



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*

August 20, 1997

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Henry L. Kirsch, M.D.  
6219 W. 77th Street  
Los Angeles, California 90045

Jude Brearton Mulvey, Esq.  
NYS Department of Health  
Corning Tower Room 2509  
Empire State Plaza  
Albany, New York 12237

**RE: In the Matter of Henry L. Kirsch, M.D.**

Dear Dr. Kirsch and Ms. Mulvey:

Enclosed please find the Determination and Order (No.97-127) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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  
Hedley Park Place  
433 River Street-Fourth Floor  
Troy, New York 12180

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,

Handwritten signature of Tyrone T. Butler in black ink.

Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:nm

Enclosure

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

COPY

IN THE MATTER  
OF

HENRY L. KIRSCH, M.D. (Respondent)

Proceeding to review a Determination by a Hearing Committee  
(Committee) from Board for Professional Medical Conduct  
(BPMC)

ADMINISTRATIVE  
REVIEW BOARD  
DECISION AND  
ORDER NUMBER  
ARB NO. 97-127

**BEFORE: ROBERT M. BRIBER, SUMNER SHAPIRO, WINSTON S. PRICE, M.D.,  
EDWARD C. SINNOTT, M.D. and WILLIAM A. STEWART, M.D.**

After a hearing into charges that a sister state (California) disciplined the Respondent for conduct that would constitute professional misconduct under New York Law, a BPMC Committee sustained the charge and imposed no sanction against the Respondent's New York License (License). In this proceeding pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1997), the New York State Department of Health (Petitioner) asks the Board to overturn the Committee's Penalty Determination and to impose a stayed suspension and probation on the Respondent's License, in the event he ever returns to practice in New York. The Respondent asks for no sanction against his New York License and asserts that he committed no misconduct in California. After considering the hearing record and the parties' briefs, the Board sustains the Committee's Determination on the charge, because the California findings against the Respondent demonstrated that he practiced medicine with gross negligence and repeated negligence in treating seven patients. We modify the Committee's Determination on the Penalty, and place a condition on the Respondent's License, to require that the Respondent provide thirty days advance notice, if he decides to return to practice in New York. We see no need for any further restriction, as the Respondent has completed a probation and retraining program successfully in California.

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

The Respondent represented himself in this proceeding.

**JUDE BREARTON MULVEY, ESQ.** represented the Petitioner.

## COMMITTEE DETERMINATION ON CHARGES

Pursuant to N.Y. Pub. Health Law § 230(7)(McKinney's Supp. 1997), three member BPMC Committees conduct disciplinary proceedings to determine whether physicians have committed professional misconduct. The Petitioner filed charges with BPMC alleging that the Respondent, who also holds a medical license in California, violated N.Y. Educ. Law §6530(9)(b)(McKinney Supp. 1997), because:

- a sister state's duly authorized disciplinary agency found the Respondent guilty for improper professional practice or professional misconduct,
- for conduct that would constitute professional misconduct under New York State Law.

The Charges allege that the conduct from which the California proceeding arose would constitute:

- practicing medicine with negligence on more than one occasion, a violation under N.Y. Educ. Law § 6530(3), and,
- practicing medicine with gross negligence, a violation under N. Y. Educ. Law § 6530(4).

The Petitioner brought the case pursuant to N. Y. Pub. Health Law §230(10)(p)(McKinney's Supp. 1997), which authorizes BPMC to refer cases dealing with administrative determinations from other forums as an expedited proceeding (Direct Referral). The statute limits such proceeding strictly to receiving evidence to determine the nature and severity for the penalty that the Committee will impose for the criminal conduct.

Three BPMC Members, **CHARLOTTE BUCHANAN, Chair, ANDREW J. MERRITT, M.D. and RAVENDER MAMTANI, M.D.** comprised the Committee who conducted the hearing in this matter and who rendered the Determination which the Board now reviews. Administrative Law Judge **MICHAEL P. MCDERMOTT** served as the Board's Administrative Officer and drafted the Determination. The Committee found that the California Board of Medical Quality Assurance (California Board) determined that the Respondent:

- engaged in unprofessional conduct by repeated negligent and grossly negligent acts, in treating seven patients from 1982 to 1989;
- prescribed controlled substances in excessive amounts and/or on repeated occasions to five patients;
- prescribed controlled substances without performing a good faith physical examination on two patients; and,
- in addition to the other violations, prescribed to three patients, who were drug dependent, drug addicted or became drug addicted while under the Respondent's care.

The Committee found further that the California Board revoked the Respondent's License in 1991, stayed the revocation and placed the Respondent on five years probation. The probation terms required the Respondent to complete an oral or written examination in internal medicine and gastroenterology successfully, to undertake forty hours per year continuing education in pain management, drug abuse and ethics for two years, and, the probation established specific conditions under which the Respondent could prescribe, administer, dispense or possess drugs. Finally, the Committee found that the California Board restored the Respondent's license to clear status in 1996, upon finding that he had completed probation successfully.

As to the charge, the Committee concluded that California found the Respondent guilty for professional or improper professional practice for conduct that would constitute negligence on more than one occasion and gross negligence under New York Law. The Committee took no action against the Respondent's New York License, because the Respondent had completed the California probation and regained a clear license in California.

### **REVIEW HISTORY AND ISSUES**

The Committee rendered their Determination on June 5, 1997. The Petitioner then commenced this proceeding, pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1997), by filing a Review Notice, that the Board received on June 20, 1997. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and the

Petitioner's brief. The Board received the Respondent's brief on July 15, 1997 and the Petitioner's brief on July 21, 1997.

**Petitioner's Issues:** The Petitioner asks the Board to modify the Committee's Penalty, because the Committee erred in failing to impose a sanction. The Petitioner argues that the Respondent's conduct subsequent to his misconduct and the time lapse since the misconduct fails to negate the need for imposing discipline for the Respondent's grossly negligent conduct, that resulted in a revocation in California. The Petitioner contends that New York had no control over the California probationary terms and that New York must impose our own terms, if the Respondent returns here to practice, to assure that the Respondent has discontinued his negligent conduct. The Petitioner recommends that the Board suspend the Respondent's License for five years, upon his return to New York, stay the suspension and place the Respondent on probation for five years.

**Respondent's Issues:** The Respondent alleges that the Petitioner delayed unreasonably in commencing this proceeding, to the Respondent's prejudice. The Respondent informed the Board that he had served and abided by all the conditions from his California probation and that he continues to maintain that he did no wrong in treating the patients at issue in this proceeding. The Respondent's brief included a response to the California findings for each case at issue in the California proceeding. The Respondent indicated that he lacked the means to come to New York to plead his case and that he has no plans to relocate to New York, although he will fight for his right to do so.

### **REVIEW BOARD AUTHORITY**

In reviewing a Committee's Determination, the Board determines: whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law, and whether the Penalty is appropriate and within the scope of penalties which the law permits [N.Y. Pub. Health Law § 230(10)(i), § 230-c(4)(b)(McKinney's Supp. 1997)]. The Board may remand a case to the Committee for further consideration [N.Y. Pub. Health Law § 230-c(4)(b)(McKinney's Supp. 1997)]. The Board's Determinations result from a majority concurrence among the Board's Members [N.Y. Pub. Health Law § 230-c(4)(c)(McKinney's Supp. 1997)].

The Review Board may substitute our judgment for that of the 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).

### **REVIEW BOARD DETERMINATION**

The Board has considered the record and the parties' briefs. We conducted deliberations in this case on August 15, 1997. Dr. Stewart and Dr. Price participated in the deliberations by telephone.

The Board votes unanimously to sustain the Committee's Determination that the Respondent's California misconduct would constitute negligence on more than one occasion and gross negligence under New York Law. We, therefore, sustain the charge that the Respondent committed misconduct under N.Y. Educ. Law § 6530(9)(b)(McKinney's Supp. 1997). Although the Respondent continued to maintain that he committed no wrong, the California Board's findings bind the Respondent in this proceeding. The California findings demonstrate that the Respondent practiced medicine with gross negligence and negligence on more than one occasion, in treating seven patients, by prescribing controlled substances in excessive amounts, repeatedly, without a prior physical examination and to persons who were or became addicted or drug dependent.

The Board votes unanimously to place a condition on the Respondent's License, requiring him to provide the Office of Professional Medical Conduct (OPMC) with thirty days notice should the Respondent decide to return to medical practice in New York. Such condition will allow OPMC to ensure that the Respondent's California License remains in good standing at any time the Respondent may choose to return to New York. The Board agrees with the Committee that, because the Respondent completed the California probation successfully, no need remains for a sanction against him, such as probation, if he returns to New York. The California probation terms required the Respondent to complete continuing education courses in several areas and to pass an examination. The Respondent completed that probation successfully. We also note that eight years have now passed

since the last cases at issue in the California proceeding, with no further charges against the Respondent. The Board concludes that California took sufficient steps to correct the deficiencies in the Respondent's practice.

The Board rejects the Petitioner's request that we impose a more severe sanction. Although the Petitioner asserted that New York had no control over the Respondent's California probation, the Petitioner failed to specify what provisions or sanction that the California probation lacked, that New York would have imposed. Further, in asking the Board to place the Respondent on probation, if he returns to New York, the Petitioner failed to specify any condition that the Board should impose through that probation. Finally, we disagree strongly with the Petitioner's assertions that described the Committee's Determination as offensive, as tacitly approving the Respondent's underlying conduct or as performing a disservice to New York's citizenry (Respondent's brief page 4).

#### **ORDER**

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

1. The Board **SUSTAINS** the Committee's Determination finding the Respondent guilty for professional misconduct.
2. The Board **MODIFIES** the Committee's Determination and places a condition on the Respondent's License, requiring the Respondent to provide OPMC with thirty days advance notice, if the Respondent decides to return to practice in New York.

**ROBERT M. BRIBER**

**SUMNER SHAPIRO**

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

**EDWARD SINNOTT, M.D.**

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



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**IN THE MATTER OF HENRY L. KIRSCH, 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. Kirsch.

**DATED: Roslyn, New York**

*August 18, 1997*



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**EDWARD C. SINNOTT, M.D.**

**IN THE MATTER OF HENRY L. KIRSCH, 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. Kirsch.

**DATED: Delmar, New York**  
August 18, 1997

  
**SUMNER SHAPIRO**

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NYS DOH - ADJUDICATION Fax:518-402-0751

Aug 19 '97 9:50 P.08

**IN THE MATTER OF HENRY L. KIRSCH, 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. Kirsch.

**DATED:** Syracuse, New York

*19 Aug*, 1997

*William A Stewart*

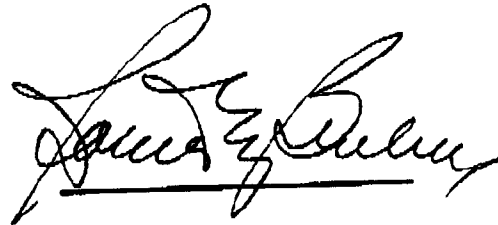
**WILLIAM A. STEWART, M.D.**

**IN THE MATTER OF HENRY L. KIRSCH, 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. Kirsch.

**DATED: Schenectady, New York**

**August 19 , 1997**

A handwritten signature in black ink, appearing to read "Robert M. Briber", written over a horizontal line.

**ROBERT M. BRIBER**