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

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Terrence Sheehan, Esq.
NYS Dept. of Health
5 Penn Plaza - Sixth Floor
New York, New York 1001

Anthony Z. Scher, Esq.
Wood & Scher
The Harwood Building
Scarsdale, New York 10583

Edward M. Birdsong, D.O
1 Spruce Drive
Patchogue, New York 11772

Effective Date: 11/21/95

RE: In the Matter of Edward M. Birdsong, D.O.

Dear Mr. Scher, Mr. Sheehan and Dr. Birdsong :

Enclosed please find the Determination and Order (No. 95-194) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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

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

IN THE MATTER

OF

EDWARD BIRDSONG, D.O.

ADMINISTRATIVE REVIEW BOARD DECISION AND ORDER NUMBER ARB NO. 95-194

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.** held deliberations on October 28, 1995 to review the Hearing Committee's Determination finding Dr. Edward Birdsong (Respondent) guilty of professional medical conduct. The Respondent requested the Review through a Notice, which the Review Board received on September 5, 1995. James F. Horan served as Administrative Officer to the Review Board. Anthony Z. Scher, Esq. submitted a brief on the Respondent's behalf, which the Review Board received on October 4, 1995. Terrence Sheehan, Esq. submitted a reply brief on behalf of the Office of Professional Medical Conduct (Petitioner), which the Review Board received on October 12, 1995.

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 Petitioner charged the Respondent, who practices emergency medicine, with committing acts of negligence on more than one occasion, gross negligence, incompetence on more than one occasion, gross incompetence and failing to maintain adequate medical records. The charges related to the Respondent's treatment of six patients, whom the record refers to as Patients A through H. The Petitioner began this proceeding on April 13, 1995 through a Summary Order by the Commissioner of Health, suspending immediately the Respondent's license to practice medicine in New York State, upon the Commissioner's finding that the Respondent's continued practice of medicine constituted an imminent danger to the health of the people of this state. The Hearing Committee rendered an Interim Report on July 7, 1995, in which they determined that the Respondent did not constitute an imminent danger to the public health and in which they ordered that the Respondent practice in a supervised setting, with monitoring, until such time as a final determination in this case is rendered.

In their final Determination, the Hearing Committee found that the Respondent was guilty of negligence on more than one occasion in the treatment of Patients A, B, C, E and F, incompetence on more than one occasion in the treatment of Patients A, B, C, E and F, gross negligence in the treatment of Patients B, C and F, gross incompetence in the treatment of Patients B and F, and failure to maintain adequate records in the cases of Patients A, B, C, E and F. The Committee found that the Respondent failed to obtain and document an appropriate medical history for Patients A, B, C, E and F; failed to obtain and document appropriate physical examinations for Patients A, B, C, E and F; inappropriately discharged Patients A, B, C and F from the Emergency Room; made an inappropriate diagnosis in the cases of Patients E and F; failed to meet minimally acceptable standards of medical

practice in the cases of Patients A, B, C and E; failed severely to meet acceptable medical standards of practice in the cases of Patients B and F; failed to prescribe appropriate antibiotics for Patient E and misinterpreted an X-ray for Patient E; failed to order a GYN consult, failed to order a chest X-ray, and failed to appreciate implications of a markedly elevated white count in the case of Patient C; demonstrated an inability to integrate clinical data and come to a reasonable conclusion concerning the disposition of Patients A and C; and, failed to recognize the immediate need for Patient A's admission to the hospital. The Committee found that the Respondent lacked fundamental medical knowledge in some areas and lacked an ability to integrate clearly presented clinical data into an appropriate diagnosis and treatment plan for his patients. The Committee concluded that the Patient's charts demonstrated his lack of logical thinking and that conclusions drawn by the Respondent were not supported by clinical findings in the charts. The Committee found that the Respondent was unable to comprehend the severity of his mistakes, to take constructive criticism about his substandard management of certain patients and to demonstrate an ability to learn from the experience.

In reaching their findings the Committee found the Petitioner's expert witness Dr. Ferrara, to be a highly credible witness. The Committee found the Respondent's witnesses, some of whom were also emergency department physicians in the Respondent's community, were not independent, and the Committee that felt statements by these witnesses were not completely unbiased. The Committee found a lack of internal consistency among the Respondent's witnesses' testimony about the care the Respondent rendered, that the explanations of the Respondent's mistakes varied among the witnesses, and in fact, differed from reasons presented by the Respondent. The Committee found there was significant evidence presented which led them to doubt the truthfulness of some of the Respondent's statements. The Committee could not find the Respondent credible when he stated that he could electively remember a large number of minor details concerning Patients A through F, which were not documented, but which exonerated his medical decisions. The Committee could not find such testimony credible in view of the thousands of patients whom the Respondent saw each year in the Emergency Room.

The Committee voted to revoke the Respondent's license to practice medicine in New York State. The Committee stated that they considered sending the Respondent for an evaluation and

retraining, but they determined the Respondent would not benefit from retraining because of significant defects demonstrated in his lack of logical thinking and his failure to comprehend and acknowledge the severity of his professional shortcomings. The Committee noted the Respondent has attended a number of conferences and accumulated a great deal of CME credits since he began practice, and noted that the Respondent had years of emergency department practice and post graduate education, but the Committee found the errors that the Respondent committed were shockingly elementary and demonstrated that the Respondent doesn't seem to be able to learn from his experience.

The Committee noted they did not consider their final decision to be incompatible with their Interim Report on the Respondent's Summary Suspension. The Committee felt that their decision on the Summary Suspension was made without the benefit of approximately one third of the transcripts, as well as proposed findings of fact by both the Respondent and the Petitioner. The Committee stated that the solution they devised at the time of the Interim Report, constant monitoring of the Respondent and of all his patient charts, was not a permanent solution and that revocation was the only appropriate action to be taken in this case.

REQUESTS FOR REVIEW

The Respondent contends that the Hearing Committee's Final Determination revoking the Respondent's license, is inconsistent with the Committee's Interim Report, in which the Committee determined that the Respondent did not constitute an imminent danger to the people of this state and which allowed the Respondent to continue practicing under strict supervision. The Respondent contends that the penalty imposed in this case was extremely harsh, based on unsound reasoning, found fault with the Respondent where none was warranted, and ignored unfairly evidence from the hearing. The Respondent contends that the six cases considered by the Committee are not typical of the Respondent's practice. The Respondent also argues that the record does not support the Committee' finding that the Respondent showed lack of ability to integrate clinical data into an appropriate diagnosis and contends that the record does not support the finding that the Respondent

is unable to learn from his mistakes. The Respondent argues that the Respondent did learn from his mistakes in the most serious cases, those of Patients B and F. The Respondent contends that there was no evidence before the Committee to indicate that the Respondent can not take constructive criticism.

The Respondent characterizes the Hearing Committee's Penalty as grossly excessive and unreasonable. The Respondent contends that the penalty is not proper because it was based on the Hearing Committee's incorrect determination that the Respondent can not be rehabilitated. The Respondent notes first that the issue of rehabilitation was not litigated at the hearing and the Respondent was unaware that rehabilitation was in consideration until he received the Hearing Committee's Final Determination. The Respondent also asserts that there was no basis in the record to find that the Respondent was not capable of rehabilitation. The Respondent argues that the Hearing Committee was not the proper body to determine whether or not the Respondent was capable of rehabilitation. The Respondent asks that the Review Board send the Respondent to the Physician Prescribed Education Program (PPEP) at Syracuse for an evaluation of the Respondent's ability and for an evaluation of the feasibility of retraining the Respondent. The Respondent requests in the alternative, that the Review Board fashion another penalty, which would allow the Respondent to continue to practice in some capacity.

The Petitioner urges the Review Board to sustain the Hearing Committee's Determination and Penalty. The Petitioner asserts that the Hearing Committee has already rejected the Respondent's main argument, that the misconduct involved in this case loses significance when compared to the many cases that the Respondent has handled without incident. The Petitioner asserted that there is no way to verify the Respondent's assertion that his record is otherwise unblemished. The Petitioner argues that even if the Respondent's record is otherwise unblemished, there would still be no reason to reduce the penalty in this case, because the Hearing Committee noted that the care of at least half of the patients presented at the hearing was so grossly negligent that it posed significant risk of death to these Patients. The Petitioner argues that no matter what the Respondent's average performance may be, the errors he committed in the six cases reviewed in this proceeding are of a shocking elementary nature and place patients at significant risk of death. The Petitioner argues that the Respondent should not be allowed to practice medicine.

REVIEW BOARD DETERMINATION

The Review Board has considered the 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 gross negligence, gross incompetence, incompetence on more than one occasion, negligence on more than one occasion, and failure to maintain adequate records. The Committee Determination is consistent with their findings and conclusions and is well documented by the record in this case.

The Review Board votes to sustain the Hearing Committee's Determination to Revoke the Respondent's license to practice medicine in New York State. The penalty is consistent with the Committee's findings that the Respondent was guilty of repeated and severe acts of negligence and incompetence, which in at least half of the cases reviewed, posed a significant risk of death to the Patients treated. The Review Board has considered all the grounds which the Respondent has raised in challenging the Hearing Committee's penalty and we reject each one.

Public Health Law Section 230-a lists retraining as one of the penalties which a Hearing Committee may impose for physician misconduct. Since the Committee can impose retraining as a penalty, the Hearing Committee is clearly the proper party to make a Determination whether or not the Respondent is retrainable. The Hearing Committee need provide no special notice to any Respondent that they are considering retraining or any of the other penalties permitted under Section 230-a.

We agree with the Respondent's contention that the Committee's decision to lift the Respondent's Summary Suspension was inconsistent with their Final Determination to revoke the Respondent's license, but for a different reason than that which the Respondent advanced. The Review Board believes that the Committee's conclusion, that the Respondent's misconduct posed a significant risk of death to half of the Patients in the cases reviewed, demonstrates clearly that the Respondent poses a risk to the public health and supported the continued Summary Suspension of the

Respondent's license.

The Record in this case supports the Hearing Committee's Determination that the Respondent is not retrainable, that the Respondent is unable to integrate clearly presented clinical data into an appropriate diagnosis and treatment plan and is unable to comprehend the severity of his mistakes or to take constructive criticism about his substandard management of certain patients. In the cases of Patients A, B, C, E and F, the Respondent's actions ignoring abnormal test results and/or misinterpreting x-rays demonstrate an inability to integrate data. The Committee correctly concluded that the Respondent was unable to comprehend the severity of his mistakes and take constructive criticism about his substandard management based on the Respondent's own testimony in which the Respondent blamed others for his errors.

The Committee was not bound to accept the Respondent's testimony that he had learned from his mistakes. The Committee found that the Respondent has attended a number of conferences and attained a great total of continuing medical education credits since beginning in practice in 1982. The Committee concluded that, despite his years of practice in the emergency room and all his in post graduate education, the Respondent still made shockingly elementary errors and demonstrated that he was unable to learn from the experience. These findings and conclusions support the Committee's Determination that the Respondent is not a candidate for retraining.

The Review Board concludes that the six cases the Hearing Committee reviewed demonstrate a consistent pattern of substandard and dangerous medicine and that the record demonstrates further that the Respondent is not a candidate who would benefit from retraining to correct his serous deficiencies. We agree with the Hearing Committee that permanent and intense supervision and monitoring will not be sufficient to protect the public in this case.

ORDER

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

1. The Review Board SUSTAINS the Hearing Committee on Professional Medical Conduct's Determination finding the Respondent Edward Birdsong, D.O. guilty of professional misconduct.
2. The Review Board SUSTAINS the Hearing Committee's Determination to Revoke the Respondent's license to practice medicine in New York State.

ROBERT M. BRIBER

SUMNER SHAPIRO

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

WILLIAM A. STEWART, M.D.

IN THE MATTER OF EDWARD BIRDSONG, D.O.

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. Birdsong.

DATED: Albany, New York

11/10, **1995**

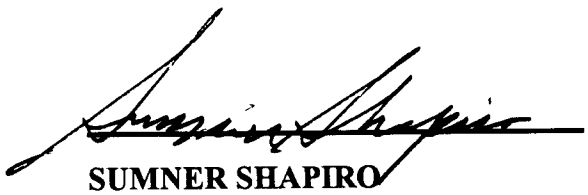
ROBERT M. BRIBER

IN THE MATTER OF EDWARD BIRDSONG, D.O.

SUMNER SHAPIRO, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Birdsong.

DATED: Delmar, New York

Nov 10, **1995**



SUMNER SHAPIRO

IN THE MATTER OF EDWARD BIRDSONG, D.O.

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. Birdsong.

DATED: Brooklyn, New York

11/9, **1995**

WINSTON S. PRICE, M.D.

IN THE MATTER OF EDWARD BIRDSONG, D.O.

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. Birdsong.

DATED: Roslyn, New York
December 10, **1995**

EDWARD C. SINNOTT, M.D.

IN THE MATTER OF EDWARD BIRDSONG, D.O.

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. Birdsong.

DATED: Syracuse, New York
10 Nov , **1995**

William A Stewart

WILLIAM A. STEWART, M.D.