects the Petitioner's request that we impose a more severe Penalty against the Respondent. The Board agrees with the Hearing Committee that the California CME requirements address the Respondent's misconduct sufficiently and the majority agrees with the Committee that prescribing the medication at issue for his family represents no serious misconduct on the Respondent's part.

The dissenting Member finds that prescribing contraindicated Ritalin to the Respondent's sons represents serious misconduct and that Member votes to restrict the Respondent's privileges to prescribe controlled substances for one year if the Respondent chooses to return to practice in New York.

**ORDER**

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

1. The Board sustains the Hearing Committee's September 19, 1996 Determination finding the Respondent guilty for professional misconduct.
2. The Board overturns the Hearing Committee's Determination to impose no penalty against the Respondent's New York license.
3. The Board places a condition on the Respondent's New York license to require that the Respondent:
  - provide BPMC with ninety days prior notice if he to returns to practice in New York;
  - provide BPMC with proof that the Respondent's license remains in good standing in any other state in which the Respondent maintains a license; and,
  - inform any New York hospital at which he applies for employment or privileges about this disciplinary action.

**ROBERT M. BRIBER**

**SUMNER SHAPIRO**

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

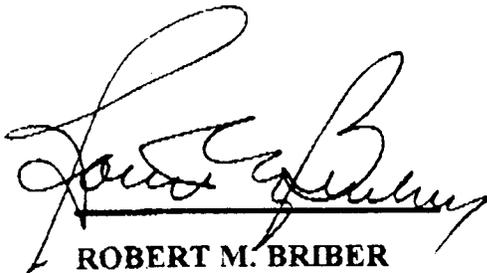
**WILLIAM A. STEWART, M.D.**

**IN THE MATTER OF CARL LEVINSON, 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. Levinson.

**DATED:** Schenectady, New York

12/22, 1996



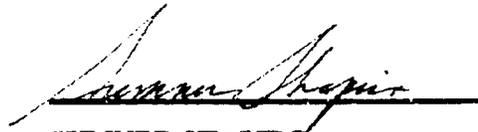
**ROBERT M. BRIBER**

IN THE MATTER OF CARL LEVINSON, 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. Levinson

**DATED: Delmar, New York**

Dec. 23, 1996

  
SUMNER SHAPIRO

**IN THE MATTER OF CARL LEVINSON, 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. Levinson.

**DATED: Syracuse, New York**

23 Dec., 1996

Handwritten signature of William A. Stewart in cursive script.

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