



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 9, 1993

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Gerald Moss, M.D.
Climer Circle
Box 296
West Sand Lake, New York 12196

James E. Dering, Esq.
Gleason, Dunn, Walsh
& O'Shea
11 North Pearl Street
Albany, New York 12207

Kevin P. Donovan, Esq.
NYS Department of Health
Bureau of Professional Medical Conduct
Corning Tower - Room 2438
Empire State Plaza
Albany, New York 12237

RE: In the Matter of Gerald Moss, M.D.

Dear Dr. Moss, Mr. Dering and Mr. Donovan:

Enclosed please find the Determination and Order (No. ARB No. 93-18) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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	:	<u>ADMINISTRATIVE</u>
	:	<u>REVIEW BOARD</u>
OF	:	<u>DETERMINATION</u>
	:	<u>AND ORDER</u>
GERALD MOSS, M.D.	:	<u>ARB NO. 93-18</u>

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The Administrative Review Board for Professional Medical Conduct (Review Board), consisting of **ROBERT M. BRIBER**, **MARYCLAIRE B. SHERWIN**, **WINSTON S. PRICE, M.D.**, **EDWARD C. SINNOTT, M.D.** and **WILLIAM A. STEWART, M.D.** held deliberations on June 22, 1993, at 5 Penn Plaza in New York, New York,¹ to review the Professional Medical Conduct Hearing Committee's (Committee) April 2, 1993 Determination finding Dr. Gerald Moss guilty of professional misconduct and limiting his license to practice medicine in the State of New York. Both the Office of Professional Medical Conduct (OPMC) and Dr. Moss requested the review through Notices which the Review Board received on April 14, 1993. James F. Horan served as Administrative Officer to the Review Board. Kevin Donovan, Esq. submitted a brief for OPMC on May 17 1993 and a response brief on May 26, 1993. Thomas Gleason, Esq. submitted a brief for Dr. Moss on May 17, 1993 and a response brief on May 24, 1993.

¹ Dr. Stewart was not present in New York City for deliberations, but participated by telephone.

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 charged the Respondent, a surgeon, with gross negligence, negligence on more than one occasion and failing to maintain adequate records arising from the Respondent's care of five patients, A through E.

The Hearing Committee found the Respondent guilty of practicing with gross negligence arising from his care provided to Patients A, C and D; with practicing with negligence on more than one occasion in treating Patients A, C and D; and with failing to maintain adequate medical records for Patients A, B, C and E.

The Hearing Committee concluded that the Respondent placed Patients A, C and D at substantial risk due to the

inappropriate hospital discharge of Patients A and D, and due to the post-discharge evaluation and treatment of Patients A and C. The Committee concluded further that the Respondent's medical records did not meet the mandated requirement to provide objectively meaningful information.

The Committee concluded that they held grave misgivings about the Respondent's continuing to practice surgery. The Committee determined that the Respondent's license to practice medicine should be limited to consultation to the exclusion of all other types of medical practice.

REQUESTS FOR REVIEW

The Office of Professional Medical Conduct has asked that the Review Board modify the Hearing Committee's Determination and Penalty. OPMC asks that the Review Board overrule the Hearing Committee's Determination that the Respondent was not guilty of negligence and gross negligence in treating Patient B, because that Determination is inconsistent with the Committee's findings and conclusions. OPMC also argues that the Hearing Committee's Penalty is inappropriate due to the Hearing Committee's findings that the Respondent was guilty of gross negligence and negligence on more than one occasion. OPMC asks that the Respondent's license be revoked.

The Respondent argues that the Hearing Committee's Determination that the Respondent was guilty of gross negligence and negligence on more than one occasion in treating Patients A, C

and D, and of failure to maintain adequate records for Patients A, B, C and E are not consistent with the Hearing Committee's findings and conclusions. The Respondent also argues that the Committee's Penalty is inappropriate for several reasons which the Respondent's brief discusses at pages 2-10. As one of these grounds, the Respondent argues that it was improper for the Committee to use their assessment of the Respondent personally in making a determination as to the proper penalty to impose in this case.

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 that the Respondent was guilty of gross negligence and negligence on more than one occasion in treating Patient A, C and D, and was guilty of failing to maintain adequate records from the treatment of Patient's A, B, C and E. The Review Board sustains the Hearing Committee's Determination that the Respondent was not guilty of Negligence and gross negligence in the treatment of Patient B. The Committee's Determination is consistent with the findings of facts and conclusions and is supported by the evidence from the hearing.

The Review Board votes to overrule the limited license penalty which the Hearing Committee imposed, because the penalty is not appropriate and because the penalty is inconsistent with

the Committee's findings and conclusions that the Respondent was guilty of gross negligence and negligence on more than one occasion in treating Patients A, C and D in this case. The Review Board believes that the appropriate penalty, in view of the Respondent's gross negligence and negligence on more than one occasion, is to revoke the Respondent's license to practice medicine in New York State.

The Review Board questions how the penalty limiting the Respondent to providing consultations can be enforced. The Hearing Committee did not provide any definition of consultation in their Determination. Does consultation mean that there will always be a treating physician between the Respondent and any patient? In the case of a young Physician who seeks a consultation with the Respondent, would the Respondent actually be making the decisions concerning the care of the patient?

The Review Board concludes, based on the Hearing Committee's findings and conclusions concerning the Respondent's multiple and egregious acts of negligence, that the Respondent should no longer be involved in patient care. The Hearing Committee stated that they had grave misgivings about the continuation of the Respondent's surgical practice. The Review Board believes that those misgivings should apply to surgical consultations by the Respondent as well as the actual performance of surgery, since the Respondent's gross and repeated acts of negligence involved the inappropriate decision to discharge Patients A and D from the hospital and the post discharge

evaluations of Patients A and C.

The Respondent faults the Hearing Committee for basing their determination in the Respondent's case, in part, on the Committee's assessment of the Respondent personally. The Review finds nothing inappropriate in the Committee's using a personal assessment of the Respondent in reaching a determination. Any finder of fact will assess a witnesses' demeanor and responsiveness to questions in determining whether a witness is credible. Further, in OPMC hearings, a Hearing Committee which sustains charges of gross and multiple acts of negligence against a physician must determine whether that physician is fit to continue practicing in New York State and whether there are any steps such as retraining, re-education or monitoring, which would allow the physician to continue practicing, without endangering the public health. An assessment of a Respondent, based on the Respondent's hearing testimony will assist a Hearing Committee in determining whether the Respondent would be a candidate for retraining or would cooperate with a practice monitor.

In this case, the Hearing Committee's did not find that the Respondent would benefit from retraining or re-education. The Committee's conclusions about the Respondent which appear at page 73 in the Hearing Committee Determination indicate that the Respondent is not a candidate for rehabilitation. Since the Committee has determined that the Respondent is guilty of multiple and gross acts of negligence in treating patients and concluded that the Respondent should not continue practicing surgery, and

since the Review Board can see no other means to protect the public health in this case, we determine that the only appropriate penalty in this case is to revoke the Respondent's license to practice medicine in New York State.

ORDER

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

1. The April 2, 1993 Determination by the Hearing Committee on Professional Medical Conduct finding Dr. Gerald Moss guilty of gross negligence, negligence on more than one occasion and failure to maintain adequate records is sustained.
2. The Hearing Committee's penalty limiting the Respondent's license to consultations is overruled.
3. The license of Gerald Moss, M.D. to practice medicine in the State of New York, is revoked.

ROBERT M. BRIBER

WINSTON S. PRICE, M.D.

MARYCLAIRE B. SHERWIN

EDWARD C. SINNOTT, M.D.

WILLIAM A. STEWART, M.D.

IN THE MATTER OF GERALD MOSS, 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. Moss.

DATED: Albany, New York

July 30, 1993

Maryclaire B. Sherwin
MARYCLAIRE B. SHERWIN

IN THE MATTER OF GERALD MOSS, 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 GERALD MOSS, M.D.

DATED: Brooklyn, New York

JULY 27th, 1993

A handwritten signature in black ink, appearing to be 'W.S. Price', written over a horizontal line.

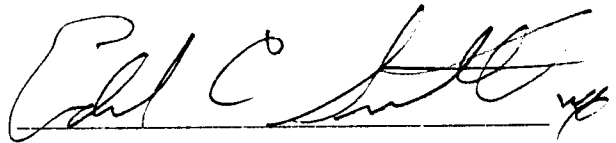
WINSTON S. PRICE

IN THE MATTER OF GERALD MOSS, 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. Moss.

DATED: Albany, New York

July 26 , 1993

A handwritten signature in cursive script, appearing to read "Ed C. Sinnott", written over a horizontal line. The signature is located to the right of the date.

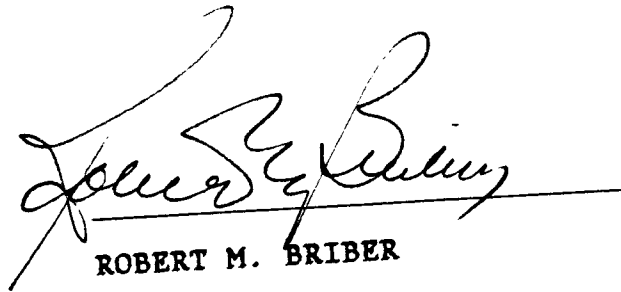
EDWARD C. SINNOTT, M.D.

IN THE MATTER OF GERALD MOSS, 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. Moss.

DATED: Albany, New York

July 7, 1993



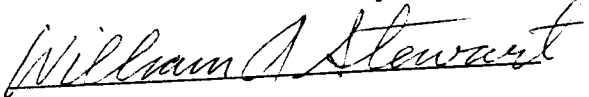
Handwritten signature of Robert M. Briber in cursive script, written over a horizontal line.

ROBERT M. BRIBER

IN THE MATTER OF GERALD MOSS, 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. Moss.

DATED: Albany, New York
August 4, 1993


WILLIAM A. STEWART, M.D.